

Punishing Homicide in Philadelphia:
Perspectives on the Death Penalty*

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This article reports some preliminary data from a study of the legal consequences of the first 204 homicides reported to the Philadelphia police in 1970. At first glance the data may seem of marginal relevance to capital punishment as a constitutional issue—only three of the 171 adults convicted of homicide charges were sentenced to death and none will be executed. In our view, however, a study of how the legal system determines punishment in a representative sample of killings provides a valuable perspective on many of the legal and policy issues involved in the post-*Furman* death penalty

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debate; it also provides a fresh and useful empirical context in which to discuss the death penalty for murder.¹

The first section of this paper outlines the method of the study and the characteristics of our sample of cases. The second section addresses three empirical issues of relevance to the current debate on the death penalty:

- (a) the extent and impact of prosecutorial and judicial discretion in determining punishment for criminal homicide;
- (b) the effect of the mandatory minimum penalty of life imprisonment for certain types of homicide on the distribution of punishments for all criminal homicides; and
- (c) the distribution of minimum sentences as a problem of distributive justice.

The third section speculates on the functions of the death penalty in the context of homicide and criminal justice in Philadelphia.

I. METHODS AND SAMPLE

The aim of this study was to gather data on a representative sample of homicides reported to the Philadelphia police and, by following these cases through the detection, adjudication and punishment process, to find out what happened, and why, in different types of homicide. Throughout, we use police description of the homicide as the baseline or "true" description of the event—whether the killing was felony-related, the weapon used, the role of the victim, and the characteristics of the victim and offender.² Records were obtained on these cases from the prosecutor's office, the courts, the department of corrections and local jails. The police records in particular were rich in the type of detail that makes this kind of study possible.

The sample included cases from January 1, 1970, through May 25, 1970, the day on which 1970's 200th killing occurred.³ A total of 198 separate events involving 204 deaths were represented in the

¹ This debate may culminate in *Fowler v. North Carolina*, 285 N.C. 90, 203 S.E.2d 883 (1974), *cert. granted*, 419 U.S. 963 (1974).

² Where charges were dismissed, or a defendant was acquitted, any information from the police report that was inconsistent with the legal determination was not used in the study. In all other cases we used the police report as the type of "baseline data" Kalven and Zeisel collected from judges. H. KALVEN, JR., & H. ZEISEL, *THE AMERICAN JURY* (1966).

³ Killings that the police considered justifiable or excusable were deleted from the sample—a total of sixteen additional homicides during our sample period fell into this category.

final sample. Three-quarters of the victims and more than 80 percent of the offenders were black. One quarter of the cases occurred during the commission of robbery, rape or one of the other crimes that activate Pennsylvania's "felony-murder" rule.⁴ Over 60 percent of the killings occurred during altercations. Three-fourths of the sample of killings were committed by a single offender; all but four cases involved a single victim. Eighty-two percent of these killings led to arrests; a total of 245 persons were arrested. Four-fifths of all suspects arrested pleaded guilty or were tried as adults, and an additional 14 percent were referred to the juvenile court. Eighty-six percent of those tried as adults were convicted of some charge. It is this group of 170 adults convicted of some charge that is of central importance to the analysis presented in the next section.

II. HOMICIDE AS A LEGAL EVENT: SOME PERSPECTIVES ON THE DEATH PENALTY ISSUES

The preliminary data are relevant to three issues in the present death penalty debate: the exercise of prosecutorial, judicial and jury discretion, the impact of severe mandatory minimum sentences, and the "justice" of capital punishment for criminal homicide.

A. A Brief Anatomy of Discretion

The "discretionary" death penalty—a punishment option left to judge or jury as one of many alternative sanctions—was declared unconstitutional by the Supreme Court in *Furman v. Georgia*, in part because it generated radically different punishments for similarly situated offenders.⁵ The legislatures or supreme courts in a majority of states have responded to this judicial constitutional fiat by fashioning penalty schemes in which the death penalty is mandatory for certain classes of criminal homicide and other serious offenses. These efforts have in turn elicited a lively debate about whether any regime of capital punishment can be truly mandatory in practice—in other words, whether discretion can effectively be exorcised from the application of the death penalty.

Although our data do not reflect the impact of mandatory death penalty legislation because no such statute was in effect during the period under study, they are useful in assessing the effect of a man-

⁴ The statute in force during the sample period was Act of June 24, 1939, No. 375, § 701, [1939] Laws of Pa. 953 (repealed 1972), replaced by PA. STAT. tit. 18, § 2501 (1973).

⁵ 408 U.S. 238 (1972). This view is stressed in the concurring opinions of Justices White (at 306) and Stewart (at 310).

datory minimum penalty for certain homicides. The sample includes thirty-eight suspects convicted of killings that the police classified as felony-murder, a crime which carries a mandatory penalty of life in prison. The sample also included at least one hundred other convictions where a killing resulted from a wound with a deadly weapon to a "vital part of the body"—facts that, under Pennsylvania law, are sufficient to support an inference of "premeditation," thereby invoking the mandatory minimum of life imprisonment. Analysis of these two sets of killings is thus relevant to the "mandatory death penalty" debate because it provides important insights into the operation of prosecutorial and judicial discretion in tempering the apparent strictures of the substantive law.

1. *Felony Killings.* The sample of felony killings shows that offenses of equal legal harm are treated unequally. We begin by analyzing the killings that the police believed were precipitated by a felony, usually robbery. A total of fifty-two defendants were convicted or adjudicated delinquent in these cases, of whom thirty-eight were tried as adults and fourteen were remanded to the juvenile court. Less than half the suspects convicted as adults were convicted of first degree murder, as shown in Table I.

TABLE I

FINAL VERDICT FOR CONVICTED FELONY MURDER SUSPECTS
TRIED AS ADULTS

	%
First Degree Murder	45
Second Degree Murder	42
Lesser Offenses	13
	<hr/> 100%
	(38)

The profile of minimum sentences given to convicted adults, as shown in Table II, illustrates the impact of this conviction pattern.

TABLE II

MINIMUM SENTENCE FOR CONVICTED FELONY-MURDER SUSPECTS
TRIED AS ADULTS

	%
Probation	5
1 Year	18
2 Years	5
3-4 Years	8
5 Years	8
6 Years and Over	11
Life Imprisonment	39
Death Penalty	5
	<hr/> 99%*
	(38)

*99% due to rounding.

