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# THE ROLE OF INTIMACY IN THE PROSECUTION AND SENTENCING OF CAPITAL MURDER CASES IN THE U.S. ARMED FORCES, 1984–2005†

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## INTRODUCTION

Scholars interested in the intersection between domestic violence and criminal law have posited that the existence of a domestic or intimate relationship between a defendant and a victim may act as an “automatic mitigator” in the prosecution of violent felonies.<sup>1</sup> This “tendency to discount the severity of domestic homicide” has been called the domestic discount or intimacy discount.<sup>2</sup> In the context of capital murder, a domestic discount would prevent an otherwise death-eligible murder from being identified as appropriate for capital prosecution and conviction and from receiving a death sentence. While a number of scholars have studied the influence of a domestic discount on other crimes, very little work has been done in capital prosecutions and sentencing.<sup>3</sup>

This article seeks to advance the domestic-discount discussion by considering whether such a discount exists in the prosecution of death-eligible homicides in the U.S. military between 1984 and 2005.<sup>4</sup> More specifically, this article considers whether, after all legitimate factors are considered, a death-eligible case involving a domestic homicide is less likely to be prosecuted as a capital case, less likely to result in conviction of a death-eligible murder, or less likely to produce an actual death sentence, than a similarly situated case that is not a domestic homicide.<sup>5</sup>

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1. See *infra* notes 11–21 and accompanying text.

2. See *infra* note 13 and accompanying text.

3. See *infra* notes 52–54 and accompanying text.

4. See *infra* Part III (detailing the data and methodology used for the study).

5. For reasons discussed in Parts II and III, this article identifies a “domestic homicide” as a non-predatory homicide in which the accused killed his or her sexual intimate. See *infra* notes 11–13, 54–55 and accompanying text. A sexual intimate includes a current or former spouse or paramour. There are twenty-five domestic homicides in the study. There are ten more cases that are used to test the appropriateness of this

The military criminal justice system presents a particularly interesting jurisdiction for this research for several reasons. First, as discussed in Part III, the law governing the prosecution and sentencing of capital cases in the military mirrors the civilian law and, in many respects, the military system tracks the civilian system.<sup>6</sup> Additionally, it is often reported that the incidence of domestic violence—out of which many domestic homicides arise—is higher in the military than in the civilian population.<sup>7</sup> Concerns about domestic violence in the military have stimulated a number of academic studies of the phenomenon.<sup>8</sup> The studies have identified high, and sometimes increasing, rates of domestic violence among active duty military personnel.<sup>9</sup>

This article progresses in the following parts: Part II presents the theory and the results of previous studies considering the impact of intimacy on criminal charging and sentencing. Part III describes the military death penalty system, including the relevant statute and rules and the charging and sentencing process. Part IV presents an overview of the data and research methodology used in the study. Part V presents the results of the study, concluding that a domestic discount operates in the military capital punishment system, but that this effect is principally the product of the sentencing decisions of court-martial members (jurors).<sup>10</sup> Part VI discusses the findings of the study and presents brief conclusions.

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definition. Five of the ten are predatory domestic homicides. Five are cases in which the accused killed only his or her children.

6. See *infra* Part III.

7. See, e.g., Fox Butterfield, *Wife Killings at Fort Reflect Growing Problem in Military*, N.Y. TIMES, July 29, 2002, at A9 (“The recent spate of cases in which soldiers have been charged with killing their wives . . . reflects a growing problem of domestic violence in the military, lawyers, psychologists and other experts say.”); Mark Thompson, *The Living Room War*, TIME, May 23, 1994, at 48 (“[A] confidential—and unprecedented—Army survey obtained by Time suggests that spousal abuse is occurring in one of every three Army families each year—double the civilian rate.”).

8. See BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY (Peter J. Mercier & Judith D. Mercier eds., 2000) (collecting social science research on domestic violence in the military); Amy D. Marshall, Jillian Panuzio & Casey T. Taft, *Intimate Partner Violence Among Military Veterans and Active Duty Servicemen*, 25 CLINICAL PSYCHOL. REV. 862, 864–67 (2005) (reviewing existing literature on the prevalence of intimate partner violence among active duty servicemen); John H. Newby, James E. McCarrroll, Laurie E. Thayer, Ann E. Norwood, Carol S. Fullerton & Robery J. Ursano, *Spouse Abuse by Black and White Offenders in the U.S. Army*, 15 J. FAM. VIOLENCE 199 (2000) (studying the racial demography of spouse abuse offenders in the U.S. Army during 1989–1997); Leora N. Rosen, Robert J. Kaminski, Angela Moore Parmley, Kathryn H. Knudson & Peggy Fancher, *The Effects of Peer Group Climate on Intimate Partner Violence Among Married Male U.S. Army Soldiers*, 9 VIOLENCE AGAINST WOMEN 1045 (2003) (studying the combined impact of individual-level and group-level variables on self-reported intimate partner violence among married male U.S. Army soldiers).

9. See, e.g., Richard E. Heyman & Peter H. Neidig, *A Comparison of Spousal Aggression Prevalence Rates in U.S. Army and Civilian Representative Samples*, 67 J. CONSULTING & CLINICAL PSYCHOL. 239, 242 (1999) (reporting that the wives of Army servicemen reported higher rates of moderate and severe husband-to-wife violence than their demographically matched civilian counterparts (13.1% versus 10.0% for moderate, and 4.4% versus 2.0% for severe)); David H. Marshall & Marilyn D. McShane, *First to Fight: Domestic Violence and the Subculture of the Marine Corps*, in BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY, *supra* note 8, at 15, 20 (“Since 1988, the number of domestic violence cases reported to the Department of Defense has increased, even though the military population has declined each year. . . .”); see also Peter J. Mercier, *Introduction: Violence in the Military Family*, in BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY, *supra* note 8, at 3, 3–4 (reporting that “[a]lthough domestic violence statistics comparing civilian and military families are limited, relevant literature suggests that military families are at a particularly high risk for family violence because of assorted demographic variables and various stressors affecting the family unit,” and discussing ten studies on domestic violence in the military).

10. Capital sentencing hearings must be held by a general court-martial. See MANUAL FOR COURTS-MARTIAL UNITED STATES, Rule for Courts-Martial (R.C.M.) 201(f)(2)(C). A general court-martial is the

## II. THE DOMESTIC DISCOUNT: THEORY AND CURRENT SCHOLARSHIP

Donald Black posited that, in any area of law, as the relationship between the defendant and the victim moves from one of strangers to one of intimates, the likelihood that the legal system will take the matter seriously ebbs.<sup>11</sup> When considering the charging and sentencing of defendants accused of death-eligible murder, this theory suggests that the death penalty would be most common in cases of stranger murder and least common in cases involving the murder of an intimate.<sup>12</sup> Elizabeth Rapaport called this tendency to discount the seriousness of a domestic homicide “the domestic discount.”<sup>13</sup>

Preconceived expectations of officials and individuals responsible for charging and sentencing may lead these government officials to investigate and prosecute domestic homicides differently than non-domestic homicides.<sup>14</sup> For example, in the context of homicide, evidence of provocation can reduce a murder charge to manslaughter.<sup>15</sup> Charging and sentencing authorities may assume that perpetrators of domestic homicides act under provocation, or at least that the perpetrators act in the midst of some kind of strong emotions that might reduce the perpetrator’s culpability.<sup>16</sup> The key question in each case, however, is whether the actual level of

highest military trial court and has jurisdiction over all armed forces. A general court martial proceeding presided is over by a military judge with at least five jurors (“members”). See BLACK’S LAW DICTIONARY 413 (9th ed. 2009). There must be at least twelve members in capital cases unless twelve members “are not reasonably available because of physical conditions or military exigencies.” See 10 U.S.C. § 825(a) (2006).

