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## COMPARISON OF THE EXECUTED AND THE COMMUTED AMONG ADMISSIONS TO DEATH ROW

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Is a rational, fair scheme, consistent with the principles of equality of justice, discernible in the commutation of death sentences? Or does a selective system appear to operate, differentiating between the executed and commuted upon improper bases? With these questions in mind, the authors have studied the case records of 439 persons sentenced to death for first degree murder and detained on death row in Pennsylvania between 1914 and 1958. How did the case records of those whose sentences were commuted differ from the case records of those who died in the electric chair? In this article, the authors present the differences in terms of type of murder committed, age, race, nativity, occupation, marital status, type of counsel, and other relevant factors; evaluate the statistically significant differences; and discuss the implications of their findings.—EDITOR.

### BASIS FOR THE STUDY

The purpose of this study is to analyze statistically the social characteristics of those persons who have been sentenced to death for the crime of murder since introduction of the electric chair in Pennsylvania. The basic data consist of the case records of 439 persons sentenced to death for first degree murder<sup>1</sup> and detained under custody on death row between 1914 and 1958.<sup>2</sup> These

<sup>1</sup> "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree." PA. PENAL CODE art. XII, §701.

The first statute to divide the crime of murder into degrees was enacted in Pennsylvania on April 22, 1794. Many other states of the union adopted this model with slight changes in the substantive law but with considerable variations in judicial interpretations, See, e.g., Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949); Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. PA. L. REV. 267 (1950); Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464 (1954).

<sup>2</sup> A recent review of data in the archives of the State Correctional Institution at Rockview, furnished by W. W. Thomas to the Bureau of Corrections, indicates that there were 433 total dispositions from death row in that institution between 1915 and 1959; of these, 347 were executed (80%), and 86 were commuted (20%). Populations in the Bureau of Correction During 1960, p. 3 (Directorate of Research and Statistics, Pa. Dep't of Justice, Bureau of Correction) (unpublished).

records are filed at the State Correctional Institution at Rockview, Pennsylvania, the only place in the state where the death penalty is administered. Because an offender sentenced to die is transported there only as his date of execution approaches, there are a number of offenders who were sentenced to die during the 1914-1958 period who do not appear in the present study because their sentences were commuted before being placed on death row at Rockview. Of those who did reach Rockview, 341 were executed and 71 were commuted; the remaining 27 included persons who either died of natural causes on death row or for whom it has not been possible to determine the final disposition.

Although the amount and kind of information on individual cases varies greatly, most records provide sufficient data for analysis of the following major attributes of the convicted offender: age, sex,<sup>3</sup> race, nativity, occupation, and marital status. Additional information usually obtainable and secured from examination of the original bill of indictment and of the Pennsylvania Legislative Journal includes: type of counsel for the defendant

For an interesting historical survey of early executions in Pennsylvania, see Teeters, *Public Executions in Pennsylvania 1682 to 1834*, 64 J. LANCASTER COUNTY HIST. SOC'Y 85 (No. 2, 1960).

Especially stimulating and useful for its comparative data is the study reported by Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957).

(private or court-appointed); type of murder (felony or non-felony); reasons for commutation of the death sentence.

There is a growing body of literature concerned with differential treatment of offenders who have committed similar offenses, but discussion usually centers around the sentencing problem, and judicial caprice in sentencing is contrasted with the need for individual treatment.<sup>4</sup> It is a widely held belief that minority groups, particularly Negroes, suffer discrimination in the courts, but there are few studies that examine this hypothesis empirically.<sup>5</sup> Because there are always many difficulties encountered when seeking to hold constant a variety of factors in the personal and social background of offenders who appear before the courts, carefully controlled research in this area of differential judicial treatment is still in its nascentcy.

The present study does not pretend to overcome these difficulties. We are required to assume, in the absence of detailed psychological analyses and other kinds of data regarding the specific character of the murder, the offender, and his victim, that there has been some randomness in the distribution of known factors. Hence, we are able to work only with the accessible gross social variables in the records. However, there is one common underlying factor, it must be remembered, that is socially and legally visible and that permits us to examine the present cases as a homogeneous group already controlled for the most significant attribute: all of these persons have been convicted—

<sup>3</sup> The number of females sentenced to die is too small to analyze separately, so that for all intents and purposes we are referring to males throughout the study. In only 4 cases during the entire period were females detained on death row; and of these, 2 were executed and 2 were commuted.

<sup>4</sup> For cogent discussions of these matters, see S. Glueck, *The Sentencing Problem*, 20 Fed. Prob. 15 (Dec. 1956); EDWARD GREEN, *JUDICIAL ATTITUDES IN SENTENCING* (XV Cambridge Studies in Criminology, London, 1961); WHAT'S NEW IN SENTENCING (Bul. No. 7 Correctional Research, Morris ed., Oct. 1957).