The data reported in Table II show a fairly clean break between first degree murder convictions with a life imprisonment or death penalty and lesser convictions that carry with them substantially smaller minimum prison terms. There are two additional dimensions to this pattern—the significance of whether the degree of murder was determined by a jury or a judge and the race of the victim. Table III separates verdicts reached by jury trial from those reached by judges acting as the triers of fact on the degree of murder for those who plead guilty of murder or waive jury trial.

TABLE III
TYPE OF CONVICTION BY TYPE OF TRIAL
FOR CONVICTED FELONY MURDER SUSPECTS

	Guilty Plea or Bench Trial %	Jury Trial %
First Degree Murder	14	88
Second Degree Murder	64	12
Lesser Offenses	23	0
	101%* (22)	100% (16)

*101 percent due to rounding.

Fewer than one out of six non-jury felony-murder cases result in first degree convictions and mandatory life sentences, compared to more than eight out of ten jury convictions. We interpret this as strong evidence that the prosecutor, with the necessary cooperation of the court, can and does avoid mandatory minimum sanctions when he deems it in his interest to do so. We do not, however, view the comparison in Table III as a fair test of the effect of "plea bargaining" on sentences, because the prosecution is obviously motivated to save its strongest cases for jury trial, and the "jury" sample is thus biased toward those cases that would in any event evoke more severe sanctions.

The data on felony killings show not only that prosecutorial discretion is important, but also when and why the prosecutor's decision becomes crucial. Although some of the killings classified as felony-related by the police may not have been provable felony-murder under Pennsylvania law, there are three reasons why this possibility cannot persuasively explain the pattern shown in Table III. First, thirty-one of the thirty-eight convictions involve robberies, where the issue of felony-relation is not difficult to investigate. It is unlikely, therefore, that the police mischaracterized a substantial number of these cases or that the felony charge could not be

proved in court. Second, it is hard to understand why judges find no felony relation six times more frequently than juries. Third, in a number of cases, one defendant is convicted of felony-murder while an accomplice is convicted of a lesser homicide charge or referred to the juvenile court. The best example of this is the seven multiple-offender felony cases where at least one offender is convicted of first degree murder. In four of these seven cases all offenders are convicted of first degree murder, a result that should be automatic under the felony-murder rule when any offender is guilty of first degree. Yet in three cases one co-felon receives a first degree conviction while his confederate is convicted of a lesser grade of homicide, a result that is inconsistent with the felony-murder rule.⁶

There is also evidence that the race of the victim is an important determinant of sentence in felony cases, as shown in Table IV.

TABLE IV
PUNISHMENT BY RACE OF VICTIM
FOR CONVICTED BLACK FELONY MURDER SUSPECTS
TRIED AS ADULTS

<u>Sentence</u>	<u>Victim's Race</u>	
	White %	Black %
Life or Death	65	25
Lesser Sentence	35	75
	100% (20)	100% (16)

Fisher's Exact Test sig. .02.

Black defendants who kill white victims receive the life or death sentence more than twice as often as black felony suspects who kill black victims. These figures must be qualified because black victims are more likely to know black offenders and therefore the crime may not appear to be as wanton as when the offender does not know the victim. Yet the figures also understate the significance of the victim's race in two important ways. First, the felony-murder rule itself tends to isolate killings that cross racial lines from killings

⁶ Under Pennsylvania's common law felony-murder rule, an accomplice to the felony was accountable for murder. The statute, PA. STAT. tit. 18, § 4701, classified this as first degree murder. If a defendant was not an accomplice to the felony, he was not accountable for criminal homicide. The Pennsylvania Supreme Court has held, however, that juries have the power to find a lesser degree of homicide than the statute permits. See *Lane v. Commonwealth*, 59 Pa. 371 (1868). This doctrine was announced during a period when first degree murder was punished with a mandatory death penalty, but survived at least until 1973 in the curious form discussed in note 19 *infra*.

where victim and offender are of the same race.⁷ Second, all three death penalties resulted from black offenders killing white victims, even though fewer than a fifth of our cases involved black offenders and white victims. This raises the paradox that those who are least likely to be killed are most protected by sentencing policy.⁸

2. *Other Homicides.* The sample of felony killings shows similar cases being treated differently; the hallmark of non-felony killings is that somewhat different cases are punished with grossly different measures. The impact of discretion observed in felony-related killings pales in comparison to the non-felony cases, where the legal distinction between first degree murder (with the mandatory life sentence) and second degree murder (no minimum) is obscure. Second degree murder requires proof of "malice," which the Pennsylvania courts hold may be inferred from the "infliction of bodily harm dangerous to life."⁹ First degree murder requires, in addition to malice, proof of premeditation. Premeditation is defined in Pennsylvania as the "specific intent to kill"¹⁰ and can be established by evidence that the offender intended to inflict a wound on a vital part of the body with a deadly weapon.¹¹ Other lesser offenses are established when the victim provoked the lethal act (voluntary manslaughter)¹² or when the offender intended less harm.¹³

⁷ Fifty-three percent of all adults convicted of charges stemming from police-classified felony killings were involved in interracial killings, compared to 9 percent of all defendants convicted of other killings.

⁸ This is an issue we intend to address in greater detail in our final report. For data on homicide risk by race, sex and age, see Block & Zimring, *Homicide in Chicago 1965-70*, 10 J. OF RESEARCH IN CRIME AND DELINQ. 1 (1973). The same general risk relations were present in Philadelphia and will be reported in the final product of this study.

⁹ *Commonwealth v. Foster*, 455 Pa. 216, 317 A.2d 188 (1974).

¹⁰ The old and new Pennsylvania statutes specify, in addition, murder by poison or lying-in-wait as specific examples of "willful, deliberate and premeditated killing." The old law used this language as the primary statutory definition of first degree non-felony-murder, see Act of June 24, 1939, No. 375, § 701, [1939] Laws of Pa. 953 (repealed 1972), and derived the "specific intent" equivalence from a series of cases, including *Commonwealth v. Foster*, 455 Pa. 216, 317 A.2d 188 (1974); *Commonwealth v. Carroll*, 412 Pa. 525, 194 A.2d 911 (1963); *Commonwealth v. Tyrrell*, 405 Pa. Stat. 210, 174 A.2d 852 (1961). The new statute made "intentional killing" the benchmark of first degree murder. See PA. STAT. tit. 18, § 2501 (1973).