11. DONALD BLACK, *THE BEHAVIOR OF LAW* 40–44 (1976). This theory has been frequently tested and contested. For example, Professor Carolyn Ramsey’s study of Colorado and New York City murder cases between 1880 and 1920 found that “concern with self-control and protectiveness toward women” led to aggressive prosecution of men who killed their intimates. She noted, however, that female intimate murder defendants were almost uniformly exonerated or acquitted of murder in the same period. Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 177–78 (2006).

12. See BLACK, *supra* note 11, at 44. In this article, a homicide in which a defendant kills his or her present or former spouse or paramour will be referred to as a “domestic homicide.”

13. Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1508 (1996) [hereinafter Rapaport, *Capital Murder*].

14. See Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking over Time*, 38 LAW & SOC’Y REV. 105, 106 (2004) (discussing and summarizing research on the use by criminal court personnel of screening devices based on preconceived expectations about crimes and criminals); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 702 (2006) (noting that crimes between intimates “are typically understood as driven by strong emotions and as embedded in preexisting complex relationships among the parties involved”); Terance D. Miethe, *Stereotypical Conceptions and Criminal Processing: The Case of The Victim-Offender Relationship*, 4 JUST. Q. 571, 571–73 (1987) (reviewing the theoretical background for his research on stereotypical conceptions and criminal processing); William B. Waegel, *Case Routinization in Investigative Police Work*, 28 SOC. PROBS. 263 (1981) (reviewing the background for his research on handling criminal incidents in a city police detective division).

15. See, e.g., MODEL PENAL CODE § 210.3(1)(b) (2001) (“Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.”); see also Rapaport, *Capital Murder*, *supra* note 13, at 1536–39 (discussing the “heat of passion” defense to homicide).

16. Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC’Y REV. 367, 380 (1991) (arguing that when a quarrel between intimates results in murder, society is predisposed to assume that the victim provoked the murder even when the facts would not legally support the reduction of a murder charge to manslaughter); see also Levine, *supra* note 14, at 702 (noting that “the victim who knows her assailant may be perceived as having somehow incited the assailant’s behavior”); Rapaport, *Capital Murder*, *supra* note 13, at 1508 (“The killing of kin and sexual intimates tends to be read by the law as mitigated by the stresses of domestic life. . . .”).

emotion or provocation achieved the level required under criminal law to make out a legally valid defense.<sup>17</sup> None of the defendants in this study appear to have raised a defense of provocation.

Prosecutors, alternately, may perceive or assume that jurors will have less empathy for victims of intimate homicides and, therefore, be less likely to convict.<sup>18</sup> Such behavior on the part of jurors or perceptions on the part of prosecutors may arise from the historical tendency to consider domestic matters private, leading the state to be slow and reluctant to intervene.<sup>19</sup> Alternately, prosecutors and police may perceive the victims of domestic crimes as less credible, leading them to conclude that domestic homicides are more difficult to prosecute to a conviction.<sup>20</sup>

Another theory suggests that domestic cases are discounted based not on the relationship between the defendant and victim, but because the defendant and the victim typically come from the same economic class and race, and that cases within economic classes and races tend to be treated more leniently than cases involving "upward crime."<sup>21</sup>

Quite apart from the plausible reasons for such a discount lies the question of whether such a discount exists in the first place. Studies considering the merit of Black's theory that intimacy will have a mitigating effect on case charging and sentencing have been inconclusive at best.<sup>22</sup> Such a mitigating effect has been identified most consistently in studies that conducted stage-wise analyses on specific crimes. Studies that separately analyzed the decision-making at each stage of the charging and sentencing process typically identified a discount at one or more stages. For example, in her well-controlled study of homicides in Toronto, Myrna Dawson identified a domestic discount in the decision to charge a case as first degree murder; the decision to send a case to trial rather than accepting a guilty plea; and in the imposition of sentence length. Dawson did not, however, identify

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17. See Rapoport, *Capital Murder*, *supra* note 13, at 1509 (critiquing the treatment of provocation in capital murder prosecutions).

18. Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 *LAW & SOC'Y REV.* 531, 536 (1997) (stating that research shows that jurors are less likely to convict if they do not feel empathetic to the victim); see also Levine, *supra* note 14, at 706 (discussing Frohmann's research); VERA INSTITUTE OF JUSTICE, *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS* 135-36 (1977), available at <http://www.vera.org/download?file=882/1410.pdf>.

19. See Levine, *supra* note 14, at 695.

20. Mieth, *supra* note 14, at 574 (reviewing the theoretical background for his research on stereotypical conceptions and criminal processing). Others have suggested that a domestic discount may result from the fact that evidence can be more difficult to collect in cases involving intimates, thereby making cases involving intimates more difficult to prosecute. See Kenneth Adams, *The Effect of Evidentiary Factors on Charge Reduction*, 11 *J. CRIM. JUST.* 525, 535 (1983) (concluding that the victim-offender relationship may be correlated with the reliability of the victims in providing evidence in felony cases in the District of Columbia).

21. See Kathleen J. Ferraro & Tascha Boychuk, *The Court's Response to Interpersonal Violence: A Comparison of Intimate and Nonintimate Assault*, in *DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE* 209, 222-23 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (defining upward crime as crime by people of a lower economic class against people of a higher economic class).

22. Two recent papers provide a thorough review of previous research in this area and reached slightly different conclusions about whether studies generally support the finding of a domestic discount. Compare Levine, *supra* note 14, at 693 (noting that "most [scholars who undertake quantitative analysis of Black's theory] conclud[e] that Black's theory holds true: intimacy tends to benefit the defendant, at least for some crimes and at some stages of the criminal process") with Dawson, *supra* note 14, at 106 ("A systematic examination of findings from relevant research . . . does not allow for any conclusive statement regarding the role of intimacy in law.").

the domestic discount in the severity of conviction (murder versus manslaughter) or in the verdict at trial.<sup>23</sup>

In a broader study, considering violent felonies in Alaska involving personal confrontations between the victim and the offender, Terance Miethe found that cases involving known victims were significantly more likely to be dismissed in the initial screening decision and after the initial screening but before trial, and less likely to receive a prison sentence.<sup>24</sup> He noted, however, that the effects that the presence of a known victim had on the case weakened in later stages of processing.<sup>25</sup> Miethe also reported on the importance of individually controlled variables at different stages of charging and sentencing, noting, for example, that the severity of the charge and use of a weapon did not gain importance in non-stranger cases.<sup>26</sup> These kinds of controls add strength to his study.<sup>27</sup>

In a third example, Leonore Simon's study of male offenders who had been sentenced and incarcerated for violent crimes in Arizona, found that non-stranger offenders are charged with and convicted of more serious crimes than stranger offenders, but that stranger offenders receive significantly longer sentences than non-stranger offenders.<sup>28</sup> These findings highlight the importance of analyzing the decisions at each stage of charging and sentencing.