<sup>5</sup> Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & C. 811 (1933); Lane, *Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison*, 32 J. CRIM. L. & C. 171 (1941); Frankel, *The Offender and the Court: A Statistical Analysis of the Sentencing of Delinquents*, 31 J. CRIM. L. & C. 448 (1940); Lemert & Rosberg, *The Administration of Justice to Minority Groups in Los Angeles County*, 2 U. CALIF. PUBLICATIONS IN CULTURE AND SOCIETY 1 (No. 1, 1948); Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. CRIM. L., C. & P.S. 411 (1961); EDWARD GREEN, *op. cit. supra* note 4.

justly or unjustly—of having committed first degree murder and have been sentenced to death.

There are, of course, many social and legal forces that function selectively prior to this stage and that have produced many differences in the conditions surrounding commission of the crime. Age, race, sex, social status, and other factors have long been recognized as functioning selectively in the commission of this and other types of crime.<sup>6</sup> Moreover, the youthful first offender, even though having committed a heinous murder, is rarely sentenced to death.

The reasons and emotions involved in court decisions that refrain from legally permitted use of the death penalty are so numerous that research has only scratched the surface of these phenomena. There are no official public national statistics on the number of capital crimes committed in the United States each year, but good estimates suggest that not more than 15 per cent of all criminal homicides are capital crimes. In any case, the *Uniform Crime Reports* for 1959 reveal that there were 8,583 murders and non-negligent manslaughters throughout the country.<sup>7</sup> For the same year *National Prisoner Statistics* reported only 49 executions for the nation.<sup>8</sup> In 1959 there were 285 murders and non-negligent manslaughters reported in Pennsylvania, and the state executed three persons during that year. Because only nine states presently have abolished the death penalty by statute, it is obvious that executions are disappearing de facto if not de jure and that a variety of factors in concatenation function to spare most convicted murderers from execution.

We are not here analyzing the factors that determine whether a penalty of death or some lesser penalty is more likely to be the sentence of the court. We recognize that from the total population capable of committing murder, selective forces are operating to "cause" some persons rather than others to commit the crime of murder, to be detected, to be prosecuted, to be convicted, to be sentenced to death, and to be held in custody on death row. The cases presently under analysis are taken from this last level of the whole cultural and judicial process of selectivity. We begin with all persons who have been sentenced to die and

<sup>6</sup> WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* (1958).

<sup>7</sup> U. S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS—1959*, 33 (1960).

<sup>8</sup> FED. BUREAU OF PRISONS, *EXECUTIONS 1959* (Nat'l Prisoner Statistics No. 23, Feb. 1960).

who have been detained on death row. We then dichotomize this group into (a) those persons who actually were executed (whose sentences were in fact carried out) and (b) those whose sentences of death were commuted to a lesser penalty (usually life imprisonment).<sup>9</sup> Whether there was legal or moral justification for the sentences of death is not our immediate concern. We may even assume (for lack of primary evidence upon which to base any other assumption) that all of these persons were equally guilty of first degree murder and were given equal treatment by the courts. At any rate, all of these offenders received identical sentences for their crimes. This element of homogeneity is one of the most severe that our society can place upon its citizens, but our judicial machinery permits reconsideration of the sentence in the form of a pardon or commutation. It is important, therefore, for us to know something about any differences that may exist between those persons who suffer the full extent of the law through death and those who have enjoyed the privilege of administrative reconsideration and retraction of the original sentence.

#### COMPARISON OF THE EXECUTED AND THE COMMUTED

Because our political institutional machinery does provide a means for mitigating the severity of a death sentence pronounced in the judicial process, we should expect some differences to be apparent between offenders who have been executed and those who were commuted. However, assuming that this legal machinery functions on the basis of rational and legal principles and discriminates among convicted offenders only on such basis, any class or racial differences that are noted between the executed and commuted cast doubt on the basic principles.

Only a minimal number of factors can presently be examined in this kind of comparison because of the paucity of data available to the researcher. But statistical analysis even on a macroscopic level is useful for it provides a point of departure for more intensive examination of the refined differentials that are placed in focus in this way.

To assure elimination of spurious associations due to chance operation we have employed com-

mon devices for testing the data. These include the chi-square ( $\chi^2$ ) with correction for continuity and the test of significance of differences between proportions, both with a probability level (P value) of less than .05. The total N, or number of cases possible for comparison among each of the variables under analysis, differs from one table to another because not all of the same information was available for all 439 cases. Among those cases for which data are available, we have used test statistics to determine whether statistically significant differences occur between the executed and commuted, and where the P value is less than .05 we are in effect saying that the difference is not due to chance factors, or that some selectivity is functioning that differentiates those who were put to death from those who were spared the ultimate penalty.