¹¹ *Commonwealth v. Carroll*, 412 Pa. 525, 194 A.2d 911 (1973); *Commonwealth v. Kirkland*, 412 Pa. 48, 195 A.2d 338 (1963); *Commonwealth v. Ahearn*, 421 Pa. 311, 218 A.2d 561 (1966). The presumption is rebuttable, but the Supreme Court has been far from clear on what circumstances are sufficient to rebut it, other than profound intoxication. See, e.g., *Commonwealth v. Foster*, 455 Pa. 216, 317 A.2d 188 (1974).

¹² Act of June 24, 1939, No. 375, § 703, [1939] Laws of Pa. 954 (repealed 1972). The newer definition also includes killings performed in the unreasonable belief that deadly force was necessary under the Pennsylvania law of justified use of deadly force. PA. STAT. tit. 18, §§ 2503-04 (1973).

¹³ See Act of June 24, 1939, No. 375, § 703, [1939] Laws of Pa. 954 (repealed 1972), replaced by PA. STAT. tit. 18, §§ 2503, 2504 (1973). Other convictions coded include involun-

Since three-quarters of our sample of homicides were committed with knives or guns, one would think that the relatively loose standards for proof of "specific intent to kill" would lead to a substantial number of first degree murder convictions. That this is not the case is shown in Table V.

TABLE V
FINAL VERDICT FOR CONVICTED
HOMICIDE SUSPECTS TRIED AS ADULTS
(EXCLUDING FELONY-MURDER SUSPECTS)

	%
First Degree Murder	3
Second Degree Murder	39
Voluntary Manslaughter	45
Lesser Offenses	13
	100%
	(132)

Three percent of the convicted defendants are found guilty of first degree murder while 39 percent are convicted of second degree murder and 45 percent of voluntary manslaughter. Although second degree murder and voluntary manslaughter carry maximum penalties of twenty¹⁴ and twelve¹⁵ years, respectively, neither crime commands a minimum sanction. Judges often impose relatively modest minimum sentences for these offenses, resulting in the pattern shown by Table VI.

TABLE VI
MINIMUM SENTENCE FOR CONVICTED
HOMICIDE DEFENDANTS TRIED AS ADULTS
(EXCLUDING FELONY-MURDER SUSPECTS)

	%
Probation	28
1 Year	34
2 Years	14
3-4 Years	11
5 Years	5
6 or More Years	5
Life Imprisonment	2
Death Penalty	1
	100%
	(132)

tary manslaughter and among "lesser offenses" the inchoate crime of conspiracy, but not culpability based on accessorial liability to the completed crime, which generates equivalent criminal liability to the principal offender.

¹⁴ PA. STAT. tit. 18, § 4701 (1939), *as amended*, PA. STAT., § 1103(1) (1972).

¹⁵ PA. STAT. tit. 18, § 4703 (1939), *as amended*, PA. STAT., § 1103(2) (1972).

The most important contrast in minimum sentence patterns is between the first degree offense, with its life minimum, and the second degree offense—almost indistinguishable conceptually—with a median minimum sentence of two years' imprisonment.¹⁶ Life sentences can be commuted by executive action in Pennsylvania, but the median time served in such commuted cases was between fifteen and twenty years in 1973 and 1974.¹⁷ Persons sentenced to one or two years as a minimum may serve longer terms, but we have found that persons sentenced to one- and two-year minimums served less than six months beyond the minimum in 73 percent of the sample cases we have so far identified.¹⁸ The contrast in sentences is stark.

Perhaps the most dramatic evidence that discretion rather than

¹⁶ A total of fifty-three non-felony suspects were convicted of second degree murder; the twenty-seventh most severe minimum sentence was two years.

¹⁷ The following distribution of time served prior to commutation is reported by the Pennsylvania Department of Corrections during the fiscal years 1973 and 1974 for persons convicted of first degree murder:

TIME SERVED	% OF ALL COMMUTATIONS
Less than 10 years	13
10 years or more but less than 15	32
15 years or more but less than 20	32
20 years or more	24
	<hr/> 101%*

*101 percent due to rounding.

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¹⁸ Finding our convicted offenders in local and state penal institutional records has not been easy, in part because many offenders had served their minimum terms before their final disposition. Of the defendants sentenced to one-year minimum terms, we have located records on thirty-eight of fifty-one cases. Of the thirty-eight defendants, twenty-four were released within one year of the time that sentence credit began; three more were released before eighteen months; four more were released before two years; five are still in jail or prison; one died, and one was sentenced for another offense. We found seventeen of the two-year defendants—eleven were released within six months of their minimum term. Fifteen of our twenty-one life defendants have been located in the records. One served four years, four months; thirteen are still in prison; one was resentenced and released.

formal law determines the degree of culpability can be seen in a comparison of cases tried by a judge or determined by guilty plea with cases tried by a jury, as shown in Table VII.

TABLE VII
FINAL CONVICTION BY TYPE OF TRIAL,
CONVICTED HOMICIDE SUSPECTS TRIED AS ADULTS
(EXCLUDING FELONY MURDER SUSPECTS)

	Guilty Plea or Bench Trial	Jury Trial
	%	%
First Degree Murder	0	29
Second Degree Murder	38	43
Voluntary Manslaughter	49	14
Lesser Charges	13	14
	100%	100%
	(118)	(14)

Guilty pleas and bench trials are combined in this comparison because under then operative Pennsylvania law a defendant who pleaded guilty to murder subjected himself to a judicial determination of the degree of the offense. But of the forty-eight defendants who either pleaded guilty or were convicted of murder, as opposed to criminal homicide, before a judge, none was found to have the "specific intent to kill" that in Pennsylvania may be inferred from a single shot or stab. This result is shown in Table VIII.