Much of the theoretical and empirical work considering the potential and actual impact of a domestic discount looks generally at violent felonies within a jurisdiction.<sup>29</sup> Research suggests, however, that it is important where possible to focus on a

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23. Dawson, *supra* note 14, at 120–25, tbl.2 (noting that defendants who killed intimate partners were significantly less likely to be charged with first degree murder than other types of defendants (odds ratio 0.572,  $p = 0.05$ ); these defendants were significantly less likely to have their cases resolved at trial (odds ratio 0.398,  $p = 0.01$ ); and these defendants received significantly lighter sentences than other defendants ( $b = 1.293$ ,  $p = 0.05$ )).

24. Miethe, *supra* note 14, at 582–84, tbls.2, 3 & 4 (comparing stranger crimes to nonstranger crimes). Miethe analyzed 2,173 felony cases in Alaska between 1974 and 1976. He coded for twenty independent variables including offender characteristics, offense characteristics, case processing attributes including a five-item scale on evaluating the strength of the evidence, and procedural information. He modeled successive stages of charging and sentencing. His paper reports standardized regression coefficients. These coefficients indicate the direction and magnitude of the effect. Miethe reported the following coefficients for the findings presented above: more likely to be dismissed at the initial screening, 0.42,  $p = 0.10$ ; more likely to be dismissed before trial, 0.47,  $p = 0.10$ ; and less likely to receive prison sentence,  $-0.45$ , not significant. *Id.* at 577–87.

25. *Id.* at 587–88.

26. *Id.* at 584–85.

27. As noted above, Miethe estimated regression models for each decision point. Each model had more than ten independent variables. *Id.* at 579 tbl.1, 583 tbl.2, 585 tbl.3, 586 tbl.4.

28. Leonore M.J. Simon, *Legal Treatment of the Victim-Offender Relationship in Crimes of Violence*, 11 J. INTERPERSONAL VIOLENCE 94, 100–02 (1996) (comparing stranger crimes to non-stranger crimes). Simon studied 273 incarcerated, sentenced offenders in Arizona. They had been convicted of homicide, rape, kidnapping, robbery, and assault. She reported on offender characteristics, type of crime, victim information, presence of a weapon, and case processing information. She did not have variables on strength of evidence or other charging details. This study also reported regression coefficients: charged with more serious crimes: 0.123,  $p = 0.05$ ; convicted of more serious crimes: 0.128,  $p = 0.05$ ; sentence length  $-0.87$ ,  $p = 0.05$ . *Id.*

29. See, e.g., Adams, *supra* note 20 (considering all felony prosecutions in the District of Columbia in 1974 in which the defendant pled guilty); Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247, 250 (1991) (considering 2,158 prosecutions in the District of Columbia in 1974); Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentencing Outcomes*, 28 CRIMINOLOGY 451, 454 (1990) (considering 500 felony cases in Ohio between June 1985 and January 1988); Cassia Spohn & Jeffrey Spears, *Gender and Case Processing Decisions: A Comparison of Case Outcomes for Male and Female Defendants Charged with Violent Felonies*, 8 WOMEN & CRIM. JUST. 29, 34 (1997) (considering all defendants originally charged with one of eleven violent felonies in Detroit in 1976, 1977, and 1978).

single felony.<sup>30</sup> Several studies that begin with a broad look at violent felonies find that a domestic discount operates with respect to some crimes but not others. For example, Kristen Williams found that the victim-defendant relationship impacted the decision to prosecute or dismiss simple assault cases, but that the relationship did not appear to influence decisions on robberies or forcible sex offenses.<sup>31</sup> Miethe's study found that a domestic discount appeared to operate at all stages of rape cases, and that rape cases were affected by the domestic discount much more than all other crimes. Rape cases were dismissed before trial 63% of the time in intimate cases, but only 29% of the time in stranger cases. In contrast, all other crimes were dismissed 51% of the time in intimate cases and 47% in stranger cases.<sup>32</sup> The importance of a narrow focus may be particularly important in the highly specialized area of capital punishment.

Previous studies also suggest the importance of distinguishing intimate homicides from murders involving other family members, including children, or acquaintances.<sup>33</sup> A study that considers only whether the victim was known or unknown—i.e., whether the victim was a stranger or a non-stranger—risks “masking” differences in treatment between intimates, children, and other family members.<sup>34</sup> Myrna Dawson's study of the impact of intimacy in homicide prosecutions found that, while defendants who killed friends were not treated more leniently than those who killed strangers,<sup>35</sup> defendants who killed intimates were less likely than those who killed strangers to be charged with first degree murder<sup>36</sup> and brought to trial<sup>37</sup> and they were more likely to receive lighter sentences.<sup>38</sup>

Williams' research on violent crimes in Washington, D.C., also illustrates the importance of this distinction. She found that cases in which the victim was mar-

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30. Cf. Dawson, *supra* note 14, at 110 n.4 (noting that, while some research has criticized homicide as too narrow a crime category on the theory that it irrationally excludes closely related violent offenses such as assault, a study on homicide avoids potential problems such as reporting bias or biases resulting from dropped cases).

31. Kristen M. Williams, *The Effects of Victim Characteristics on the Disposition of Violent Crimes*, in CRIMINAL JUSTICE AND THE VICTIM 177, 198–201 (William F. McDonald ed., 1976) (finding the significance of different victim-spouse relationships to vary by type of crime).

32. Miethe, *supra* note 14, at 584, 587–88.

33. See, e.g., Julia Horney & Cassia Spohn, *The Influence of Blame and Believability Factors on the Processing of Simple Versus Aggravated Rape Cases*, 34 CRIMINOLOGY 135, 140 (1996) (arguing that dynamics of official decision-making in cases involving children merit separate analysis of cases in which the only victims are children).

34. Scott H. Decker, *Exploring Victim-Offender Relationships in Homicide: The Role of Individual Event and Characteristics*, 10 JUST. Q. 585, 588–93 (1993) (arguing for the need to expand beyond the division of homicide into stranger and non-stranger crimes); Levine, *supra* note 14, at 705 (predicting that intimacy between a defendant and a victim may yield the most significant discount); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 659, 673–74 (2001) (raising doubts about the reliability of previous studies that did not find differences in the charging and sentencing of rape and sexual assault cases between strangers and non-strangers).

35. Dawson, *supra* note 14, at 128–29, 121 tbl.2 (odds ratio between 0.82 and 0.95, not significant).

36. *Id.* at 120, 121 tbl.2 (odds ratio 0.57,  $p < 0.05$ ).

