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A NATIONAL STUDY OF THE *FURMAN*- COMMUTED INMATES: ASSESSING THE THREAT TO SOCIETY FROM CAPITAL OFFENDERS

James W. Marquart *
*Jonathan R. Sorensen***

On June 29, 1972, a sharply splintered United States Supreme Court, in *Furman v. Georgia*,¹ struck down the capital sentencing statutes of Georgia and Texas. Justices Brennan and Marshall found that the death penalty was per se unconstitutional.² Justices Stewart, Douglas, and White found that capital punishment, as then administered under the statutory schemes of many states, constituted cruel and unusual punishment in violation of the eighth amendment.³ Justice Stewart concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."⁴ Justice Douglas echoed this sentiment and stated "[u]nder these laws no standards govern the selection of the penalty."⁵ Prior to *Furman*, defendants were sentenced to death almost at the whim of jurors under the vague sentencing guidelines enumerated in most state capital statutes.⁶ Thus, this landmark ruling invalidated vague capital sentencing statutes throughout the United States.

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1. 408 U.S. 238 (1972) (per curiam).

2. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

3. *Id.* at 306 (Stewart, J., concurring); *id.* at 240 (Douglas, J., concurring); *id.* at 310 (White, J., concurring).

4. *Id.* at 310 (Stewart, J., concurring).

5. *Id.* at 253 (Douglas, J., concurring).

6. See M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 293-97, 313 (1973).

The *Furman* ruling also invalidated the death sentences of hundreds of inmates awaiting execution in thirty states and the District of Columbia.⁷ The capital offenders affected by the decision had their death sentences commuted to life imprisonment and were subsequently "released" into the general prisoner population to serve the remainder of their sentences.⁸

Many legislators and criminal justice practitioners were outraged by the *Furman* decision.⁹ Georgia Lieutenant Governor Lester Mattox stated that the decision amounted to "a license for anarchy, rape, [and] murder."¹⁰ Edward Kiernan, then head of the Patrolman's Benevolent Association, maintained that *Furman* "struck a blow at our remaining fabric of law and order."¹¹ Correctional administrators regarded former death row prisoners as a threat to institutional security and stability.¹²

The *Furman* decision represents an "ideal" natural experiment for testing such predictions of future dangerousness. Other natural experiments have resulted when court decisions released potentially dangerous offenders from hospitals for the criminally insane.¹³ For example, in 1974 Steadman and Cocozza released a study¹⁴ that tracked the behavior of over 1,000 inmates transferred to civil mental hospitals as a result of the United States Supreme Court's ruling in *Baxstrom v. Herold*.¹⁵

Similarly, Thornberry and Jacoby analyzed the effects of *Dixon v. Attorney General*,¹⁶ a ruling that resulted in the release of over 500 patients from a maximum-security institution for the criminally insane.¹⁷ The primary conclusion from these two studies was that during confinement and on release in the free community, these offenders who were

7. See *infra* Table 1 at Section III, A.

8. M. MELTSNER, *supra* note 6, at 293.

9. See Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10, 12-15 (1973).

10. F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 38 (1986).

11. See Arnold, *Parole in Capital Offenses Less Likely*, N.Y. Times, June 30, 1972, at 1, col. 6.

12. Indeed, some clinicians maintained that "the adjustment [to death row] is likely to proceed in a socially undesirable direction and may have negative value in accommodations outside of death row." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 171 (1972).

13. H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE (1974); T. THORNBERRY & J. JACOBY, THE CRIMINALLY INSANE (1979).

14. H. STEADMAN & J. COCOZZA, *supra* note 13.

15. 383 U.S. 107 (1966).

16. 325 F. Supp. 966 (M.D. Pa. 1971).

17. T. THORNBERRY & J. JACOBY, *supra* note 13.

predicted to be dangerous exhibited little assaultive behavior.¹⁸ Most recently, studies in Texas¹⁹ and Kentucky²⁰ concluded that the *Furman*-commuted inmates in those states did not represent a disproportionate threat to either the custodial staff, or if released, to the general community.²¹ In both states, recidivism among ex-capital offenders was not proportionally higher than among offenders convicted of similar crimes.²²

This study examines the prison and release behavior of all capital offenders commuted by *Furman*. What happened to the former death row prisoners? How accurate were the long-term predictions of violence? If released, did these offenders repeat their crimes and return to prison? Providing answers to these and other questions bears directly on the justification for capital punishment in many states today—particularly those eight states whose current capital statutes have a “future-dangerousness” provision.²³ Such a provision reflects the premise that incapacitation of capital offenders protects society from future violence inflicted by those offenders.²⁴ This study is a descriptive analysis of the institutional and post-release behavior of 558 *Furman*-commuted inmates in thirty states and the District of Columbia. First, we examine the relevant literature on commuted offenders. Then, we present the background characteristics of these inmates with special emphasis on the race of offenders and victims. Next is an in-depth analysis of the institutional behavior of the *Furman*-commuted inmates that addresses whether these inmates were a special threat to the custodial staff, other prisoners, and institutional order. Finally, we examine the patterns of recidivism among these capital offenders. We conclude with a discussion

18. H. STEADMAN & J. COCOZZA, *supra* note 13, at 138-40; T. THORNBERRY & J. JACOBY, *supra* note 13, at 178-98.

19. Marquart & Sorensen, *Institutional and Postrelease Behavior of Furman-Commuted Inmates in Texas*, 26 *CRIMINOLOGY* 677 (1988).

20. Vito & Wilson, *Back from the Dead: Tracking the Progress of Kentucky's Furman-Commuted Death Row Population*, 5 *JUST. Q.* 101 (1988).

21. Marquart & Sorensen, *supra* note 19, at 690; Vito & Wilson, *supra* note 20, at 110.

22. Marquart & Sorensen, *supra* note 19, at 687-88; Vito & Wilson, *supra* note 20, at 110.

23. See Worrell, *Psychiatric Prediction of Dangerousness in Capital Sentencing: The Quest for Innocent Authority*, 5 *BEHAV. SCI.* 433, 433-36 (1987). For examples of future dangerousness provisions in capital punishment statutes see OKLA. STAT. ANN. tit. 21, § 701.12.7 (West 1983); VA. CODE ANN. § 19.2-264.2 (1983); WASH. REV. CODE ANN. § 10.95.060(8) (Supp. 1989).