#### *Type of Murder*

Although all of these cases are defined in Pennsylvania as first degree murder, an important legal and social difference is whether the death occurred in conjunction with, or as a result of, commission of another type of felony.<sup>10</sup> In Pennsylvania any death that occurs during the commission of arson, burglary, robbery, rape, or kidnapping is by statute classified as first degree murder, whether or not the felon committed, intended, or premeditated the slaying. This type of slaying is referred to as "felony murder," and all other types of murder are "non-felony murder." While extenuating circumstances may have been involved in commission of a non-felony murder, nonetheless there can be little doubt in a capital conviction that the court found the defendant guilty of a premeditated, intentional killing. A felony murder may involve deliberate killing concomitant to another felony, but usually this type of slaying is incidental and peripheral to the principal purpose of another crime, which most commonly is some form of theft or other crime for financial profit.<sup>11</sup>

Relative to these two types of murder a null hypothesis states: Among felony and non-felony murderers sentenced to death and detained on death row there are no significant differences in the proportions who are subsequently executed or

<sup>9</sup> For discussion and research on pardons and commutations, see *Pardon and Commutation*, 39 PRISON J. 1 (Pa. Prison Soc'y, April 1959); Wolfgang, *Murder, the Pardon Board, and Recommendations by Judges and District Attorneys*, 50 J. CRIM. L., C. & P.S. 338 (1959).

<sup>10</sup> Savitz, *Capital Crimes as Defined in American Statutory Law*, 46 J. CRIM. L., C. & P.S. 355 (1955). See also WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* ch. 13 (1958).

<sup>11</sup> *Id.* at 238-44.

TABLE I  
TYPE OF MURDER BY FINAL DISPOSITION

Final Disposition	Type of Murder					
	Felony Murder		Non-Felony Murder		Total	
	N	%	N	%	N	%
Executed . . . . .	159	86.4	92	73.6	251	81.2
Committed . . . . .	25	13.6	33	26.4	58	18.8
Total . . . . .	184	100.0	125	100.0	309	100.0

$\chi^2 = 7.14$ ; P less than .01.

commuted. Table I presents the distribution of these cases, and a test for significance of difference reveals that there is an association between felony murder conviction and execution for the crime. Not only are there absolutely more felony murderers (184) than non-felony murderers (125) among the total cases for which information is available, but also proportionately more felony murderers than non-felony murderers actually suffered the death penalty; contrariwise, more non-felony cases had their sentences commuted. We shall later examine these relationships by holding constant the factor of race.

These findings are interesting simply as descriptive statistics of the disposition of capital crimes, but they take on important meaning because of wide state variations in the definition of felony murder.<sup>12</sup> Moreover, suggestions have recently been made to eliminate from the penal code an automatic charge of first degree murder in felony homicide cases. The felony murder rule has been abrogated in England, from which country our own use of this rule has evolved.<sup>13</sup> An act that is by statute labeled "first degree murder" is consequently a capital crime and subjects the offend-

<sup>12</sup> Savitz, *supra* note 10.

<sup>13</sup> The English Homicide Act, enacted in 1957, provides as follows:

"§ 1. *Abolition of 'constructive malice'*.—(1) Where a person kills another in the course or furtherance of some other offense, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense.

"(2) For the purpose of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offense."

ers, whether principals in the first or second degree, to the maximum penalty. Thus, all other things being equal a state such as Kansas that considers as a felony murder a death occurring during *any* felony has a proportionately greater number of capital offenders involved in the administration of justice than does a state such as Massachusetts that considers as felony murder a death occurring only during a crime punishable by death or life imprisonment. On the basis of the experience in Pennsylvania, one convicted of a felony murder, regardless of the kind of felony in which he participated concurrent to the death and irrespective of how the death occurred (by accident, by a police officer, or by the offender directly), has less probability of having his death sentence commuted. Although we cannot speak conclusively about experience in other states, it would appear that states with felony murder statutes so broad in scope as to include a death during any felony would have an even higher proportion of executions than we have found in Pennsylvania. This assumption leads to a generalization requiring further study; namely, that the more inclusive the definition of felony murder, the higher the proportion of executions and the greater the differential in final disposition between felony and non-felony murderers.

We cannot know what would have been the fate of the 184 felony murderers sentenced to death had there been no statutory definition of felony homicide as first degree murder; but it is probably safe to say that more than a few of the 159 defendants who were executed under this ruling would have been convicted of less serious forms of criminal homicide and consequently would not have received sentences of death and would not have been executed.<sup>14</sup> It appears, then, that abolition of the felony murder rule would reduce the number of executions if the past proportion of commutations for non-felony cases should continue. At any rate, nearly half a century of Pennsylvania history indicates that a significantly higher proportion of felony murder than of non-felony murder cases provoked the full extent of society's negative reaction to homicide.