37. *Id.* at 123, 121 tbl.2 (odds ratio 0.40,  $p < 0.01$ ).

38. *Id.* at 125, 121 tbl.2 (regression coefficient  $-1.29$ ,  $p < 0.05$ ); cf. Albonetti, *supra* note 29, at 261 (not identifying any relationship between treatment among three categories of defendant-victim relationship: intimates, acquaintances, and strangers); Simon, *supra* note 28, at 103 (finding a domestic discount at some stages of the criminal justice process in a study distinguishing only strangers and non-strangers); Spohn & Holleran, *supra* note 34, at 673–74 (not identifying any differences between the treatments of acquaintances and intimates in a study of rape cases).

ried to the defendant were more likely to be dismissed without prosecution than cases between a child and parent, or another family member.<sup>39</sup> Other research has illuminated unique difficulties in charging and prosecuting cases in which a parent has killed his or her child or children, including the difficulty of identifying motives, the typical lack of external injuries, public difficulties in believing that parents hurt their children, and, sometimes, the use of mental health defenses.<sup>40</sup> Regardless of whether the child-only victim cases are aggravating or mitigating as a set, the best practice suggested by earlier work is to distinguish intimates from the defendant's children, other family members, acquaintances, and strangers.

The importance of introducing appropriate controls for legal and extralegal factors that might affect prosecution and sentencing outcomes, other than the relationship between the defendant and the victim, is also clear in the literature. Studies employing bivariate analyses are more likely to identify a domestic discount than studies that introduce more controls.<sup>41</sup> While a number of studies consider control factors relating to characteristics of the defendant (race, gender, age), characteristics of victim (race, gender, age, relation to defendant), and characteristics of the crime (such as the presence of a gun or the seriousness of the crime), very few control for factors such as strength of evidence or culpability.<sup>42</sup> In addition, many studies analyze data on multiple crimes in one group. This leads to additional complexity that is difficult to parse.<sup>43</sup>

Dawson's study focused exclusively on homicides and introduced more controls than other studies. In addition to considering basic information about the relationship between defendants and alleged victims, and using detailed case procedure coding, Dawson introduced the use of controls for factors intended to assess culpability. These factors included a defendant's role in the crime, the number of defendants, and the number of victims.<sup>44</sup> She also introduces controls for time.<sup>45</sup> These kinds of factors are particularly important in the context of capital charging and sentencing where the decision-makers are required to consider factors beyond the finding of premeditated or felony murder in decision-making.

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39. Williams, *supra* note 31, at 198–99, tbl.9 (62% (spouse) versus 38% (child/parent) or 57% (other family member)).

40. See Charles A. Phipps, *Responding to Child Homicide: A Statutory Proposal*, 89 J. CRIM. L. & CRIMINOLOGY 535, 538 (1999) (identifying difficulties prosecuting parent-child homicide cases); see also Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 528, 534–38 (2006) (summarizing myths about infanticide and child murder and noting that prosecutors have difficulty in prosecuting child murder cases successfully).

41. See Dawson, *supra* note 14, at 107–08 (discussing several studies, including Ferraro & Boychuk, *supra* note 21; HENRY LUNDGAARDE, *MURDER IN SPACE CITY: A CULTURAL ANALYSIS OF HOUSTON HOMICIDE PATTERNS* (1977); Rapaport, *Capital Murder*, *supra* note 13).

42. See Erez & Tontodonato, *supra* note 29, at 455 (detailing information on defendant and victim characteristics, plea information, presence of private defense attorney, measure of “offense seriousness”); see also Spohn & Spears, *supra* note 29, at 38–40 (detailing information on defendant and victim characteristics, outcome of prosecution, “offense seriousness” measure, presence of private defense attorney, availability of bail, and presence of gun).

43. See sources cited in *supra* note 29 (citing studies looking at multiple crimes).

44. See Dawson, *supra* note 14, at 114–18 (discussing each variable and how it is coded).

45. See *id.* at 126–28.

An additional matter of concern for the study is the question of time. Many domestic discount studies focus on a single year or a very short span of years.<sup>46</sup> The cases in this study span more than twenty years. It is at least arguable that society and public officials have become more sensitive to domestic violence during the last twenty years and, as a result, the tendency to discount domestic homicides may have dissipated.<sup>47</sup> Dawson is the only other scholar to have considered the impact of time. When comparing the effect of intimacy in cases that entered the criminal justice system in 1984 or earlier to cases that entered in 1985 or later, she found the effects discussed above to result entirely from cases in the earlier period.<sup>48</sup> In contrast, the latter period showed “no evidence of leniency at any stage of the criminal justice process for any victim-offender relationship type.”<sup>49</sup> This study provides an opportunity to test this finding in another context.

One issue this study does not address is the question of whether women defendants are treated more leniently than men. A number of scholars have addressed this issue.<sup>50</sup> Related scholarship has focused on whether victim gender impacts charging and sentencing decisions.<sup>51</sup> Because the military database includes only one female accused who killed her male intimate, the only adult male intimate victim, the authors have not explored this issue further.

Focusing more precisely on studies of the domestic discount in capital charging and sentencing systems, the authors are aware of only one study of death-eligible homicides in which the defendant killed his or her intimate.<sup>52</sup> Rapaport studied “all women sentenced to death in the United States over a twelve year period, 1978–89, and all men sentenced to death in six states . . . whose cases had been heard on direct appeal from 1976–91”<sup>53</sup> to identify the characteristics of the domestic homicides that resulted in a death sentence. That study provides valuable insight into the ranking of domestic homicides in terms of perpetrator culpability

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46. See, e.g., Adams, *supra* note 20, at 528 (one year); Albonetti, *supra* note 29, at 250 (one year); Erez & Tontodonato, *supra* note 29, at 454 (two years, six months); Spohn & Spears, *supra* note 29, at 34 (three years).

47. See Dawson, *supra* note 14, at 109 (noting the passage of the legislative and policy initiatives intended to change the way police, prosecutors, and courts respond to domestic violence).

48. *Id.* at 126.

49. *Id.*

50. See, e.g., Donna M. Bishop & Charles E. Frazier, *The Effects of Gender on Charge Reduction*, 25 SOC. Q. 385 (1984); Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 CRIME & JUST. 201 (1997); Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, 4 CRIME & JUST. 91 (1983); Ramsey, *supra* note 11; Rapaport, *Capital Murder*, *supra* note 13.

51. Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363 (2003).

52. Rapaport, *Capital Murder*, *supra* note 13. At least two other capital charging and sentencing studies consider the significance of the victim-defendant relationship as part of a larger project considering the role of race. Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 58–60 (1984) (“Those who killed strangers were far more likely to be sentenced to death than those who killed family members, friends, or acquaintances: ten times as likely in Georgia, four times as likely in Florida, and over six times as likely in Illinois. . . . [But, c]ontrolling for the relationship of the suspect to the victim . . . does little to change the pattern of disparities in capital sentencing by the race of the victim.”); Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 J. CRIM. JUST. 207, 215 (2001) (“[H]omicides involving strangers were more likely (1.8 odds ratio) to result in a death sentence than homicides involving nonstrangers.”).