24. See generally P. Greenwood & A. Abrahamse, *Selective Incapacitation* (August 1982) (available at RAND Corp., Santa Monica, California, doc. no. R-2815-NIJ); von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 11 (1983-84).

of recidivism among capital murderers and the accuracy of long-term predictions of serious violence.

I. PREVIOUS RESEARCH ON COMMUTED CAPITAL OFFENDERS

Little systematic research exists examining the behavior of commuted capital offenders. The few studies available are summarized in this section.

A. *Commuted Prisoners in the Institution*

Not every individual slated for execution is actually put to death. For a variety of reasons such as insufficient evidence, a coerced confession, or diminished capacity, some capital offenders have their death sentences commuted or reduced in severity, typically to life imprisonment. For example, in Texas between 1924 and 1964, of the 447 offenders sentenced to death, 362 were executed and eighty-five (19%) were commuted to life imprisonment.²⁵ Research by Johnson in North Carolina documented that between 1909 and 1953 only 24% of the burglars and 56% of both murderers and rapists given the death penalty were ever executed.²⁶ Whether commuted by governor's clemency or by judicial mandate, these individuals were subsequently released to either the general prison population or society.²⁷

Studies of commuted capital offenders suggest that these inmates are not unusual threats to institutional order and security. Bedau, while studying capital sentencing patterns in New Jersey, found no information "alleging unmanageable behavior during incarceration" among the fifty-five capital offenders who were serving terms of life imprisonment and released from death row between 1907 and 1960 because of commutation or reversal of sentence.²⁸ Wagner recently conducted an extensive analysis of the prison behavior of 100 commuted capital offenders (from 1924 to 1971) in Texas.²⁹ He tracked their institutional behavior from 1924 to 1988 and found that eighty commutes did not commit any serious prison rule violations, such as murder, aggravated assault, sex by force, striking a guard, or escape.³⁰ Most served their sentences without inci-

25. Wagner, *A Commutation Study of Ex-Capital Offenders in Texas, 1924-1971* (1988) (unpublished dissertation available at Sam Houston State Univ.).

26. Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165 (1957).

27. *Id.* at 166-67.

28. Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 46-47 (1964).

29. Wagner, *supra* note 25.

30. *Id.* at 32.

dent, although three of the commuted capital offenders killed four fellow inmates.³¹

Although the research literature on commuted offenders in prison is sparse, it does not suggest that these prisoners are more dangerous, violent or aggressive than other offenders. If anything, the prison behavior of commuted capital offenders paralleled that of murderers in general, the latter group being "settled" prisoners infrequently involved in homicidal or other violent types of behavior.³²

B. *Recidivism of Commuted Capital Prisoners*

Sellin noted that the recidivism of commuted capital offenders was difficult to ascertain, as they were seldom categorized apart from murderers in general.³³ Although systematic research is also lacking on this topic, available research indicates that commuted prisoners, while on release, pose no significant threat to society when compared to other similar offenders.³⁴

In New Jersey and Oregon, Bedau studied the parole performance of capital offenders given clemency or released by judicial decision.³⁵ Of thirty-one capital offenders commuted between 1907 and 1960 in New Jersey, and subsequently released on parole, only one was returned to prison; this offender was convicted of attempted sodomy and, after his second release from prison, was then convicted of robbery.³⁶ Of the fifteen commuted capital offenders released from prison between 1903 and 1964 in Oregon, three (20%) returned to prison for technical violations or new offenses.³⁷ None of these capital offenders in New Jersey or Oregon committed an additional criminal homicide while in prison or on parole.³⁸

Stanton examined the release behavior of sixty-three first-degree

31. *Id.* Research by Sellin reveals that the majority of assaults with intent to kill, and actual prison homicides, occur in states that allow enforcement of the death penalty. T. SELLIN, *THE PENALTY OF DEATH* 104-13 (1980). Wolfson also found that of 124 prison homicides in 1973, only seven occurred in non-death penalty states. W. Wolfson, *The Patterns of Prison Homicide* (1978) (unpublished dissertation available at Univ. of Penn.).

32. See Flanagan, *Time Served and Institutional Misconduct: Patterns of Involvement in Disciplinary Infractions Among Long-term and Short-term Inmates*, 8 J. CRIM. JUST. 357 (1980).

33. T. SELLIN, *supra* note 31, at 103-04.

34. *Id.* at 113-14.

35. Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 OR. L. REV. 1 (1965) [hereinafter Bedau, *Capital Punishment*]; Bedau, *supra* note 28.

36. Bedau, *supra* note 28, at 46-47.

37. Bedau, *Capital Punishment*, *supra* note 35, at 32-34.

38. *Id.*; Bedau, *supra* note 28, at 47.

murderers paroled between 1930 and 1961 in New York, sixty-one of whose sentences were commuted from death to life imprisonment.³⁹ He found that by the end of 1962 only three of these murderers returned to prison—two for technical parole violations, and one for burglary.⁴⁰ Wagner tracked the release behavior of eighty-four commuted capital offenders paroled over the course of sixty-four years (1924-1988) in Texas.⁴¹ Seven were returned to prison for committing new felonies—two for possession of a firearm, and one each for rape, robbery, aggravated assault, burglary and kidnapping.⁴² None of the released inmates committed a murder while in the free community, and most successfully completed their parole without incident.⁴³

Thus, recidivism rates for capital offenders are relatively low.⁴⁴ After reviewing the evidence, Sellin concluded that capital offenders, "whether in prison or on parole, pose no special threat to the safety of their fellowmen."⁴⁵ Given these data, Bedau maintained that while on parole, former death row inmates were not menaces to the social order:

There is no reason to believe that the thousands of those sentenced to death by trial courts in this century have been so sentenced because the sentencing authority was shown evidence that these persons were more dangerous, more likely to assault and kill in prison or after release, than the many thousands of other convicts guilty of similar crimes but never sentenced to death.⁴⁶

Throughout the United States in the pre-*Furman* era, a sprinkling of commuted offenders entered the general prisoner population; most of these reached the free community. Few researchers have paid attention to the behavior of these "special" prisoners. However, the *Furman* decision represents a unique opportunity to systematically analyze the institutional and post-release behavior of commuted prisoners. Never before has such a large and noteworthy group of former capital offenders been analyzed.