#### *Age of the Offender*

Table II shows the distribution of 407 cases for whom age at time of arrival on death row was

<sup>14</sup> Especially would this statement be valid for at least 20 persons executed who were not directly responsible for the deaths which occurred.

TABLE II  
FINAL DISPOSITION BY AGE OF OFFENDER

Age of Offender	Final Disposition			
	Executed N	Commuted N	Per Cent Executed	Total N
15-19	7	7	50.0	14
20-24	96	8	92.3	104
25-29	71	21	77.2	92
30-34	58	12	82.9	70
35-39	48	9	84.2	57
40-44	26	6	81.3	32
45-49	18	2	90.0	20
50-54	7	1	87.5	8
55+	5	5	50.0	10
Total...	336	71	82.6	407

known. As might be expected, the polar ends of the age groups (15-19 years, and those 55 years and over) have the lowest frequency of execution and consequently the highest frequency of commutation. As a matter of fact, an equal number in each of these age groups was executed as was commuted. The highest frequency (92 per cent) of execution occurs in the age group 20-24 years. Although the highest rate of criminal homicide occurs in this same age group,<sup>15</sup> this fact does not explain their highest proportion of executions. The answer seems to lie in the fact that this age group contributes most disproportionately to felony murders.<sup>16</sup> Of the 160 felony murderers executed, 57, or 36 per cent, were aged 20-24 years; while of the 99 non-felony murderers executed, only 16, or 16 per cent, were aged 20-24. Although persons in the youngest (15-19 years) and the oldest (55 years and over) age groups may be treated differentially because of age, it appears that within the age range from 20 through 54, age per se has little or no influence on final disposition. Rather, it is the higher frequency of felony murders that most directly affects the final disposition, as is indicated by the association between felony murder, execution, and the age class 20-24 years. This age group has the highest frequency among

<sup>15</sup> WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 65-78 (1958).

<sup>16</sup> Among those cases for whom information was available for both age and type of murder (N = 317), there are 185 felony murderers and 132 non-felony murderers; of the felony murderers, 160, or 87%, were executed compared to 99, or 75%, of non-felony murderers.

all felony murderers; consequently, any change in the statutes regarding felony murder would most directly affect homicide offenders in their early twenties. Non-felony murders appear to be more evenly distributed throughout the age groups from 15-19 to age 55 and over. Finally, the median age for executed felony murderers is 27.5 years, and the median age for executed non-felony murderers is 35.7 years. The interrelationship therefore is strikingly obvious between the proportion of persons convicted of murder who (a) are executed, (b) are young adults, and (c) have committed felony murder.

#### *Race of the Offender*

Much previous research in criminal homicide, which includes murder in the first degree, has demonstrated that a disproportionate contribution to the homicide rate is made by Negroes.<sup>17</sup> It is no surprise, therefore, that as many as 36 per cent of the persons placed on death row are Negro. Consistent with independent research and the *Uniform Crime Reports*, Negroes comprise between three and four times more of the criminal homicide cases (either as offenders or as victims) than they do of the general population.

What interests us in the present analysis, however, is not the rate of criminal homicide but the ratio of executed-to-commuted Negroes compared to this same ratio among whites. Using the null hypothesis again, we may assert that there is no significant difference between Negroes and whites in the proportionate distributions of capital offenders who are ultimately executed and those who are commuted. Table III indicates that this hypothesis is rejected and that there is an association between race and type of disposition. The probability value resulting from the  $\chi^2$  reveals in this table that compared to whites a significantly higher proportion of Negroes are executed instead of commuted.

Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference. On the basis of this study it is not possible to indict the judicial and other public processes prior to the death row as responsible for the association between Negroes and higher frequency of executions;

<sup>17</sup> For an analysis of criminal homicide rates by race both in Philadelphia and in other community studies, see WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 31-46 (1958).

TABLE III  
RACE OF THE OFFENDER BY FINAL DISPOSITION

Final Disposition	Race					
	Negro		White		Total	
	N	%	N	%	N	%
Executed.....	130	88.4	210	79.8	340	82.9
Commuted.....	17	11.6	53	20.2	70	17.1
Total.....	147	100.0	263	100.0	410	100.0

$\chi^2 = 4.33$ ; P less than .05.

nor is it entirely correct to assume that from the time of their appearance on death row Negroes are discriminated against by the Pardon Board. Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless, because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided. If such a relationship had not appeared, this kind of suspicion could have been allayed; the existence of the relationship, although not "proving" differential bias by the Pardon Boards over the years since 1914, strongly suggests that such bias has existed.