53. Rapaport, *Capital Murder*, *supra* note 13, at 1513. Professor Rapaport included all women sentenced to death due to the limited number of women on death row. She limited the study to a sample of men sentenced to death in six states because the population of men on death row is so large. *Id.*

and the factors that may be important to culpability. It does not, however, compare domestic or intimate homicides to similarly situated nondomestic or stranger homicides to determine whether the fact that a case is domestic had a mitigating effect on cases' prosecution and sentencing.<sup>54</sup>

Rapaport's research suggests the importance of distinguishing predatory from passionate domestic homicides. Rapaport defined a passionate homicide as one in which "the killers acted under the influence of powerful and painful emotions, out of hurt and anger of the sort that respectable people, [such as] ourselves, recognize as normal experience."<sup>55</sup> This type of passionate killing arguably brings to mind the defense of heat of passion and suggests lowered culpability.<sup>56</sup> In contrast, a predatory killing is typically motivated by pecuniary gain.<sup>57</sup> Rapaport pointed out that a predatory domestic homicide—a crime motivated by economic gain that ensnares a domestic victim—differs from a case arising from domestic violence. Studying the predatory cases does not provide information about "domestic violence and the law's role in defining, censuring, preventing (and perpetuating), and punishing domestic violence."<sup>58</sup>

This article builds on the body of research described in this Part both with respect to its findings and methodology.

### III. THE MILITARY CAPITAL PUNISHMENT SYSTEM

Capital punishment has long existed in the U.S. Armed Forces.<sup>59</sup> There are fifteen death-eligible offenses in the Uniform Code of Military Justice (UCMJ).<sup>60</sup> All but two of the offenses relate to crimes with important national security or military

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54. *See id.* at 1515–16. Rapaport found that a domestic homicide is most likely to result in a death sentence when it involves pecuniary gain, a felony, multiple victims, or extreme brutality. *See id.* at 1514–15. For male defendants, the most common aggravators among domestic homicide cases that correlated with a death sentence were extreme brutality (48%), felony (35%), multiple victims (20%), or a prior record of violence (16%). *Id.* at 1515.

55. *Id.* at 1516.

56. *Id.* A predisposition toward this mitigation and possible defense may explain the presence of a domestic discount. *See supra* Part III. Rapaport analyzes several court decisions from which she argues against the expansive reach of these defenses in the domestic homicides thereby discouraging capital prosecutions of domestic homicides. Rapaport, *Capital Murder*, *supra* note 13, at 1519–47; *see also* Levine, *supra* note 14, at 702–03 (discussing the different legal and social responses to predatory and passionate crimes).

57. Rapaport, *Capital Murder*, *supra* note 13, at 1514.

58. *See id.* at 1518.

59. *See* *Loving v. United States*, 517 U.S. 748, 752–54 (1996) (describing the history of capital punishment in the U.S. Armed Forces).

60. Capital offenses under the military capital punishment framework are those offenses for which death is an expressly authorized punishment under Part IV of the Manual for Courts-Martial or under the law of war. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES, Rule for Courts-Martial (R.C.M.) 1003(b)(9) (2008). Death may be adjudged when an accused is convicted by a concurrence of all members on the court present during a vote, when procedural requirements are met, and when at least one aggravating factor is found. R.C.M. 1004. There are fifteen capital offenses when considering mutiny and sedition as separate offenses (mutiny and sedition are enumerated under the same section of the United States Code and Punitive Article of the Manual for Courts-Martial United States) and when attempt crimes and failure to suppress crimes (such as attempted mutiny and failure to suppress mutiny or sedition) are considered as part of the more broadly defined offenses (for example, mutiny and sedition respectively). Those offenses are: desertion, assaulting or willfully disobeying superior commissioner officer, mutiny, sedition, misbehavior before the enemy, subordinate compelling surrender, improper use of countersign, forcing a safeguard, aiding the enemy, spying, espionage, improper hazarding of vessel, misbehavior of sentinel or lookout, murder, and rape. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES, Punitive Articles 85, 90, 94, 99, 100, 101, 102, 104, 106, 110, 113, 118, 120 (2008); R.C.M. 104(c)(9) (2008).

implications that have no counterparts in civilian death penalty systems. The crimes in the national security category include mutiny, and sedition and espionage.<sup>61</sup> Eight death-eligible offenses with serious military implications apply only “in time of war” or during combat operations against a foreign power.<sup>62</sup> Some offenses with military implications do not have a “time of war” requirement.<sup>63</sup> To the authors’ knowledge, these offences, while long-standing, have not been applied since the Korean War.

The fourteenth and fifteenth death-eligible offenses are those UCMJ offenses with civilian death penalty counterparts: murder (premeditated and felony murder)<sup>64</sup> and rape (of a person twelve or younger or resulting in maiming or death),<sup>65</sup> committed by U.S. military personnel, during peacetime, anywhere in the world.<sup>66</sup> A murder conviction is the basis of all of the military death sentences imposed since 1960.<sup>67</sup> This study included only murder cases.

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61. See MANUAL FOR COURTS-MARTIAL UNITED STATES, Punitive Articles 94, 106.

62. See 10 U.S.C. §§ 885, 890, 901, 906, 913 (2006) (describing the non-homicidal military specific crimes for which a death sentence may be given only during times of war: desertion (and attempted desertion), assaulting or willfully disobeying superior commissioned officer, improper use of a countersign, spying, misbehavior of sentinel).

63. See *id.* §§ 894, 899, 900, 902, 904, 906a, 910 (describing the non-homicidal military-specific crimes without any explicit requirement that the offense be committed during wartime for a death sentence to be applicable: mutiny (and attempted mutiny), sedition, failure to suppress mutiny or sedition, misbehavior before the enemy, subordinate compelling surrender, forcing a safeguard, aiding the enemy (and attempting to aid the enemy), espionage, and improper hazarding of vessel).

64. *Id.* § 918 (2006 & Supp. 2009) (“Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill; (2) intends to kill or inflict great bodily harm; (3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.”).

65. *Id.* § 920(a) (Supp. 2009) (“Any person subject to this chapter who causes another person of any age to engage in a sexual act by—(1) using force against that person; (2) causing grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) rendering another person unconscious; or (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.”). A 2007 amendment removed death as a penalty listed in the statutory language for the offense of rape, but the Rules for Courts-Martial retain capital punishment if the appropriate aggravating factors are present. Compare 10 U.S.C. § 920 (2006) with 10 U.S.C. § 920 (Supp. 2007), R.C.M. 1004(c)(6), and R.C.M. 1004(c)(9). In 1977, the U.S. Supreme Court held in *Coker v. Georgia* that the death penalty is unconstitutional as excessive punishment for the rape of an adult woman. See 433 U.S. 584 (1977). The U.S. Air Force Court of Military review held that *Coker* was binding, making the rape of an adult woman a non-capital case. See *United States v. McReynolds*, 9 M.J. 881, 882 (A.F.C.M.R. 1980). More recently, in *Kennedy v. Louisiana*, the Court held that death was a cruel and unusual punishment, unconstitutional under the U.S. Constitution, for the rape of a child. 128 S. Ct. 2641 (2008). In a denial of rehearing the Court chose not to address capital prosecutions for rape under the UCMJ. See *Kennedy v. Louisiana*, 129 S. Ct. 1, 2 (2008) (opinion of Kennedy, J., joined by Stevens, Souter, Ginsburg, Breyer, JJ., respecting denial of rehearing) (“[W]e need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision).”).