39. Stanton, *Murderers on Parole*, 15 CRIME & DELINQ. 149, 150 (1969).

40. *Id.*

41. Wagner, *supra* note 25.

42. *Id.* at 37.

43. *Id.* at 38.

44. T. SELLIN, *supra* note 31, at 120; Stanton, *supra* note 39, at 152-53.

45. T. SELLIN, *supra* note 31, at 120.

46. See H. Bedau, *Recidivism, Parole, and Deterrence*, in THE DEATH PENALTY IN AMERICA 173, 174 (3d ed. 1982).

II. METHODOLOGY

The first stage in this research was to obtain a list of inmates commuted by *Furman*. Douglas Lyons of the NAACP Legal Defense Fund prepared a "List of Persons on Death Row at Time of *Furman*."⁴⁷ The list contained thirty states and 613 inmates whose capital sentences were set aside by the *Furman* ruling.⁴⁸ We obtained a copy, telephoned each state department of corrections, developed a contact person, and explained our research goals. Next, a letter was forwarded to each contact person that identified the commutees and outlined the specific objectives and time frame for data collection. The necessary research agreement forms were then signed and our research plan was officially approved.

Once the research was formally approved we forwarded code sheets to the contact persons for data collection. These sheets covered six data categories:

1. current status (e.g., still in prison, paroled, deceased);
2. previous felony convictions;
3. total number of prior incarcerations;
4. prison disciplinary history;
5. victim information for the crime for which the defendant received the death penalty; and
6. whether the crime was committed in the commission of another felony.

According to the contact persons, the majority of the data was computerized and easily accessible; however, some data (i.e., previous convictions and complete disciplinary history) had to be retrieved manually. Some states, for example Georgia, simply supplied us with a printout of the necessary data. Other states, such as Arkansas, sent entire copies of the inmates' institutional files. Once the contact person filled out the code sheets, they were returned for analysis. Data on 558 prisoners was obtained from twenty-nine states and the District of Columbia.

III. GENERAL CHARACTERISTICS OF THE *FURMAN*-COMMUTED OFFENDERS

Although we began this project with a list of the *Furman*-commutees, the list was both incomplete and overinclusive. In a previous study of the *Furman*-commuted inmates in Texas, we identified forty-seven inmates as having been physically present on death row at the time

47. Unpublished study from NAACP Legal Def. and Educ. Fund, Inc. (1982) [hereinafter *Lyons List*].

48. *Id.*

of the ruling.⁴⁹

The list compiled by Lyons, however, noted that fifty-two Texas prisoners were affected by *Furman*.⁵⁰ Undoubtedly, some of the individuals on his list were still in county jails awaiting transfer to death row or at the time of the decision had their cases on appeal. More important, eight inmates housed on death row and commuted by the decision were not included in Lyons' list. These "missing eight" were physically on death row at the time of *Furman*. Other inconsistencies have been discovered in Kentucky and Florida.⁵¹

In several states, prison records of persons on the Lyons list could not be found. In other states, additional commuted offenders were found. To obtain the most "accurate" figure possible, we instructed our contact persons to match Lyons' list with institutional death row records wherever possible. If such records were not available, then the inmates' institutional files had to contain death row records that documented the prisoners' presence on death row. The death row files contained offense information, communication documents, and institutional histories. For the current study, a "*Furman* inmate" had to be confined on death row in 1972.

A. Region and State

Table 1 presents a state by state listing of how many capital offenders had their sentences commuted by *Furman*. We give both Lyons' and our figures.

According to both lists, most of the death row population in 1972 resided in Southern prison systems. These data are consistent with previous research on region and capital punishment in America.⁵² In December 1988, 59% of those sentenced to death were confined on Southern death rows.⁵³ All *Furman*-commuted prisoners sentenced to death for rape and robbery were also from the South.

The data in Table 1 reveal a discrepancy of twenty-four inmates—excluding Illinois data that was not provided. We suggest that our compilation is the most accurate due to our criterion that the prisoner be

49. Marquart & Sorensen, *supra* note 19, at 681.

50. Lyons List, *supra* note 47.

51. See Vito & Wilson, *supra* note 20, at 103; Garr, *Forgotten Killers Up for Parole*, Miami Review, August 30, 1983, at 1, col. 1.

52. See W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 (1984).

53. Unpublished study from NAACP Legal Def. and Educ. Fund, Inc. (1988).

TABLE 1: REGION AND STATE COMPARISON BY LIST

State	Lyons' List			Our Study		
	Murder	Rape	Total#	Murder	Rape	Total#
TOTAL	527	82	613	474	80	558
NORTHEAST	59	0	59	61	0	61
Connecticut	4	0	4	4	0	4
Massachusetts	23	0	23	25	0	25
New Hampshire	2	0	2	2	0	2
New York	5	0	5	5	0	5
Pennsylvania	25	0	25	25	0	25
MIDWEST	123	0	123	88	0	88
Illinois	31	0	31	—	—	0*
Indiana	9	0	9	9	0	9
Kansas	2	0	2	2	0	2
Missouri	16	0	16	16	0	16
Nebraska	2	0	2	2	0	2
Ohio	63	0	63	59	0	59
WEST	25	0	25	25	0	25
Colorado	2	0	2	2	0	2
Nevada	8	0	8	8	0	8
Utah	5	0	5	5	0	5
Washington	10	0	10	10	0	10
SOUTH	320	82	406**	300	80	384**
Alabama	26	5	31	26	5	31
Arkansas	6	0	6	6	0	6
Delaware	3	0	3	3	0	3
District of Columbia	3	0	3	1	0	1
Florida	73	29	102	71	29	100
Georgia	29	12	43**	27	12	40**
Kentucky	21	0	21	21	0	21
Louisiana	36	12	48	29	10	39
Maryland	18	5	23	18	5	23
Mississippi	9	0	9	9	0	9
North Carolina	9	2	11	8	2	10
Oklahoma	15	0	15	15	0	15
South Carolina	10	1	11	10	1	11
Tennessee	11	5	16	11	5	16
Texas	42	8	52**	37	7	47**
Virginia	9	3	12	8	4	12

* Illinois did not complete the codesheets. However, an official stated that of the thirty-one Illinois offenders, nineteen have never been released from prison, ten have been discharged, and two have been paroled. No releases have returned to prison.