Within the confines of the data available examination has been made of race and type of final disposition by holding constant the factor of age. Of the total number of cases for which there is information for each of these variables ( $N = 308$ ), no significant differences emerged. When tests were run to determine association only between race and type of murder (excluding final disposition), both among Negroes and among whites a little over six out of ten had been convicted of felony murder.<sup>18</sup> (See Table IV.) No significant differences occurred in this comparison; hence, the previously noted significant association between felony murder and a high proportion of executions could not account for the proportionately greater number of Negro offenders who are executed. Furthermore, there are no important differences in the distributions of Negro and white offenders among non-felony murder cases according to the type of disposition (Table IV). In short, although among non-felony cases a higher percentage of

<sup>18</sup> Of 207 whites, 121, or 59%, had been convicted of felony murder; of 101 Negroes, 63, or 63%, had been convicted of felony murder.

Negroes (79 per cent) than of whites (71 per cent) are executed, it is not a statistically significant difference and could be due to chance.

But, as Table IV indicates, it is among felony murder cases that major differences may be noted when type of disposition is examined: 94 per cent of Negro felony murderers are executed compared to 83 per cent of white felony murderers. Thus, we see that the earlier statistical association between executions and felony murder is principally due to the fact that proportionately a much greater number of Negro felony murderers are executed. In terms of final disposition, no significant differences occur when Negro felony murder is compared with Negro non-felony murder; and no significant differences occur when white felony murder is compared with white non-felony murder.

Here, then, is a point at which the lack of statistical significance carries important meaning when placed side by side with a relationship that is significant. Thus, the fact that Negroes on death row do not comprise a significantly higher proportion of felony murderers than do whites, combined with the fact that a significantly higher proportion of Negro felony murderers are executed than are white felony murderers focuses the direction of differential treatment. It is the Negro felony murderer more than any other type of offender who will suffer the death penalty. Especially is this finding striking when we note that nearly three times more white (17.4 per cent) than Negro (6.3 per cent) felony murderers have their sentences commuted.

#### Nativity

Although differentials between the native-born and the foreign-born have been noted relative to the commission of certain types of crime<sup>19</sup> our point of reference once again is executions and commutations among those who have been sentenced to death and have been held in custody on death row. A null hypothesis states: There is no significant difference between native-born and foreign-born in the proportions executed and commuted. (Negro males have been eliminated from this particular analysis for obvious reasons.) Table V presents data by nativity and disposition and shows that the hypothesis generally is accepted. Too many national groups are involved to

<sup>19</sup> For a general survey of nativity and crime, see DONALD R. TAFT, *CRIMINOLOGY* 152-66 (3d ed. 1956); SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 143-50 (5th ed. 1955).

TABLE IV  
RACE OF OFFENDER BY TYPE OF MURDER AND FINAL DISPOSITION

Final Disposition	Negro				White				Total	
	(A) Felony Murder		(B) Non-Felony Murder		(C) Felony Murder		(D) Non-Felony Murder			
	N	%	N	%	N	%	N	%	N	%
Executed.....	59	93.7	30	79.0	100	82.6	61	70.9	250	81.2
Commuted.....	4	6.3	8	21.0	21	17.4	25	29.1	58	18.8
Total.....	63	100.0	38	100.0	121	100.0	86	100.0	308	100.0

For columns (A) and (C):  $\chi^2 = 4.27$ ; P less than .05  
 For columns (B) and (D); (A) and (B); (C) and (D): not significant.

analyze these cases statistically by country of origin.

In order to determine whether there are inter-relationships obscured by the factor of type of murder, Table VI is presented below. Among those on death row, proportionately and significantly more native-born than foreign-born offenders committed felony murder. Of the 123 native-born offenders two-thirds had committed felony murder; whereas, among the 82 foreign-born offenders less than half had committed felony murder. We should expect, on the basis of our previous finding of a relationship between felony murder and higher frequency of executions, that significantly more native-born than foreign-born offenders would be executed. Therefore, the observed absence of any significant association between nativity and final disposition (as shown in Table V) is meaningful and Table VI indicates that proportionately fewer native-born than foreign-born felony murderers are executed.

Table VII should help to clarify the relationships among these various attributes. As it indicates, nearly 90 per cent of foreign-born felony murderers are executed compared to slightly less than 80 per cent of native-born felony murderers. However, the difference does not quite reach the level of statistical significance. It is important to recognize what cannot be asserted statistically from this table. We cannot say, for example, that compared with the native-born significantly more foreign-born felony murderers are executed (columns A and C); nor that more foreign-born non-felony murderers are executed (columns B and D); nor that among the native-born more felony murderers than non-felony murderers are

TABLE V  
NATIVITY OF OFFENDER BY FINAL DISPOSITION

Final Disposition	Native Born		Foreign Born	
	N	%	N	%
Executed.....	127	80.9	83	79.8
Commuted.....	30	19.1	21	20.2
Total.....	157	100.0	104	100.0

Chi-square test not significant.