TABLE VIII
FINDINGS ON PREMEDITATION FOR DEFENDANTS CONVICTED OF MURDER
(EXCLUDING FELONY SUSPECTS)

	Plea of Guilty- Trial of Degree	Plea of Not Guilty- Bench Trial	Plea of Not Guilty- Trial by Jury
	%	%	%
Premeditation	0	0	45
No Premeditation	100	100	55
	100%	100%	100%
	(32)	(16)	(11)

We do not mean to suggest that assessing lesser punishments is senseless. The Pennsylvania law of premeditation is too broadly drawn for sensible policy. The point is, rather, that this pattern of sentencing is lawless in the fundamental sense that the factors determining the sanction are not those appearing in the statute or reported court decisions.

Most observers of the criminal justice system would expect to

find broad discretion in assessing punishment. The present data are useful not so much for documenting the existence of such discretion as for establishing its impact on the distribution of punishment, as shown in Table IX.

TABLE IX
MINIMUM SENTENCE BY TYPE OF TRIAL
CONVICTED HOMICIDE DEFENDANTS TRIED AS ADULTS
(EXCLUDING FELONY-MURDER SUSPECTS)

	Guilty Plea of Bench Trial	Jury Trial
	%	%
Probation	31	0
1 Year	37	14
2 Years	14	7
3-4 Years	11	14
5 Years	4	14
6 Years and Over	3	22
Life Imprisonment	0	22
Death Penalty	0	7
	100%	100%
	(118)	(14)

There are two striking elements to the comparison produced in Table IX. First, the small number of jury trials produce sentences that are more severe than all but a few of the judge-imposed sentences. This contrast must be tempered, however, by recognizing that the "jury" sample contains many cases where the prosecutor refuses to offer concessions to the defendant in exchange for a guilty plea or waiver of jury trial, and hence is biased toward harsher sentences. The second striking element in the table is the lack of a substantial number of cases that result in minimum sanctions in the "middle range"—less than 20 percent of all convictions carry minimum sentences greater than three years but less than life in prison.

The strong relationship between the type of adjudication and subsequent punishment level suggests that there are two styles of homicide in the Philadelphia system—"wholesale" and "retail." Most killings do not involve collateral felonies, high-status or particularly vulnerable members of the community, or more than one victim—these are the "wholesale" cases. The prosecutor has a strong incentive to dispose of the case quickly but no pressure to press for severe penalties. The result is that the prosecutor allows the defendant to plead guilty to a lesser offense or stipulate to a trial without jury, and a minimum prison sentence of two years or less is imposed.

An important minority of killings—the "retail" cases—receive more attention, more complete due process, and penalties close to

an order of magnitude higher than the low-visibility wholesale cases. These retail cases are more likely to involve collateral felonies and other circumstances that the community and the prosecutor see as aggravating the seriousness of the offense. In addition, of course, a fair proportion of cases will come to trial because the defendant feels he has a good chance of being acquitted. But we believe that the decision to go to trial in the majority of the jury trial cases is made because of a prosecutorial refusal to bargain down the consequences of an offense.

B. The Impact of the Mandatory Minimum Life Term

Against this background, it is interesting to speculate about the impact of the mandatory minimum life term on the criminal justice system, the substantive law, and the distribution of punishment in criminal homicide cases.

In felony-murder cases the legislative decision to establish mandatory minimum life sentences, rather than removing discretion from the legal system, simply relocates discretion by making the prosecutor's elected course of action the primary determinant of the eventual sentence. Since any killing for which the offender is culpable should clearly produce a first degree conviction, the minimum life sentence provides a powerful, even awesome deterrent to a defendant who might otherwise refuse the offer of a guilty plea to a lesser offense in exchange for waiving his right to jury trial. Where a jury trial does occur, the impact of the minimum sentence is to remove the judge's discretion.

In non-felony-murder cases, the life term far exceeds the sanction that the court or the prosecutor would wish to impose in most willful killings. The result, notwithstanding the loose formal definition of premeditation, is that 96 percent of all non-felony homicide convictions in such cases are for lesser offenses than first degree murder. In short, the system has responded to the mandatory minimum term by effectively redefining the circumstances that mandate its use. In this sense, the high minimum sanction generates leniency by reducing the number of cases that will result in convictions for the highest degree of murder.

This de facto redefinition of the law of premeditation may also generate a discrepancy between the law as administered by prosecutors and judges and the law as administered by juries. In the forty-eight non-felony cases in which the judge is charged with determining the degree of murder, he finds premeditation in none. Each judge views each individual case against the background of many other killings. He may well view his decision on the degree of murder