** Includes four robbers. The NAACP listed two robbers from Georgia and two from Texas. In the current survey, however, one robber was from Georgia and three were from Texas.

physically present on death row in 1972; agency officials assured us that the figures reflected this criterion.

B. Offender Characteristics

According to our data, there were 558 inmates (excluding Illinois) on death row awaiting execution in 1972 who were commuted as a result of *Furman*. Of these inmates, 474 (85%) were capital murderers, eighty-one (14%) were rapists, and four (1%) were sentenced to death for armed robbery. In terms of race and ethnicity, 309 (55%) prisoners were black, 240 (43%) were white, eight (1%) were hispanic, and one was an American Indian. As expected, the capital offenders were overwhelmingly male (only two were female), with a median age of thirty-two years in 1972.

We asked each state prison system to provide data on the prisoners' prior criminal history. According to our contact persons, these data were gleaned from initial classification interviews and cross-checked with FBI and local state police records. Table 2 presents this information.

TABLE 2. CRIMINAL HISTORY OF THE *FURMAN*-COMMUTEES

	White (N=240)	Nonwhite (N=318)	Total (N=558)
Prior Record			
Convicted of UCR offense *	56.9%	52.7%	54.5%
Convicted of UCR property offense	46.3%	38.8%	42.1%
Convicted of UCR violent offense	24.5%	28.7%	26.8%
Prior adult prison incarceration	45.5%	33.1%**	38.6%
Prior jail term	31.7%	29.2%	30.3%
Prior juvenile incarceration	22.1%	24.7%	23.6%

* Offense documented by the Uniform Crime Reports.

** Chi square = 4.05 d.f. = 1 p < .05 level.

These data reveal that the majority of commuted offenders had been convicted of a prior UCR offense.⁵⁴ They were not first offenders. However, these conviction data also show that property crimes were their main criminal activity. Nearly three-quarters had no prior convictions for violent UCR offenses. Specifically, 97% had no previous conviction

54. A UCR offense is an offense documented in the Uniform Crime Reports. See FBI UNIFORM CRIME REP. (published annually).

for murder, 96% for rape, 87% for armed robbery, and 85% for aggravated assault.⁵⁵ Additionally, 61% of these inmates had never been incarcerated in an adult correctional institution. In short, the typical *Furman*-commutee was a southern male black murderer without a lengthy history of serious violence or repeated trips to prison.

IV. OFFENSE DATA

In this section we compare the death row population in 1972 with aggregate UCR arrest data for homicide from the years 1968-1972. These latter data, while less than ideal, serve as a crude "control" group. Where possible we relate our findings to prior research that also serves as a "control." The first section examines the capital murderers, while the second focuses on the rapists.

A. *The Furman Murderers*

Bowers suggested that much of the research on capital offenders in the pre-*Furman* era examined the racial characteristics of those executed, in an attempt to uncover discrimination and differential sentencing patterns between whites and non-whites.⁵⁶ However, while studies of rape and racial discrimination are available, little systematic research has examined the effect of race on the imposition of the death penalty for murder in the pre-*Furman* years.⁵⁷

Table 3 compares the *Furman*-releasees with persons arrested for murder during the preceding five years. While not offering conclusive evidence, these data provide support for the differential sentencing of capital offenders—in this case murderers. Clearly, capital juries consistently sentenced to death those defendants who killed whites. While a direct comparison between the groups is not possible, the differential treatment of male and female homicide offenders has been shown repeatedly and exists in pre-*Furman* and post-*Furman* periods. In the five years prior to 1972, 16% of those arrested for murder were women, yet less than 1% were on death row at the time of the *Furman* decision.⁵⁸ During 1968-1972, an average of 22% of the victims of homicide were female. However, victims of death row inmates were female in 33% of the homicides.

55. In 1987, 88.8% of the prisoners on death row had never been convicted of a prior homicide. BUREAU JUST. STATISTICS BULL., U.S. DEP'T JUST., CAPITAL PUNISHMENT 1987 (July 1988).

56. W. BOWERS, *supra* note 52, at 67-102.

57. T. SELLIN, *supra* note 31, at 63-64.

58. See Table 3.

Table 3 also presents data on those currently housed on death row. Today's death row population is somewhat dissimilar from the *Furman* prisoners. The majority of death row inmates are white males. Interestingly, 38% of today's victims were non-white, as compared to 20% in the *Furman* era. Perhaps prosecutors are more sensitive to minority victims of felony-murders than they were two or even three decades ago. Authorities may simply be more willing to prosecute these cases today.

To obtain a more focused picture of the capital murderer, we collected data on the victims of the *Furman* murderers. Table 4 presents data on these crimes.

These data indicate that white and non-white offenders were quite similar in terms of the number of victims, and the sex and age of the victim. By far the most striking difference between white and non-white murderers was the victim's race. White offenders killed whites in almost every circumstance. However, non-white offenders "crossed over" 65% of the time and were subsequently sentenced to death. This pattern of differential sentencing is also evident in Table 3. Less than half of the homicide victims during the five years prior to *Furman* were white. However, victims of offenders on death row were overwhelmingly (80%) white. Based on the victim's race, our data suggest bias and arbitrariness in the processing of capital murder cases.⁵⁹

If racial discrimination occurs through interaction with other variables, one would expect that non-white and white offenders on death row would have different background characteristics. Data would show that non-whites are less violent than whites, or that the circumstances of the crime were not as grave for non-whites to become death row inmates. However, data in this paper reveal that non-whites typically had more violence in their backgrounds and their capital offenses were more serious in that they occurred in the course of another felony.