TABLE VI  
NATIVITY BY TYPE OF MURDER

Type of Murder	Native Born		Foreign Born	
	N	%	N	%
Felony.....	83	67.5	38	46.3
Non-Felony.....	40	32.5	44	53.7
Total.....	123	100.0	82	100.0

$\chi^2 = 8.25$ ; P less than .01.

executed (columns A and B). The only statistically significant difference that emerges from this particular analysis is that among the foreign-born more felony murderers (90 per cent) than non-felony murderers (68 per cent) are executed (columns C and D). A statement about commutations is, of course, equally true; that is, among the foreign-born significantly more non-felony murderers (32 per cent) than felony murderers (11 per cent) have their sentences commuted. This



TABLE VII  
NATIVITY OF OFFENDER BY TYPE OF MURDER AND FINAL DISPOSITION

Final Disposition	Native Born				Foreign Born			
	(A) Felony Murder		(B) Non-Felony Murder		(C) Felony Murder		(D) Non-Felony	
	N	%	N	%	N	%	N	%
Executed	66	79.5	30	75.0	34	89.5	30	68.2
Committed	17	20.5	10	25.0	4	10.5	14	31.8
Total	83	100.0	40	100.0	38	100.0	44	100.0

For columns (C) and (D):  $\chi^2 = 4.14$ ; P less than .05

For columns (A) and (B); (A) and (C); (B) and (D): not significant.

finding suggests that there may have been some kind of conflict between the communal mores of the foreign-born who committed non-felony murder and the legal codes of the host cultures to which the immigrants came, and that the Pardon Boards (if not the courts) recognized this culture conflict as a basis for mitigation of the severity of the sentence.<sup>20</sup>

#### *Race and Nativity Compared*

At this point in our analysis we can make some interesting generalizations about the various sets of attributes consisting of ethnic status (Negro, white, native-born, foreign-born); type of murder (felony, non-felony); and type of final disposition (execution, commutation).

1. If an offender commits a first-degree murder, he is more likely to be executed than commuted (in a ratio between three and four to one) regardless of his ethnic affiliation.

2. Negroes (in a ratio of five to one) more than whites (in a ratio of four to one) are more likely to be executed than commuted.

3. If the offense is a non-felony first-degree murder, there are no statistically significant differences among ethnic groups in the proportions that are executed, although a higher proportion of foreign born (32 per cent) than of native born (25 per cent) or of Negroes (21 per cent) have their sentences commuted.

4. If the offense is a felony murder, a significantly higher proportion of Negroes (94 per cent) than of whites (83 per cent) are executed.

5. If the offense is a felony murder, there is no significant difference in the proportion of offenders

executed when Negroes (94 per cent) are compared with the foreign-born whites (90 per cent), nor when the foreign-born whites are compared with the native-born whites (80 per cent).

6. If the offense is a felony murder, there is a significant difference between the proportion of Negroes (94 per cent) and of native-born whites (80 per cent) executed.

7. The statistically greatest likelihood of being executed occurs among Negro felony murderers (94 per cent).

8. The statistically greatest likelihood of being commuted occurs among foreign-born white non-felony murderers (32 per cent).

#### *Occupation and Marital Status*

Our null hypothesis again states that there are no significant differences in the distribution by occupational status of capital offenders who have been executed, compared to capital offenders who have been commuted. Table VIII presents these distributions, and analysis accepts this hypothesis. Moreover, no significant differences occur when the table is compressed into relatively similar occupational groupings, or when race or type of murder is held constant. It cannot be said, therefore, on the basis of these data, that differential application of the death penalty among those persons who ultimately reach death row is due to social class variation as represented by occupation. The race differential previously noted remains therefore unaffected by the factor of social class.

Similarly, no important differences appear between the executed and commuted when examined in terms of marital status. One interesting feature is that there are five times as many widowers

<sup>20</sup> SELLIN, *CULTURE CONFLICT AND CRIME* (Social Science Research Council Bul. no. 41, 1938).

among the commuted as among the executed, even though the executed outnumbered the commuted nearly five to one. The major reason appears to be that many of the commuted had slain their wives in non-felony murders.