66. See UCMJ, 10 U.S.C. §§ 918 (2006 & Supp. 2009), 920(a) (Supp. 2009).

67. See generally Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1 (2006).

### A. Death-Eligible Murder Under the UCMJ

The UCMJ does not require a connection between a murder and any military interest or function for a defendant to be death eligible.<sup>68</sup> Rather, as a condition for imposing a death sentence, court-martial members must find “beyond a reasonable doubt” that one or more “aggravating factors” exist and that “any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.”<sup>69</sup>

Rule 1004 of the Manual for Courts-Martial limits death eligibility for murder with aggravating circumstances similarly to the limits for death-eligibility found in many civilian jurisdictions and the Model Penal Code.<sup>70</sup> In cases involving a felony-murder conviction, Rule 1004(c) defines separate aggravating factors.<sup>71</sup> These aggravating factors, listed in Rule 1004(c) at the end of this subsection, also mirror a majority of civilian jurisdictions.<sup>72</sup> The rule does not list specific mitigating circumstances. Rather it provides that the accused “shall be given broad latitude to present evidence in extenuation and mitigation.”<sup>73</sup> As is the case in every civilian statute of which the authors are aware, there is no mention in the UCMJ, or in the relevant rules, of the appropriate impact of the accused-victim relationship on charging or sentencing.

#### Manual for Courts-Martial Rule 1004(c)(2) (2008)

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

. . . .

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

68. Although the Supreme Court during the late 1960s found that courts-martial only had jurisdiction to try servicemen when the crime was “service connected,” *O’Callahan v. Parker*, 395 U.S. 258, 272 (1969), the “service connection” requirement was abandoned by the Supreme Court in 1987, when the Court held that court-martial jurisdiction was established by one factor—the military status of the accused. *Solorio v. United States*, 483 U.S. 435, 439 (1987).

69. MANUAL FOR COURTS-MARTIAL UNITED STATES, Rule for Courts-Martial (R.C.M.) 1004 (b)(4)(A)–(C), (c) (2008). The Rule uses the phrase “aggravating factors” in most instances. In 1004 (b)(4)(C), “aggravating circumstances” includes the aggravating factors discussed in Part II.

70. Compare R.C.M. 1004, with, e.g., NMSA 1978 § 31-20A-5 (1981), and MODEL PENAL CODE § 210.6 3–4 (1962). Only one part of one aggravating factor for capital murder is uniquely tailored to military circumstances. This aggravating factor (7G) classifies as death-eligible the premeditated murder of a “commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States” killed “in the execution of office” when the accused had knowledge of the victim’s status. R.C.M. 1004(c)(7)(G). The balance of the 7G aggravating factor reflects an effort to provide special protection for law enforcement and corrections officers that is found in most civilian jurisdictions.

71. See R.C.M. 1004(c).

72. Compare, e.g., R.C.M. 1004(c)(1)–(9), with, e.g., NMSA 1978 § 31-20A-5 (1981), and MODEL PENAL CODE § 210.6 3–4 (1962).

73. R.C.M. 1004(b)(3).

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in the case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under factors that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; . . . or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid. 315(c)(2) or 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffer-

ing to the victim. For purposes of this section, “substantial physical harm” means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term “substantial physical harm” does not mean minor injuries, such as a black eye or bloody nose. The term “substantial mental or physical pain or suffering” is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

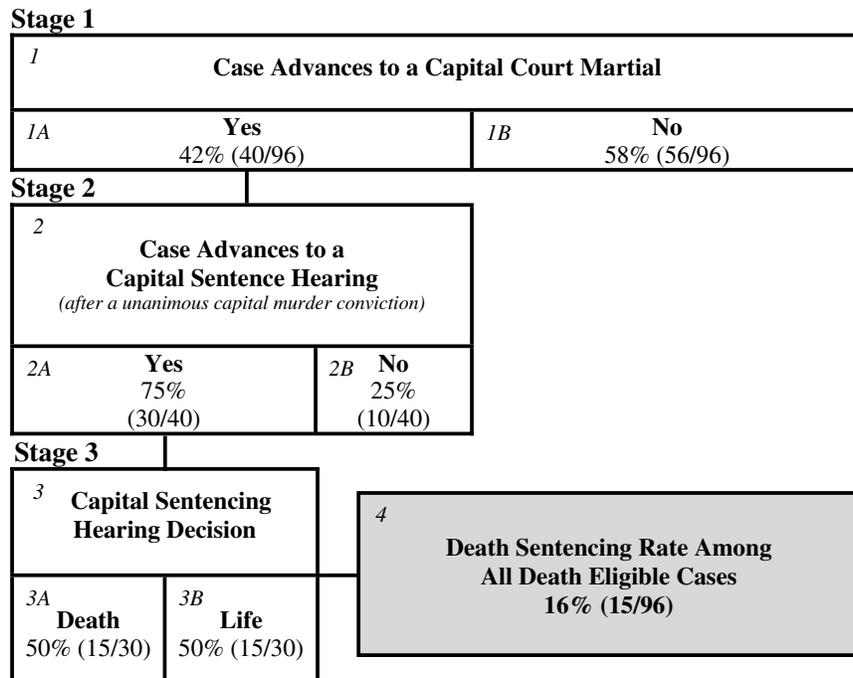
(K) The victim of the murder was under 15 years of age.

*B. Decision-Making in Death-Eligible Cases*

Under military law and practice, the death penalty statute is applied in a three-stage process by two decision-makers—the convening authority and the court-martial members. The three stages are depicted in Figure 1 (below).

A capital prosecution in a death-eligible case is commenced by the “convening authority,” normally a general or admiral in the accused’s command,<sup>74</sup> who has

**FIGURE 1.** Capital Charging and Sentencing Outcomes Among Death-Eligible Cases: U.S. Military, 1984–2005



The cases of the eight accused acquitted of capital murder by members are not included in this Figure. Their cases are included in the analysis of convening authority charging decisions.