B. *The Furman Rapists*

In the first several decades following the Civil War Reconstruction era, executions consisted mainly of lynchings of blacks convicted of crimes against whites.⁶⁰ The penalty served to reassert social distance—

59. See Garfinkel, *Research Note on Inter and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1941); Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941).

60. See A. RAPER, *THE TRAGEDY OF LYNCHING* (1933); N. TEETERS & J. HEDBLUM, *HANG BY THE NECK* (1967).

61. Phillips, *Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918*, 21 LAW & SOC'Y REV. 361, 364 (1987).

62. See, e.g., C. MAGNUM, *THE LEGAL STATUS OF THE NEGRO* 274-370 (1940); G. MYRDAL, *AN AMERICAN DILEMMA* 547-59 (1944).

TABLE 3: COMPARISON OF *FURMAN*-MURDERERS, PERSONS ARRESTED FOR MURDER ONLY 1968-1972, AND THE CURRENT DEATH ROW POPULATION

	<i>Furman</i> (N=474)	Arrestees* (N=64,337)	Current** Death Row (2,158)
Offender Characteristics			
Sex			
Male	99.6%	84.3%	98.9%
Female	0.4%	15.7%	1.1%
Race			
White	47.5%	36.8%	51.8%
Non-white	52.5%	63.2%	48.2%
Victim Characteristics			
Sex			
Male	67.4%	78.0%	56.0%
Female	32.6%	22.0%	44.0%
Race			
White	80.2%	44.4%	61.9%
Non-white	19.8%	55.6%	38.1%

* Source: FBI, UNIFORM CRIME REP., 1968-1972.

** Source: Tanya Coke and Karima Wicks of the NAACP Legal Defense and Education Fund.

and social control—between the racial groups and to primarily “protect” whites.⁶¹ Early twentieth century trials appeared to be a continuation of the same process. Lawyers, social scientists, and other authors have noted discrimination occurring in these instances.⁶² As a Southern student of law wrote:

One has only to visit a Southern community at a time when some Negro is on trial for the rape or murder of a white person to obtain a vivid picture of the hate and passion and desire for vengeance which is often aroused in the hearts of the southern whites. . . . Under circumstances of this kind it is rather difficult for the jury or even the judge to escape being influenced by the feeling which permeates the throng.⁶³

Statistics support the sentiment that the death penalty has been im-

63. C. MAGNUM, *supra* note 62, at 274.

TABLE 4. VICTIM-OFFENDER RELATIONSHIP BY RACE OF OFFENDER

	White Offenders (N=225)	Nonwhite Offenders (N=249)	Total (N=474)
Offense Characteristics			
Multiple Victims	20.3%	16.7%	18.4%
Sex of Victim			
Male	64.7%	69.9%	67.4%
Female	35.3%	30.1%	32.6%
Median age of victim	38	34	37
Race of victim			
White	95.2%	65.5%*	80.5%
Nonwhite	4.8%	34.5%	19.5%
Victim-offender relationship			
Stranger	42.0%	60.8%**	52.3%
Law enforcer	13.0%	13.9%	13.5%
Acquaintance	29.0%	20.5%	24.3%
Family	15.9%	4.8%	9.9%
Committed during a felony	50.0%	64.4%***	58.0%

* Chi square = 45.6 d.f. = 1 p < .00001

** Chi square = 13.18 d.f. = 1 p < .0005

*** Chi square = 7.07 d.f. = 1 p < .01

posed in a discriminatory manner, especially in rape cases. The definitive work on racial discrimination and the imposition of capital punishment for rape prior to 1972 was conducted by Wolfgang and Riedel.⁶⁴ That study reported the following: of the 3,859 persons executed for all crimes since 1930, 54.6% have been black or members of other minority groups.⁶⁵ Of the 455 executed for rape alone, 89.5% have been non-white.⁶⁶

The researchers collected data from 230 counties in eleven southern states, including every rape conviction (over 3,000) in those counties from 1945-1965.⁶⁷ Analyzing the dispositions of 1,265 cases in Florida, Georgia, Louisiana, South Carolina, and Tennessee, they found that nearly seven times as many blacks were sentenced to death as whites,

64. Wolfgang and Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973).

65. *Id.* at 123.

66. *Id.*

67. *Id.* at 127.

13% (110 of 823) versus 2% (9 of 442), and when victims of black offenders were white, the margin was even greater.⁶⁸ In a more detailed examination of Florida, Georgia, and Tennessee from 1945 to 1965, they found that blacks convicted of raping whites were disproportionately sentenced to death.⁶⁹

Our data reveal a clear pattern of discrimination that parallels the findings of Wolfgang and Riedel. Of the eighty rapists on death row at the time of the *Furman* decision, all were incarcerated in southern prison systems. Furthermore, sixty-eight (85%) were non-white.⁷⁰ The victims of these offenses were overwhelmingly white (91% of the instances). Most of these offenses (81%) involved a lone victim, who was unknown to the assailant (78% of the offenses). Most of the rapists lacked a prior record. Only 5% had a previous rape conviction, while 29% had been confined in an adult penitentiary for any crime. Nationwide, during 1968-1972, an average of 51% of persons arrested for rape were non-white.⁷¹ Of the *Furman*-commuted offenders, 85% were non-white.

V. INSTITUTIONAL BEHAVIOR

Custodial officers, psychiatrists and prison administrators feared the release of the *Furman*-commuted inmates into the general prisoner population.⁷² Many believed that these former death row prisoners were different than other inmates and represented a unique security risk.⁷³ In this section, we analyze the institutional disciplinary behavior of the *Furman* offenders from 1972-1987. We begin with an explanation of what are termed serious rule violations and then focus specifically on chronic and violent rule violators in order to determine whether predictions of violent institutional behavior among *Furman*-commuted inmates were accurate.

68. *Id.* at 126-30.