*Counsel*

An a priori assumption suggests that a private counsel will devote more attention and energy to his client's case than will a court-appointed attorney. A variety of reasons may be offered to explain why this assumption appears valid, although we are not necessarily casting any derision

on capable court-appointed attorneys. However, the expenses incurred in pursuing a murder case through the judicial process from indictment to petition for commutation would seem to handicap the court-appointed counsel in preparation of his case. If incentive to work diligently on the case is present, expenses usually are not; and lack of the latter may sometimes reduce the former. Moreover, it is suggested that younger lawyers eager or willing to accept these cases for experience are often appointed by the courts to act as counsel for persons indicted for murder. More thorough analysis of the system of court-appointed counsel, the methods of selection of counsel, and the qualification of the appointed attorneys are needed before any valid assertions can be made that the defendant with a court-appointed counsel is at a definite disadvantage.

However, the data presented in Table IX indicate that there is a significant relationship between type of counsel and final disposition, for less than 15 per cent of the death-row offenders with a court-appointed counsel received commutation of sentence compared to over 25 per cent of those offenders with private counsel. Refined examination of the data leads us to conclude that race is the major factor influencing this association. Among whites, no significant differences are noted in the final disposition according to whether the defendant had a private or a court-appointed counsel; but among Negroes, a decided relationship is discernible. It appears that if a Negro offender has a private counsel he is much more likely to have his death sentence commuted than if he has a court-appointed at-

TABLE VIII

FINAL DISPOSITION BY OCCUPATION OF OFFENDER\*

Occupation of Offender	Final Disposition		Total
	Executed	Com-muted	
Professional.....	5	0	5
Farmers and farm managers....	0	2	2
Managers, officials, proprietors..	7	0	7
Clerical, sales.....	5	1	6
Craftsmen, foremen.....	60	9	69
Operatives, kindred workers....	75	20	95
Laborers, incl. farm.....	122	21	143
Service workers, household.....	51	15	66
Total.....	325	68	393

\* Adapted from occupational categories in ALPHABETICAL INDEX OF OCCUPATIONS AND INDUSTRIES at vi (United States Department of Commerce, Bureau of Census 1950).

TABLE IX

RACE OF OFFENDER AND TYPE OF COUNSEL BY FINAL DISPOSITION

Final Disposition	Negro				White			
	(A) Court-Appointed Counsel		(B) Private Counsel		(C) Court-Appointed Counsel		(D) Private Counsel	
	N	%	N	%	N	%	N	%
Executed.....	93	91.2	9	69.2	121	81.2	53	75.7
Commutated.....	9	8.8	4	30.8	28	18.8	17	24.3
Total.....	102	100.0	13	100.0	149	100.0	70	100.0

For columns (A) + (C) and (B) + (D):  $\chi^2 = 4.14$ ; P less than .05  
 For columns (A) and (B):  $\chi^2 = 5.40$ ; P less than .05  
 For columns (A) and (C):  $\chi^2 = 4.04$ ; P less than .05  
 For columns (C) and (D); (B) and (D): not significant.

torney. The number of cases (13) of Negroes on death row having a private attorney is so small that statistical analysis must be viewed with much caution. If the counsel is private, no significant differences are noted between whites and Negroes in the final disposition; hence, the race differential under private counsel disappears. But if the counsel is court-appointed, the race differential is again evident, for proportionately twice as many whites (19 per cent) have sentences commuted as do Negroes (9 per cent).

#### REASONS FOR COMMUTATION

Of the total 71 commutations over the period examined, information was available regarding the reasons for commutation in 62 cases. The number is too small for more refined analysis than the frequencies presented in Table X. (Overlapping in these commutation themes means that the total percentage is more than one hundred.) The 71 cases represent over 17 per cent of the total 407 persons sent to death row between 1914 and 1958. Thus, in nearly one out of six cases in which a court had pronounced the death sentence and the defendant had moved as close to the electric chair as being in custody at the center for executions, a politically designated body—the Board of Pardons—found legally justifiable reasons to impose limits on the courts' decisions.

It is especially interesting to note that of the eleven reasons given for commuting sentences, four involve serious doubts about the circumstances of the slaying so that the status of first degree murder is legally in question. These items include: lack of premeditation (26 per cent), provocation by victim (11 per cent), not directly responsible for the death (8 per cent), and the possibility of mistaken identity (5 per cent). All told, these items (under "A" in Table X) related to the crime itself account for 50 per cent of the reasons for commutation.<sup>21</sup> In another 59 per cent the commutation themes ("B" in Table X) are related to the character of the defendant rather than to aspects of the crime and include such items as the comparative youthfulness of the offender, his previous good record, poor family background, mental condition, and intoxication

<sup>21</sup> It is conceivable that "intoxication at time of crime" could be added to this list of items that relate to the crime instead of being listed under items related to the defendant. However, drunkenness is not generally a legally justifiable basis for reduction of the seriousness of the crime nor for mitigation of the penalty.