74. 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 8-13.32 (3d. ed. 2006).

total discretion whether or not to seek a death sentence in a death-eligible case.<sup>75</sup> A decision to seek a death sentence in the case is known as a “capital referral.” A capital referral is heavily influenced by the “advice letter” written by the commander’s Staff Judge Advocate (his chief legal advisor), or by the commander’s legal officer.<sup>76</sup>

If a case is capitally charged and the capital referral is not withdrawn by the convening authority, the case advances to a capital court-martial with the government seeking a death sentence.<sup>77</sup> At decision two, a unanimous finding of guilt by the court-martial members will advance the case to a capital sentencing hearing, or stage two.<sup>78</sup> At decision three, court-martial members consider the aggravating factors and mitigating circumstances and make a life or death determination.<sup>79</sup> Since November 18, 1997, the life sentence option has included a life sentence without possibility of parole.<sup>80</sup>

The appellate process following the imposition of a death sentence begins with a request for clemency to the convening authority. The convening authority has complete discretion to reduce both the crime of conviction and the punishment for

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75. *Id.* § 10-31.00.

76. *See* R.C.M. 1006. This study shows that the commander typically follows the recommendation of the Staff Judge Advocate (SJA). (The advice of the SJA predicts the direction of commander’s referral 74% of the time in the data collected.) Article 34 advice letters, *see* UCMJ, 10 U.S.C. § 834 (2006), take a variety of forms. Some SJAs provide an explicit recommendation in the letter. Often, however, the letter makes no mention of a capital referral but the SJA prepares a charge sheet with the choice indicated and informs the commanding officer that signing the sheet will implement the SJA’s recommendation. In a few cases in the study, the letter tells the convening authority what must exist factually to justify a capital referral without a suggestion of what the referral should be.

77. In many of the cases collected as part of the data that are not charged capitally, the decision of the convening authority not to bring a capital case is based on a plea bargain in which the accused pleads guilty in exchange for the convening authority’s waiver of the death penalty. In capitally charged cases, the capital charge is often withdrawn by the convening authority in exchange for a guilty plea to the crime charged or a less serious offense, in which event the accused escapes the risk of his or her case advancing to a capital sentencing hearing with the government seeking a death sentence. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES, R.C.M. 705(b)(2)(B) (2008). In contrast to civilian courts, a military accused’s case may not advance to a capital sentencing hearing on the basis of a guilty plea. *Compare, e.g.,* United States v. Broce, 488 U.S. 563, 569 (1989) (“A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a *lawful sentence*” (emphasis added)) with R.C.M. 1004(a)(2) (permitting death to be adjudged only when an accused has been convicted by the concurrence of all the members of the court-martial who are present at the time a vote was taken, and thus excluding the possibility of death when a defendant makes a guilty plea to a capital offense). If the government seeks a death sentence, the case must be tried and sentenced by court-martial members. *See* R.C.M. 1004(a). A crucial feature of the military system distinguishing it from its civilian counterparts is that plea bargains are strictly within the authority of the convening authority rather than the judge advocates who prosecute the cases on behalf of the government or the military judges who try the cases. *Compare, e.g.,* FED. R. CRIM. P. 11(c)(1),(3) (describing the general federal plea agreement procedure in which an attorney for the government and the defendant’s attorney, or defendant, may discuss and reach a plea agreement and the court’s subsequent consideration of that plea agreement), with R.C.M. 705. Military prosecutors may, on their own motion, initiate plea negotiations leading to a waiver of the death penalty and may propose such an agreement to the convening authority, but no plea bargain involving a waiver of the death penalty can go forward without the personal consent of the convening authority. *See* R.C.M. 705(d).

78. R.C.M. 1004(a)(2) makes a condition precedent for the imposition of a death sentence the accused’s conviction of capital murder “by the concurrence of all the members of the court-martial.” Approximately 25% of the factually death-eligible accused whose cases advance to a capital court-martial escape the risk of a death sentence at this stage of the process by virtue of a non-unanimous finding of guilt or a finding of not guilty on the capital murder charge. *See infra* Part V.B., fig.2

79. *See* R.C.M. 1004(b)(4).

80. *See* 10 U.S.C. § 856(a) (2006).

that crime.<sup>81</sup> Convening authorities disallowed the death sentence in two of the fifteen death sentences that have been issued by military courts since 1984. No comparable authority exists in civilian courts.

For death sentences approved by the convening authority, appeals go to the branch-specific courts of military review, the Court of Appeals of the Armed Forces (CAAF), and the U.S. Supreme Court.<sup>82</sup>

#### IV. METHODOLOGY

##### A. *The Data*

The data for the study was collected by the authors for their analysis of the role of race and other extra-legal factors within the U.S. Armed Forces' capital punishment system. The sample includes all 104 death-eligible murder cases prosecuted by the armed forces between 1984 and 2005. As discussed in Part III, to be considered death-eligible the accused must have committed premeditated or felony murder and there must be one or more statutory aggravator present in the case. For each case, the data file includes more than 200 variables, relating to the characteristics of the accused and victim(s), the nature of the crime, the case presented against the accused, the defense presented, as well as any mitigation presented or available, and each significant charging or sentencing recommendation or decision in the case. In addition, the data includes a detailed narrative summary of each case.

##### B. *Research Design*

As recommended by the literature discussed in Part II, for the purposes of this study, a domestic homicide is defined as a non-predatory homicide in which the accused killed his or her sexual intimate.<sup>83</sup> In the study's primary analysis, a sexual intimate includes a current or former spouse or paramour.

There is one case included in the study that involved a non-predatory domestic homicide in which a woman was the death-eligible defendant after she killed her husband.<sup>84</sup> As noted in Part II, while this case is included in the domestic subset, a single case is not enough to analyze the impact of the gender of the accused or the victim on the analysis.

Five cases in which the accused killed his wife for pecuniary gain were excluded from the study as predatory homicides.<sup>85</sup> The study's subset of domestic homicides

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81. R.C.M. 1107. The convening authority also has the power to reduce a life sentence to a term of years. *Id.*

82. See R.C.M. 1203-05. In addition, the Supreme Court exercises discretionary jurisdiction over CAAF's decisions. UCMJ, 10 U.S.C. § 867(a) (2006). At the present time, two death sentenced accused have exhausted their military appeals through CAAF. In both cases, the accused have also exhausted direct appeals through the Supreme Court. See *Gray v. United States*, 532 U.S. 919 (2001) (order denying cert.), *reh'g denied*, 532 U.S. 1035 (2001); *Loving v. United States*, 517 U.S. 748 (1996), *habeus corpus denied by* 68 M.J. 1 (2009).

83. See *supra* Part II.

84. In addition, one case involved a female accused, Lillie Morgan, who killed only her children. This case is included in the parallel analysis of child-only cases but excluded from the primary analysis.

85. Charles Gardner (#135) arranged to have his wife killed so he could claim life insurance. Allen Justice (#137) stabbed his wife to death when she refused to loan him money. Clayton Kaspers (#30) threw his wife off a cliff with a co-perpetrator so he could claim life insurance proceeds. Joseph Thomas (#167.1, original trial and sentencing, #167.2, re-sentencing) killed his wife with a tire iron to recover insurance proceeds. Here and elsewhere, the numbers associated with each listed defendant denote the case numbers used in the study.

also excludes cases in which the accused killed only his or her children.<sup>86</sup> The primary analysis is replicated at each decision point for (a) all domestic killings including predatory killings and (b) all domestic cases including those with only children (“child-only cases”).