69. *Id.* at 131-32.

70. In *Coker v. Georgia*, 433 U.S. 584 (1977), the United States Supreme Court declared that the death penalty for rape was unconstitutional, because it was excessive punishment for the crime. *Id.* at 592.

71. 1968 FBI UNIFORM CRIME REP. 13; 1969 FBI UNIFORM CRIME REP. 12-13; 1970 FBI UNIFORM CRIME REP. 14; 1971 FBI UNIFORM CRIME REP. 14; 1972 FBI UNIFORM CRIME REP. 14.

72. Interview with ex-warden of Texas prison system in Huntsville, Texas (September, 1987) (name withheld upon request).

73. For instance, one classification and records officer from Texas whom we interviewed predicted that the *Furman* inmates would commit serious acts of violence and generally be a disruptive element in the prison setting. Interview with Texas classification officer in Huntsville, Texas (September, 1987) (name withheld upon request).

A. *Serious Rule Violations*

The definition of serious rule violations and the classification of these offenses vary between states. To insure coder reliability, we designated three major generic categories of offenses: offenses against other prisoners such as murder and fighting with weapons; offenses against prison staff such as striking a guard; and offenses against institutional order such as inciting riots or work strikes. The main problem with this approach is that the same offense category may reflect variation from state to state. While some of the categories, e.g., aggravated assault on an inmate without a weapon, are open to a certain amount of interpretation that could have inflated reporting, other categories involving weapons and homicides are not amenable to subjective judgments.⁷⁴ In these latter cases, the offense categories were consistent and valid.

Table 5 presents the number of serious rule violations for *Furman*-commuted murderers and rapists and the percentage of each group involved in those violations.

The data in Table 5 indicate that over a fifteen-year period, slightly less than one-third of the former death row inmates committed serious prison rule violations. Over one-half (84 or 51.9%) of those inmates committing serious rule violations were involved in only one rule violation, and another quarter (38 or 23.5%) were involved in only two rule violations. These data demonstrate, at least among these violators, that most serious infractions were one-time events or situations. In short, most of the *Furman* inmates were not violent menaces to the institutional order. As a group, they were not a disproportionate threat to guards and other inmates.

B. *Chronic Rule Violators*

A small group of chronic offenders, forty inmates (7.4% of the total for whom disciplinary information was available) were involved in three or more serious rule violations, accounting for more than one-half of the total serious rule violations. Each of these forty inmates (thirty-six murderers and four rapists) committed an average of 5.1 serious rule violations over the fifteen-year period. This finding supports previous studies which have shown that within the prison community, as in the free world, a small group of offenders accounts for the majority of offenses.⁷⁵

74. The categories of homicide and attacks with weapons were standard across the various state prison systems.

75. See Fox, *Analysis of Prison Disciplinary Problems*, 49 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 321, 324 (1958); Ramirez, *Race and Apprehension of Inmate Misconduct*, 11 J.

TABLE 5. NUMBER OF SERIOUS RULE VIOLATIONS BY CRIME*

Offense	Murderers (Valid N=453)		Rapists (N=80)	
Prisoner-Prisoner Acts				
Homicide	4	(0.9%)	0	
Aggravated Assault with a Weapon	29	(4.4%)	6	(6.3%)
Aggravated Assault without a Weapon	113	(11.7%)	22	(17.5%)
Aggressive Sexual Attacks	20	(2.4%)	1	(1.3%)
Prisoner-Staff Acts				
Homicide	2	(0.4%)	0	
Aggravated Assault with a Weapon	17	(2.4%)	0	
Aggravated Assault without a Weapon	30	(4.6%)	4	(5.0%)
Acts Against Institutional Order				
Escape	77	(12.6%)	7	(6.3%)
Rioting	30	(4.9%)	0	
Work Strike	3	(0.7%)	1	(1.3%)
Total Offenses	325	(30.2%)	41	(31.3%)

* Of the four armed robbers in the study, none committed any serious rule violations.

C. Violent Rule Violators

For the purposes of this study, violent rule violators were defined as those prisoners who committed murders and weapon-related aggravated assaults on prison staff or other inmates. Overall, the *Furman* offenders committed six killings in the institutional setting. The four prisoner homicides occurred in Alabama, Florida, Louisiana, and Pennsylvania. Both prison guard murders occurred in Ohio. Further, all six institutional killers were serving time for capital murder. Two of these murderers were again sentenced to death, one for the murder of an inmate in Florida, and the other for the murder of a correctional officer in Ohio. Of the other fifty-nine serious acts of violence, thirty-eight inmates

CRIM. JUST. 413, 418 (1983); Wolf, Freinek & Shaffer, *Frequency and Severity of Rule Infractions as a Criteria of Prison Maladjustment*, 22 J. CLINICAL PSYCHOLOGY 244, 246 (1966).

(thirty-three murderers and five rapists) were involved. We investigated the differences between inmates committing serious violent acts and those who did not.

Neither offense characteristics (including whether the act was committed in the commission of another felony or the victim-offender relationship) nor the offender's race, age, or prior criminal history significantly differed between those who committed violent acts and those who did not. In short, no variable served as a predictor of these violent acts.

VI. PAROLE BEHAVIOR

Perhaps the greatest fear expressed after the *Furman* decision was that commuted inmates would someday be released to society and commit more heinous crimes. Enough of these inmates have been released to society so that predictions made in 1972 regarding their propensity toward violence on the community at large can be assessed. This section describes the behavior following release of the former death-row inmates. The following section compares rates of recidivism of *Furman*-commuted murderers and rapists to recidivism rates for offenders convicted of similar crimes who were not originally sentenced to death.

A. *The Parolees*

Of the 558 *Furman*-commuted inmates, 315 (56.5%) have not been released from prison. Of those, thirty-nine died, and three escaped and have not been recaptured. Two hundred forty-three (44%) of the capital offenders have been released to society. Of these, 191 (78.6%) have not been returned to prison: 147 are on their original parole, 19 discharged their sentences, 17 successfully completed their parole, 6 died in the community, and 2 were pardoned. Fifty-two (21%) of the releasees returned to prison for technical violations or new offenses. Of these, forty-two are currently incarcerated, eight have been re-paroled, and two have died in prison.