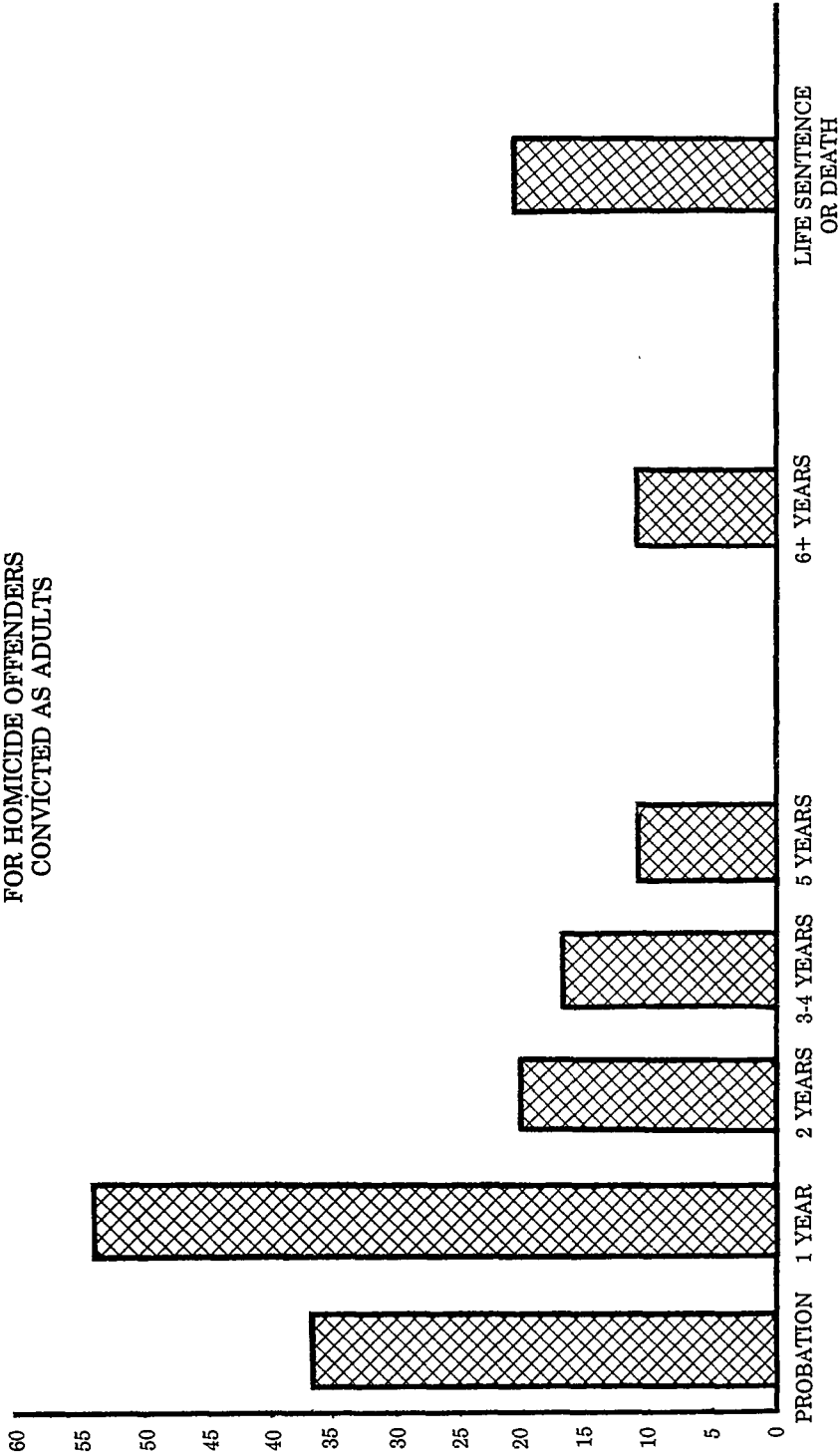
as merely one of determining the proper level of punishment. By finding that the killing was not first degree, the judge retains the ability to sentence flexibly. The jury, on the other hand, is only told the formal law. The killing before it is most likely the first criminal homicide each juror has come to know in any detail. To the extent that the jury views the formal law as binding, it may be operating under a different set of rules in these cases than the judiciary.¹⁹ The number of jury trials in non-felony cases is too small to provide a rigorous test of this notion, but the little data we have are consistent with this interpretation.

The mandatory minimum sentence also exerts a marked impact on the distribution of punishments. The severe minimum sentence for first degree murder increases the disparity between sanctions imposed on the relatively small number of defendants who bear the full brunt of the law and sanctions imposed on those convicted of lesser degrees of homicide. Figure 1 (page 240) sets out graphically the distribution of minimum sentences for all adults convicted of homicide, by assuming a life or death sentence is the equivalent of fifteen years' minimum prison confinement.

The visually striking element of Figure 1 is a gap between the great bulk of homicide convictions with one- and two-year sentences and the 15 percent of all killings that result in life terms. To be sure, different types of criminal killings should call forth criminal sanctions of different degrees of severity. But it seems intuitively un-

¹⁹ One aspect of this problem deserves special mention. In felony-murder cases the Pennsylvania Supreme Court requires that the jury must be instructed on second degree murder, apparently to give jurors an opportunity to show mercy on the defendant by deviating from the statutory pattern. But apparently the judge need not *tell* the jury that it may find a felony defendant guilty of second degree murder as an act of mercy. Since the definition of first degree murder includes "[a]ll murder" committed during the enumerated felonies, the second degree conviction would have to come from juries that either receive a "mercy" instruction or take it upon themselves to exercise apparently unauthorized mercy. See *Commonwealth v. Schwartz*, 445 Pa. 515, 520, 285 A.2d 154, 157 (1971).

FIGURE 1
DISTRIBUTION OF MINIMUM SENTENCES
FOR HOMICIDE OFFENDERS
CONVICTED AS ADULTS



likely that any rational theory of punishment would rank criminal offenses in such a way as to produce a distribution with so few cases in the middle range. This issue and its implications for jurisprudence and punishment are addressed in the following section. For now, it is sufficient to note that the impact of the minimum life sentence in the context of Philadelphia homicide is to separate the polar extremes in punishment policy even further than would otherwise be the case. In operation, the minimum sanction drives an additional wedge between wholesale and retail homicide, between felony killings that do not go to jury trial and felony killings that reach the jury, and between felony and non-felony killings.

The mandatory minimum life term is not without its ironies. It is intended to increase penalties for first degree murder and it undoubtedly does so where first degree murder is found. The mandatory life sentence also increases penalties, in a large number of cases, by scaring felony-murder suspects into accepting less lenient terms for waiving their right to jury trial. It is intended to create an equivalence between an offense and a penalty, but probably results in fewer defendants who should be convicted of the first degree offense being convicted of that charge. The shotgun marriage of offense and penalty acts systematically to distort the distinctions in the formal law. When high mandatory penalties are attached to grades of criminal offenses, the sentencing tail wags the substantive dog, and informal criteria for grading offenses dominate the formal criteria that were supposed to justify the minimum sanctions.

C. Philadelphia Homicide as Distributive Justice

At first glance the skewed distribution of punishments in Philadelphia strikes us as unjust. In analyzing this problem of distributive justice further, we begin by asking what we take to be the initial social science query about the sample of cases we have reported: the punishments meted out for homicide differ, but can we not explain the difference through a combination of legally relevant (felony vs. non-felony) and socially understandable (plea bargaining) reasons?

In one sense, the answer is yes. Without debating the merits of either the felony-murder rule or plea bargaining, it is clear that the small sub-sample of cases that receive either life or the death penalty differ in terms of culpability from the average homicide that results in a one- or two-year prison minimum. But this difference between cases does not make the distribution of sentences a "just" one.

To begin with, there is substantial overlap between those killings that call forth life sentences and those that receive lesser sanctions. The more culpable offense does not always receive the more severe punishment.

The second point is, in our view, the more profound. The killings that result in life sentences may differ from those subject to lesser punishment—but by how much? The 198 episodes of homicide are a continuum of human culpability. The discontinuous nature of the sanctions assessed is disturbing. The distinctions propounded by the formal law are too insubstantial to bear the weight of such gross differences in punishment; while the difference between felony and non-felony killing is important, we can think of no reason why a felony killing merits punishment ten times as severe as a non-felony killing. The distinction between premeditated and other killings strikes us as even less able to support such a monumental burden.