TABLE X  
NUMBER AND PER CENT COMMUTED ACCORDING TO  
REASON FOR COMMUTATION\*

Reason for Commutation	Number Commuted	Per Cent Commuted
<i>A. Relative to Crime:</i>		
Lack of premeditation.....	16	25.8
Provocation by victim....	7	11.3
Not directly responsible for death.....	5	8.0
Possibility of mistaken identity.....	3	4.8
	—	—
	31	49.9
<i>B. Relative to Defendant:</i>		
Previous good record.....	9	14.7
Mentally deficient or diseased.....	9	14.7
Intoxication at time of crime.....	8	12.9
Comparative youth.....	7	11.3
Lacking or poor family background.....	3	4.9
	—	—
	36	58.5
<i>C. Relative to Court Trial:</i>		
Accomplices received lesser sentences.....	13	20.9
Deprivation of right to fair trial.....	4	6.4
	—	—
	17	27.3

\* More than one reason was given for some of the 62 persons commuted; hence, the per cent commuted on the table totals more than one hundred. Our interest, however, is in the frequency with which each reason for commutation occurred among the total persons commuted.

at the time of the crime. Finally, in 27 per cent of these commutation statements ("C" in Table X) the reason given was most directly related to the conduct of the trial, for in 21 per cent it was noted that accomplices had received lesser sentences and in 6 per cent the defendants had been considered as having been deprived of fair trials.

#### SUMMARY AND CONCLUSION

An attempt has been made in the foregoing analysis to examine the application of the death penalty in Pennsylvania since introduction of electrocutions in 1914. The original group studied consisted of 439 persons who were held in custody

awaiting final disposition at the state center for execution. This number was reduced as additional variables were introduced for analysis, for all data were not available for each case. The major focus of attention has been on the proportion of persons whose sentences were executed and those whose sentences were commuted. Significant relationships ( $P$  less than .05) were found to exist between the type of final disposition and several attributes summarized under *A* and *B* below. The numbered item under *A* was compared with the same numbered item under *B* relative to final disposition.

<i>A</i> Attributes Associated With Execution	<i>B</i> Attributes Associated With Commutation
1. Felony murder	1. Non-felony murder
2. Offenders 20-24 years of age	2. Offenders 15-19 yrs. or 55+ yrs.
3. Negro offenders	3. White offenders
4. Negro felony offenders	4. White felony offenders
5. Foreign-born white fel- ony offenders	5. Foreign-born white non-felony offenders
6. Offenders with court- appointed counsel	6. Offenders with private counsel
7. Negro offenders with court-appointed counsel	7. Negro offenders with private counsel
8. Negro offenders with court-appointed counsel	8. White offenders with court-appointed counsel

No significant differences in distributions were noted when the following were analyzed:

- Age and race with type of murder
- Race and felony murder
- Race and non-felony murder
- Among Negroes, type of murder and final disposition
- Among whites, type of murder and final disposition
- Among native-born whites, type of murder and final disposition
- Non-felony murder, by nativity and final disposition
- Occupation and final disposition
- Occupation, by race and type of murder
- Marital status and final disposition
- Among whites, type of counsel and final disposition
- Among offenders with private counsel, race and final disposition

The quality and quantity of the data available for research do not permit more refined analysis, but on the basis of what we have, it appears that the three significant findings are intricately inter-related: type of murder, race of the offender, and type of counsel. The one factor that links each of the others together is race; for while more offenders convicted of felony murder and offenders with court-appointed counsel are executed than offenders convicted of non-felony murder and offenders with private counsel, respectively, these differences are produced by the fact that significantly more Negroes than whites are executed. This race differential bears no relationship to the fact that the homicide rate (or perhaps even the murder rate) is higher for Negroes than for whites in the general population. We have consistently posed the question: After the pre-death-row factors have selectively functioned to produce a group possessing the major element of homogeneity characterized by being convicted of first-degree murder and held in custody at the center for execution, what measurable factors differentiate those who are executed from those who are commuted? While the present study has not been able to draw any conclusions regarding differential treatment of Negroes in the courts, and although there may be many factors obscured by the available gross data, there is reason to suspect—and statistically significant evidence to support the suspicion—that Negroes have not received equal consideration for commutation of the death penalty.

Thus, although differences in the disposition of capital offenders probably function to the greatest extent before sentencing, differences may be found even after offenders have been committed to death. This study of the Pennsylvania data has discovered nothing new; Johnson's analysis in North Carolina has many similarities and also used death-row data.<sup>22</sup> But any empirical verification of previously assumed differences among persons who received society's ultimate sanction should be of value in understanding the operation of our legal principles. That race is one of these significant differences constitutes a social and political violation of the principle of equal justice and is an obvious argument for those who favor abolition of the death penalty.

<sup>22</sup> Johnson, *supra* note 2.