In the following analyses, those prisoners who have died or escaped will not be considered. Neither of the two females have been paroled. Very few of the chronic and violent prison rule violators have been paroled and those that were spent an average of nine and one-half years in the general prisoner population prior to release. Table 6 reports the number of parolees by region and crime.

As can be seen in Table 6, every armed robber and two-thirds of the rapists were released from confinement. Releases were most commonly

TABLE 6. RELEASE FROM PRISON BY REGION AND CRIME*

Region	Never Released	Released
SOUTH		
Murder	51.6% (142)	48.4% (133)
Rape	35.4% (28)	64.6% (51)
Armed Robbery	0	100.0% (4)
MIDWEST*	56.1% (46)	43.9% (36)
NORTHEAST*	81.5% (44)	18.5% (10)
WEST*	59.1% (13)	40.1% (9)
Total	52.9% (273)	47.1% (243)

* *Furman* inmates in these three regions were all convicted of capital murder.

granted in the southern states, and least often in the northeast. However, inmates have been released from confinement in all but three states.⁷⁶

Unlike inmates in states with life-without-parole sentencing statutes,⁷⁷ nearly all of the *Furman* inmates are eligible and will soon be reviewed for parole. Of those not yet released, almost every expected parole date for these inmates is set for the early 1990s.

How have the *Furman*-releasees fared on parole? Did these capital offenders present a great risk to society? Table 7 reports the percentages of the murderers and rapists who were released and returned to prison or recidivated (percent of offenders convicted of new crimes or returned to prison for technical violations).

The released *Furman*-commuted offenders have lived a combined total of 1282 years in the community while committing twelve violent offenses—approximately two violent offenses per year for the released inmates or nine violent offenses per 1,000 releasees per year. Recidivism occurred an average of 3.4 years after release for murderers and 2.5 years for rapists. Of the 239 paroled offenders, one killed again. Two rapists raped again.

To determine if this level of recidivism is excessive for these criminals, we compared them to a like group of offenders, specifically other murderers. Bedau cites various data on the release behavior of pa-

76. Life terms in these three states in 1972 generally allowed parole after serving 10 to 20 years, including good time. Only Kansas, with two *Furman*-commuted inmates, indicated that those inmates were not eligible for parole without an executive pardon.

77. See Cheatwood, *The Life-Without-Parole Sanction: Its Current Status and a Research Agenda*, 34 CRIME & DELINQ. 43 (1988).

TABLE 7. TOTAL RECIDIVISM BY OFFENSE*

Release Outcome	Murderers	Rapists
Total Released	188 (43.4%)	51 (64.6%)
Mean Time in Community	5.3 years	5.6 years
Recidivated	38 (20.2%)	13 (25.5%)
Technical Violations	15 (8.0%)	4 (7.8%)
Misdemeanor	3 (1.6%)	0
New Felony Offense	20 (10.6%)	9 (17.6%)
Murder	1	0
Rape	0	2
Robbery	4	2
Aggravated Assault	1	2
Burglary	4	2
Larceny-Theft	3	0
Possession of firearms	2	0
Drugs	4	1
Indecency with a child	1	0

* Of the four armed robbers released, one returned to prison in 1987 for committing an armed robbery.

roled murderers.⁷⁸ The data show that, overall, only a small percentage (less than 1%) of released murderers were returned to prison for committing a subsequent homicide. For example, of 11,532 murderers released between 1971 and 1975, twenty-six committed new homicides in the first year after release from prison.⁷⁹ However, our data reveal that after five years on parole, only one murderer committed a second murder while in the larger society. Though these data are not conclusive, they do suggest that the capital murderers on parole do not represent a disproportionate threat to the larger society.

The data in this study parallel other recidivism research on murderers in general.⁸⁰ While murderers on parole appear to rarely repeat their original crime, more research on these released offenders is needed. We agree with Bedau's conclusion on this point:

78. H. Bedau, *supra* note 46, at 175-80.

79. *Id.* at 179.

80. See Donnelly & Bala, *1977 Releases: Five Year Post Release Follow-Up*, ALBANY, N.Y., DEP'T OF CORRECTIONAL SERV. (1984); Auerbach, *Common Myths About Capital Criminals and Their Victims*, 3 GA. J. CORRECTIONS 41 (1974); Wallerstedt, *Returning to Prison*, in BUREAU OF JUST. STATISTICS SPECIAL REP., U.S. DEP'T OF JUST. (1984).

While not complete, these data studies of murderers on parole are encouraging. Although they prove that the popular belief is true, that murderers do sometimes kill again even after years of imprisonment, the data also show that the number of such repeaters is very small. Both with regard to the commission of felonies generally and the crime of homicide, no other class of offender has such a low rate of recidivism. So we are left to choose among clear alternatives. If we cannot improve release and parole procedures so as to turn loose no one who will commit a further murder or other felony, we have three choices. Either we can undertake to execute every convicted murderer; or we can undertake to release none of them; or we can reconcile ourselves to the fact that release procedures, like all other human practices, are not infallible, and continue to improve rehabilitation and prediction during incarceration.⁸¹

Given the amount of time these parolees have spent in the free community (an average of five years), their overall post-release behavior takes on great significance when evaluating the incapacitation effect of the death penalty. Murder is the prime concern. Incapacitation advocates would insist that the execution of every *Furman*-offender would have prevented the one subsequent murder referred to above. Further, the executions would have prevented six prison murders (four inmates and two guards). This evidence supports permanent incapacitation as a means to prevent future capital crimes.⁸² However, four inmates on death row at the time of *Furman* were innocent according to a study by Bedau and Radelet.⁸³ These four individuals could possibly have been executed had it not been for *Furman*.