If the formal legal distinctions are insufficient to justify the skewed distribution of punishment, the informal distinctions are even less persuasive. Even assuming that the most shocking killings are singled out for special treatment, the absence of formal rules to guide discretion and the huge differences in sanctions within the murder category would appear to offend any colorably coherent theory of punishment. Three purposes of punishment may be isolated for special mention in this context: general deterrence, desert or retribution, and incapacitation.

General deterrence as a motive of penal policy aims to dissuade potential offenders from particular crimes by holding up the example of punishment of those actually convicted. From a purely utilitarian viewpoint, the extremely severe punishment of a few offenders may serve the same deterrent function as more evenly apportioned punishments. But if certain offenders' interests are to be sacrificed to warn off their fellow citizens, it seems perverse to tax an unlucky few so harshly when the same goals might be achieved by a more evenly apportioned sanction.

On retributive grounds, which we sense are the center of the constitutional debate, it is clearly proper to punish some of our sample of offenders more severely than others. But we cannot find the principle that justifies differences of ten-to-one within the general category of murder. Nor can we explain, on these grounds, the virtual absence of middle-range minimum sanctions, even though

the minimum sanction should be the essential measure of retributive justice.²⁰

Incapacitation to prevent further crime is undoubtably an important consideration in the decision to imprison and an important determinant of the length of sentence. Some of the factors that may be relevant to an offender's future dangerousness, such as his prior criminal record and whether a collateral felony was involved, influence the length of the sentence imposed by the court in our sample. But the principle of incapacitation cannot explain adequately the extraordinary bi-modality in punishment on either practical or moral grounds. The practical objection is that the majority of minimum sentences are too short to provide substantial incapacitation, while the life terms far exceed the risk period for most offenders. Given the difficulties of predicting differential dangerousness among convicted offenders, we would expect an incapacitation strategy to emphasize precisely the middle-range sanctions missing in our sample. The moral problem with explaining the pattern of sanctions by appeal to incapacitation principles is that any such gross differences in prison terms would be no less unjust because they were imposed for this reason. While some difference in penal sanction may acceptably be based on fear of future crime, the degree of difference in this sample seems to exceed by far the moral boundary of dangerousness as a proper determinant of sanction.

Social values, court congestion, and low-visibility discretion contribute to the skewed distribution of punishments. The mandatory minimum penalty for first degree murder seems to exacerbate rather than moderate the problem. With this hypothesis as a background, the next section considers the impact of a special form of mandatory minimum penalty—capital punishment after *Furman v. Georgia*.

III. PERSPECTIVES ON THE DEATH PENALTY

Our sample of cases came to trial at a time when the death

²⁰ When a judge sentences an offender to a minimum of x years and a maximum of $x +$ five years, the theory that justifies the difference between minimum and maximum is that the system will learn things about the offender during his imprisonment that should properly affect the duration of his confinement. The relevant factors include his performance in prison rehabilitation programs, propensity to future crime (which we "diagnose" in prison), and behavior in prison. At the point of sentencing, however, the judge has learned all that the system will ever know about the seriousness of the offense that leads to confinement. We thus would argue that the minimum sentence—the time the offender must serve—is the proper measure of the community's outrage at the offense. The maximum sentence is related to principles of retribution in this scheme, but only as a restraint on the amount of time that can, in justice, be assessed, without regard to the offender's later behavior.

penalty was an alternative sanction to life imprisonment for first degree murder. Only three defendants received death sentences at trial—a figure equal to 1 percent of all homicide convictions and 12 percent of all convictions for first degree murder. The number of cases is plainly far too small to support a rigorous investigation of the circumstances that lead to the death penalty. Moreover, our sample includes no cases where the police note a “contract” killing, no killings of police or prison guards, no killings by an imprisoned offender. Our data cannot be used to predict prosecutorial, judicial, and jury behavior in these cases, which are often singled out for special punishment by legislatures.

But much of the data from this study is useful in predicting the impact of mandatory sentence legislation, including mandatory death penalty legislation. Our Philadelphia data suggest that legislation prescribing mandatory capital punishment for premeditated or felony-murder would not be mandatory in effect and would further skew the distribution of punishments for criminal homicide.

Attempts to legislate minimum punishments for “premeditated” killing are doomed in both theory and practice. In theory, the line between premeditated and unpremeditated killing is blurred and morally unpersuasive. In practice, premeditation means little more than appearing before an unsympathetic jury. Any mandatory death penalty legislation that makes premeditation the dividing line between life and death would operate in the same lawless fashion as the discretionary death penalty held unconstitutional by the Supreme Court in *Furman*.

In theory, the conceptual distinction between felony and non-felony killing is clearer and carries some moral force. Yet fewer than half of those convicted of killings that the police believed were felony-related are sentenced to the present mandatory minimum of life in prison. A death penalty for felony-murder would further reduce the proportion of felony-murder convictions. It would probably widen the gap between felony-murderers treated as such by the legal order and those felony-killers allowed to plead guilty to lesser offenses. Mandatory death penalty legislation would certainly widen the gap between those cases singled out for “retail” treatment in Philadelphia and the bulk of all cases that result in modest prison sentences.

As long as most murders are punished modestly, the moral and constitutional support for the death penalty must come, if at all, not from the special values our system attaches to preserving life, but from unique characteristics of the particular capital offense. Social needs to condemn or deter willful killing call for a more even distri-

bution of punishments before the state can claim the moral equivalence of a life for a life. As long as the price of wholesale homicide is one or two years in prison, the justification for mandatory death sentences rests on the importance of differences in who is killed, the motive for the offense, the number of victims involved, or the method of killing. The death penalty thus becomes a device to protect not all of us but some of us, not life but life from particular threats. The difficult problem becomes one of determining which special factors justify mandatory death penalties.

Earlier it was argued that, on the basis of the Philadelphia experience, neither premeditation nor felony-murder was a sufficiently clear indication of special moral turpitude to justify mandatory death. This conclusion followed from the fact that in a majority of cases neither type of killing resulted in a first degree murder conviction under the mandatory life imprisonment provisions of Pennsylvania law. Two types of killing usually did lead to first degree murder verdicts—rape-murders and killings involving more than one victim. These killings, alone in our sample, might appear to be the appropriate raw material for a mandatory death penalty; but none received the death penalty.

Two of the three police-nominated rape-killings in Philadelphia resulted in verdicts of first degree murder; the third resulted in a finding of voluntary manslaughter. In the first case, a 27-year-old black male raped and apparently strangled a 13-year-old black female. The offender had an extensive criminal record. The sentence was life imprisonment.

In the second case, six offenders raped a 19-year-old black woman; one, the eventual first degree offender, strangled the victim. The 34-year-old offender, who had a history of thirteen prior arrests, seven prior convictions, and one pending charge, was tried before a judge and received a life sentence. One of his co-defendants went free and the others received prison terms.

The multiple-killing cases would seem to come closest of any in our sample to justifying mandatory minimum sanctions. But none of the five convicted multiple-killers received a death penalty even though four were convicted of first degree murder, for which death is an alternative sanction.

In one case, a 58-year-old black offender with no criminal record killed a white husband and wife, ages 61 and 58, during a store robbery. The trial was before a jury. The sentence was life. His 24-year-old accomplice also received a life sentence. Each victim was wounded more than twice with a .38-caliber revolver.

In the second case, apparently arson, a 30-year-old black male

killed a 34-year-old white female and two white teenagers. The offender had eight prior convictions. The sentence was life.

In the third case, a 47-year-old black male killed his common law wife and eight-year-old child with a .38-caliber revolver. The trial was before a jury. The sentence was life.

In the fourth multiple-victim case, two black offenders, ages 18 and 21, killed two white males, ages 68 and 74. The cause of death was multiple-knife wounds; the motive was robbery. The 18-year-old was not indicted. The 21-year-old pleaded guilty to general murder and was convicted of the second degree charge. The sentence was five to fifteen years in prison.

None of these cases resulted in the death penalty, despite its availability to the jury in most of them. As we read such results, our sample offers no evidence of any type of homicide that would, under contemporary standards, justify mandatory death.

Against this background, it is instructive to consider the three cases in which one defendant was sentenced to death. Two of the three death sentences involved felony killings. In the first case two black men, ages 19 and 20, robbed a 56-year-old white man. The 19-year-old street robber shot and killed the victim with a .22-caliber handgun. The 19-year-old had one prior conviction for a crime against property and a pending charge in addition to this offense. After a jury trial he was sentenced to death. His 20-year-old co-felon had two prior convictions for crimes against the person. He was sentenced to life.

The second death case grew out of a store robbery. The victim, a 60-year-old white, was brutally beaten by four young black males. He died of head wounds inflicted by a sledgehammer and throat wounds inflicted by a hacksaw. The 18-year-old black male who used the sledgehammer was sentenced to death after a jury trial. He had five prior convictions—all for property offenses. The 15-year-old who wielded the hacksaw and a 16-year-old accomplice received life sentences. No action was taken against the fourth offender.

The only non-felony case resulting in a death sentence was a *cause célèbre* in Philadelphia. Five black males, ages 14 through 16, apparently agreed to kill the first white man they would encounter. After traveling by car to a parking lot at Temple University, they shot a 21-year-old graduate student to death with a .22. The victim was married. The youth who fired the shot was sentenced to death after a jury trial. He was 16, with a record of one adjudication in the juvenile court and one pending charge. One of his companions, also sixteen, was sentenced to life imprisonment after a jury trial. One 14-year-old was referred to the juvenile court. The other

two members of the group, ages 15 and 16, had not been tried by 1974.

Although two of these three cases are more gruesome than most murders, it is still difficult to judge the appropriateness of the sanction. To help make this assessment, it is useful to compare the defendants who received the death penalty with three groups from our sample. The first comparison is with their co-defendants. In two of the three cases, the difference between the defendant condemned to death and his co-defendants is that he was responsible for the lethal wound. In the third case the condemned participant contributed to the death with a sledgehammer, and his co-felon who used the hacksaw was only 15 years old. In none of these cases does the legal sanction carry the logic of accessorial liability to the conclusion that more than one defendant should die.

The two other groups with which the condemned defendants must be compared to judge the appropriateness of these capital sanctions are the other twenty-one first degree murder convictions and the other 165 convictions for criminal homicide. As against the other twenty-one "premeditated" and "felony" killers, we can sense no pattern other than the fact that all of the capital cases were tried before a jury and the lack of death sentences for confederates who do not kill. As against all of our culpable killers, the three selected for death seem more blameworthy, but it is difficult to justify the enormous difference in punishment outcome by the difference in culpability. The random selection and execution of a white stranger is shocking and senseless, but how much less shocking and senseless than an epidemic of teen-gang killings? How can we measure these differences with moral confidence and transform them into issues of life and death?

How would our sample of cases fare under Pennsylvania's post-*Furman* death penalty legislation? The outcome of any individual case cannot be predicted, of course, because of the large role that prosecutorial and judicial discretion will play. But the principles of the new legislation can be weighed against the pattern of jury and judicial decisions in our sample.

The new Pennsylvania legislation creates three degrees of murder and establishes a mandatory death penalty for first degree murder when an "aggravating" circumstance, but no "mitigating" circumstance, is proved. First degree murder is defined as "criminal homicide when it is committed by an intentional killing."²¹ Since

²¹ PA. STAT. tit. 18, § 2502 (1973).

intent to kill can be inferred from the use of a deadly weapon on a vital part of the body, the new statute seems to retain the broad coverage of Pennsylvania's older statute as interpreted by the courts.²² Second degree murder is defined as a killing that occurs during a felony,²³ except that an "intentional" felony killing is murder in the first degree.²⁴ Murder in the third degree is defined as "all other murder."²⁵ The change in Pennsylvania's grading of murder is that offenders who kill during felonies are not guilty of first degree murder without an intent to kill. For the felon who commits the lethal act, this change does not offer great solace, because the large majority of felony killings are done with lethal weapons or under other circumstances that will support the inference of intent in Pennsylvania. But for the accomplice to a felony who did not kill, the new law should limit his liability to the "second degree" offense under a literal reading of Pennsylvania accomplice liability, unless the accomplice concurred in the lethal act.²⁶

First degree murder is accompanied by a mandatory death penalty if it is proved that the killing "is accompanied by at least one of the following aggravating circumstances and none of the following mitigating circumstances."