At the same time, incapacitation advocates might argue that the death row experience itself was prophetic and acted as a deterrent that kept more of the *Furman*-releasees from killing again. That is, the *Furman* inmates were so close to death that they straightened up their act out of fear. Although this possibility seems far-fetched and self-serving, it is a viable explanation for the behavior of some prisoners. For example, a *Furman* inmate in Texas, a double murderer who has never been released from prison, wrote us and explained that his good prison conduct and overall positive outlook on life was the direct result of his

81. H. Bedau, *supra* note 46, at 175-80.

82. See Gibbs, *Preventive Effects of Capital Punishment Other Than Deterrence*, 14 CRIM. L. BULL. 34, 37-40 (1978).

83. See Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, app. B at 177 (1987).

time spent on death row. Moreover, this capital murderer has over the years completed more than a dozen furloughs successfully.

While execution would certainly have prevented seven additional murders, our data also show that 551 prisoners, or 98%, did not kill either in prison or in the free community. The vast majority served their time in prison with few challenges to the prison staff. Moreover, most of those released on parole were not menaces to the social order. The death row experience alone cannot account for deterring 551 inmates spread across thirty states. What can account for this fact?

In 1972, the average age of the *Furman* inmates was thirty-one years. These inmates were generally older than other "incoming" prisoners. Some had spent five, six, or even seven years on death row prior to commutation and this confinement eased their adjustment upon return to the general prisoner population. If anything, the death row experience was a learning experience. While confined on "the row," these prisoners learned how to survive in prison and how to "do time." When released to the general prisoner population in 1972, they were already "prisonized" and acclimated to institutional life. This minor adjustment translated into relatively few disciplinary infractions. The disciplinary data reported earlier support this point.⁸⁴ The *Furman* prisoners represented an "older" cadre of convicts well-adapted to the penitentiary.

We also suggest that the commutees as a group were older upon release to the free community. Excluding time on death row, the average time spent in prison before release was nine and one-half years. Therefore, these prisoners as a group were over forty years old when released from prison. We are suggesting that the most important variable explaining the *Furman*-offenders' low rate of recidivism in the free community is age, or the aging process and its effect on future criminal activity.⁸⁵ In other words, the dual effects of long prison terms (incapacitation) and aging on these offenders—presumably the high risk offenders—effectively reduced their potential for future criminal activity.

VII. CONCLUSIONS

In 1972, the historic *Furman v. Georgia*⁸⁶ decision held that the death penalty as then administered constituted cruel and unusual punishment.⁸⁷ Jurors, afforded too much discretion in their deliberations and

84. See *supra* at Section V.

85. See Hirschi & Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983).

86. 408 U.S. 238 (1972) (per curiam).

87. *Id.* at 239-40 (per curiam).

sentencing, reflected unusual amounts of arbitrariness and capriciousness.⁸⁸ The United States Supreme Court's decision invalidated the death sentences of capital felons on the death rows of thirty states and the District of Columbia.⁸⁹

Many in the criminal justice community feared the worst from the former death row inmates.⁹⁰ The goal of this research was to contribute to death penalty theory by ascertaining what happened to the *Furman*-commuted inmates across this country. Did the *Furman* inmates pose a significant threat to the prison and outside community?

While there is some ambiguity as to just how many death row prisoners were actually affected by *Furman*, the research reported here accounts for 558 inmates scattered across twenty-nine states and the District of Columbia.⁹¹ We tracked these 558 prisoners' institutional and release behavior for nearly fifteen years. In the prison setting, these prisoners committed six murders—killing four prisoners and two correctional officers.⁹² However, the majority of the former death row prisoners served out their sentences with few instances of serious institutional misconduct. A minority were responsible for the bulk of disciplinary infractions.

Over the course of fifteen years, 239 *Furman*-commuted prisoners were released to the free community. These parolees have spent an average of five years in society.⁹³ Twenty-one percent recidivated and were returned to prison, 12% committing new felonies.⁹⁴ Only one parolee from Texas committed a second homicide.⁹⁵ On the other hand, nearly 80% of those released to the free society have not, at least officially, committed additional crimes.

H.L.A. Hart asked: "What is the weight and character of the evidence that the death penalty is required for the protection of society?"⁹⁶ This question, in our opinion, is the most salient one in any discussion of the utility of capital punishment. Seven (1.3%) *Furman*-commuted prisoners were responsible for seven additional murders. Certainly execution of all 558 prisoners would have prevented these killings. However, such

88. *Id.* at 248-52 (Douglas, J., concurring).

89. *See supra* Table 1 at Section III, A.

90. *See supra* notes 9-12 and accompanying text.

91. This "final" figure does not include thirty Illinois prisoners since no official records could be obtained from that state's department of corrections.

92. *See supra* at Section V, C.

93. *See supra* at Section VI, A.

94. *See supra* at Section VI, A.

95. *See supra* at Section VI, A.

96. H. HART, PUNISHMENT AND RESPONSIBILITY 71 (1968).

a “preemptive strike” would not have greatly protected society. In addition, four innocent prisoners would have been put to death. The question then becomes whether saving the lives of the seven victims was worth the execution of four innocent inmates.

The data in this paper suggest that these prisoners did not represent a significant threat to society. Most have performed well in the prison; those few who have committed additional violent acts are indistinguishable from those who have not. Therefore, over-prediction of secondary violence is indicated.⁹⁷ More than two-thirds of the *Furman* inmates, using a very liberal definition of violence, were false positives—predicted to be violent but were not. We cannot conclude from these data that their execution would have protected or benefitted society.

There are numerous policy implications to be drawn from the data presented in this paper. We do not suggest that every commuted capital offender can be released into free society. Some, albeit a minority, certainly need long-term confinement in maximum security facilities. Life-without-parole statutes are not the answer either because the indiscriminate warehousing of these prisoners would not have prevented numerous killings in free society. What we are suggesting is that the great majority of the *Furman* inmates were not violent predators in the prison or free society. The data presented in this paper suggest that current capital sentencing schemes predicated on their incapacitation effect, as is the practice of many states today that include a prediction of future dangerousness to justify executions, cannot accomplish their goals accurately or with a sense of fair play.

97. See F. DUTILE & C. FOUST, *THE PREDICTION OF CRIMINAL VIOLENCE* (1987).