The aggravating circumstances:

- (i) The victim was a fireman, peace officer or public servant concerned in official detention as defined in section 5121 of this title (relating to escape), who was killed in the performance of his duties.
- (ii) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.
- (iii) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

²² See, e.g., *Commonwealth v. Carroll*, 412 Pa. 525, 194 A.2d 911 (1963); PA. STAT. tit. 18, § 2502 (1973).

²³ PA. STAT. tit. 18, § 2502 (1973).

²⁴ This result is unavoidable if the felony provisions in the death penalty sections are read with § 2502 and § 301.

²⁵ See PA. STAT. tit. 18, § 306 (1973).

²⁶ PA. STAT. tit. 18, § 301 should be read to provide that the accomplice is liable for first degree murder only if he had the requisite mens rea, in this case specific intent to kill. Whether the courts will adopt this interpretation is not yet known, nor are the circumstances under which accomplice complicity to intentional killing will be inferred. These issues have not been litigated because they were not relevant under the common law and statutory felony-murder rules before *Furman*.

- (iv) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.
- (v) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offense.
- (vi) The defendant committed a killing while in perpetration of a felony.
- (vii) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
- (viii) The offense was committed by means of torture.
- (ix) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was impossible or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.²⁷

The mitigating circumstances:

- (i) The age, lack of maturity, or youth of the defendant at the time of the killing.
- (ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.
- (iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress).²⁸

The new Pennsylvania statute meshes with our sample of cases with unpredictable but interesting effects. Despite the long list of aggravating circumstances, only two types of "capital" killings are found in our sample—felony killings (aggravating circumstance vi) and those involving multiple victims (which created a "risk to the life of another" under vii or could lead to a conviction that triggers ix). As against the two felony-murder suspects in our sample who received death sentences, the Pennsylvania statute seems to state that all twenty-five of our felony suspects who committed the lethal act should be sentenced to death, barring "youth," "immaturity,"

²⁷ PA. STAT. tit. 18, § 1311(d)(1) (1973).

²⁸ PA. STAT. tit. 18, § 1311(d)(2) (1973).

or lack of intent to kill.²⁹ The thirteen felony-murder suspects who did not kill are marked for death if their consent to the lethal act can be inferred from the circumstances.

The objectives reflected in the new statute are in stark contrast to the jury's behavior in singling out certain offenders for execution. No multiple killers and no felony defendant who did not cause a death were sentenced to death. In fifteen of the seventeen felony cases where the judge or jury was free to choose between life imprisonment and death, the sentence was life. If the statute is to be administered literally (and again excluding the effect of the "youth" clause), death sentences in this group of cases would climb by a factor of fifteen or twenty; one defendant sentenced to death would escape under the new statute (because the group of youths who shot the first white they encountered was not attempting to take his property).

All of this raises questions of legislative intent and legislative foresight. Did Pennsylvania (and her sister states) pass this legislation to rebel against the leniency of juries, judges, and prosecutors? Did the draftsmen envision or expect any results such as those outlined above? Or was the legislation drafted to circumvent the *Furman* decision, to keep a death penalty on the books and enhance the selective power of the prosecutor?³⁰ The extraordinary parallel action of so many states suggests the latter interpretation.³¹

But this conclusion raises the more profound question of why the *Furman* decision provoked this kind of response in states where the death penalty had fallen into disuse. Perhaps it is one thing to live in a state without executions and quite another to be told that the penalty of death cannot be imposed. The *Furman* decision raised the specter of unilateral disarmament—"criminals can kill us but we can't kill criminals, even those few we might wish to kill." The legislative reaction was to search for a formula that would restore the death penalty, never mind for what. These statutes need

²⁹ "Youth" and "immaturity" are not defined. Intent to kill is broadly defined. See notes 8-11 *supra*.

³⁰ If the statute was designed to enhance discretion, the use of the "intent" formula was admirable, since Pennsylvania-style "intent to kill" is, in our sample, the softest category of mens rea in the Pennsylvania system. In felony cases it is now the dividing point between second degree murder and mandatory capital murder. See PA. STAT. tit. 18, §§ 306, 2502 (1973).

³¹ For a collection and analysis of the first generation statutes, see Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974). Compared with the laws in many states, Pennsylvania's seems a model of clarity and draftsmanship.

not present the Supreme Court of the United States with the issue of "whether capital punishment is unconstitutional for all crimes and under all circumstances"³² because they do not represent a legislative judgment that particular offenses are "atrocious" in any singular sense.³³

The legislatures have responded to *Furman v. Georgia* with a shopping list of capital offenses that suggest more a sanction in search of a crime than a crime in search of a sanction.

CONCLUSION

The data in this study are preliminary in three important respects. First, the life terms we have studied, while not eligible for parole, are subject to executive clemency—and while that clemency has been exercised only after an average of fifteen or more years in the past, the life sentence may carry less bite for our sample of homicides. This would have the effect of lessening the distressing gap between general murder and first degree murder sanctions while increasing the distance between life imprisonment and death as sanctions for first degree murder. Second, we do not yet have data on actual time served by some of our sample of defendants. While that figure, historically, has been close to the minimum for most sentences, this trend may change, although we have no reason to expect such a shift. Third, this study deals with only one city in a single state. Replication of this study will doubtless show interesting variations between cities with large numbers of "wholesale" killings and less criminally congested areas, where every murder is an event worthy of coverage outside the obituary page. We look forward to further studies of other jurisdictions.

However, the basic contrast between wholesale and retail killing, between the many cases and the few, seems secure. The going price of criminal homicide is either two years or twenty. The argument for the death penalty for murder fails, in our view, in the context of the reality of the criminal process.

This judgment is not based on any model of what a just sentence for willful killing should be; social values are too discordant in this country and the jurisprudence of punishment is too primitive to argue that one year or twenty years, or any term between these, best serves the balance of interests that justice represents. Yet a sophisticated definition of justice is not necessary to recog-

³² *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring).

³³ *Id.* at 307-08.

nize that particular patterns of punishment are unjust. For similar reasons the tired debate between "hardliners" and "softliners" in the United States fails to recognize an important aspect of American criminal justice: the problem is not that our system of justice is too lenient, or too severe; sadly, it is both.