To analyze the impact of the fact of being a domestic homicide on the prosecution and sentencing of the death-eligible murders, the authors started from the broadest and most superficial look at the data and progressed by factoring in the impact of other legitimate and illegitimate factors at each stage of charging and sentencing. The study highlights the importance of identifying and including these control variables, as the unadjusted findings of across-the-board disparate treatment are explained in part by the controls. The details of the analysis are presented in Part V.

The authors hypothesized that cases in which the accused killed his or her intimate would be treated more leniently at each stage of the military criminal justice system than non-intimate cases.

## V. THE ANALYSIS

### A. Overview of the Domestic Homicides in Military Death-Eligible Cases

As noted above, a “domestic homicide” is a non-predatory homicide in which the accused killed his or her sexual intimate. A sexual intimate includes a current or former spouse or paramour. The primary analysis in the study focused on the treatment of twenty-five domestic homicides.<sup>87</sup>

Seventeen of the crimes took place in the United States, six in Western Europe, and two in Asia.<sup>88</sup> The cases are distributed across the time period of the study (1984 to 2005) in a roughly equal distribution, except that no case occurred after 2002.<sup>89</sup> One domestic homicide resulted in a death sentence.<sup>90</sup> In this case, James Murphy received a death sentence for killing his wife, his stepson, and his son in 1989. His sentence was overturned due to ineffective assistance of counsel, and he has not been resentenced.<sup>91</sup>

In twenty-four cases a male accused killed his present or former wife or female paramour. In two of these cases, the accused also killed his child or children. In two other of these cases, the accused also killed a second adult.<sup>92</sup> In one case, the

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86. The study included five cases in which the accused killed only his or her child or children: Jerry Brown (#147), Kirkland Curry (#23), Lillie Morgan (#145), Fredrick Thomas (#90), and Melvin Turner (#991).

87. In addition to the twenty-five domestic homicides, there are five predatory domestic homicides and five child only cases. There are a total of thirty possible cases when all variations in the definition are included.

88. Five of the six cases in Western Europe took place in Germany. The remaining case took place in Spain. The Asian cases took place in Korea and the Philippines. All of the predatory domestic homicides took place in the United States. Three of the child victim cases took place in the United States and two took place in Germany.

89. The predatory cases occurred in 1989, 1990, 1992, and 1997. Two of the child victim cases occurred between 1984 and 1993; three occurred in 1994 or later.

90. Two other cases that resulted in death sentences were excluded because they do not qualify as domestic homicides under this study. The first prosecution of Joseph A. Thomas for predatory domestic homicide resulted in a death sentence. Melvin Turner was sentenced to death for homicide of a child.

91. *United States v. Murphy*, 50 M.J. 4, 5–6, 15–16 (1998).

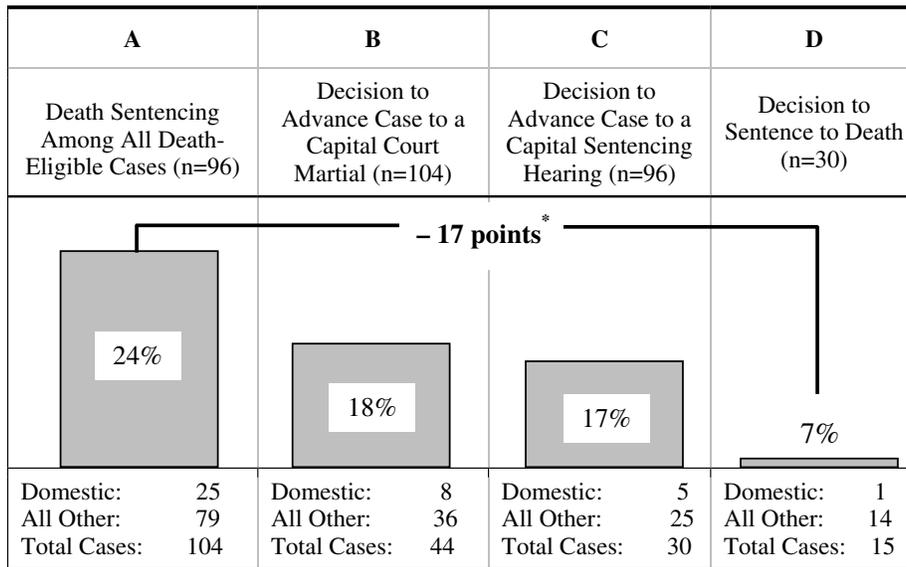
92. In two cases the victims are the accused’s wife and child or children (Fuhrman (#32), Murphy (#37) respectively). In two cases, the accused killed his sexual intimate and a bystander (Strom (#43), Patterson (#139)). In two cases, the accused killed two of the accused’s children or stepchildren and no adult (Curry (#23), Morgan (#145)).

accused is a woman who killed her husband. She is the only female accused and her husband is the only male intimate victim in the domestic homicide subset.<sup>93</sup>

*B. Unadjusted Results*

In order to study whether death-eligible cases involving a domestic homicide are less likely to be prosecuted as capital cases or less likely to receive death sentences than those cases that are not domestic homicides, the authors first examined how the cases progress through charging, conviction, and sentencing decisions without regard to culpability. Figure 2 (below) presents the percentage of the total death-eligible cases that are domestic homicides and the percentage that are domestic homicides after each decision.

**FIGURE 2.** Unadjusted Evidence of a Domestic Discount in Capital Charging and Sentencing Among All Death-Eligible Cases: U.S. Armed Forces, 1984–2005 (showing the percentage of domestic homicide cases among all death-eligible cases and among cases at successive stages of charging and sentencing)



\*The percentage point measure between Columns B and C indicates the 17-point decrease in the representation rates of domestic homicides between Columns A and D.

Figure 2 demonstrates that domestic homicides make up 24% of all death-eligible homicides identified between 1984 and 2005 (Column A). The representation rate of domestic cases falls to 18% when the subset of cases is limited to those in which the convening authority sought the death penalty (Column B). A slight decline in the representation rate of domestic homicides appears between the decision to seek the death penalty documented in Column B and the decision to advance the case to a capital sentencing hearing documented in Column C. Domestic homicides make up 17% of the cases in which the convening authority ad-

93. A second woman accused killed her children and not her husband (Morgan (#145)).

vanced the case to a capital sentencing hearing. Column D shows that domestic homicides make up only 7% of the death-eligible cases in which death sentences were imposed. There is an overall seventeen-point decline in the representation rate of domestic homicides between the full set of all death-eligible cases, documented in Column A, and the cases in which a death sentence is imposed, documented in Column D.<sup>94</sup>

To evaluate the significance of the seventeen point decline, the authors compared the rates at which domestic and non-domestic homicide cases advanced through each decision point in the prosecution and sentencing of death-eligible cases. This comparison remains unadjusted. It presumed all cases are alike with respect to culpability and race. Table 1 (below) presents this comparison and continues to support the hypothesis that a crime's domestic homicide status may have a mitigating influence on charging and sentencing decisions in the system.

**TABLE 1.** Unadjusted Domestic Homicide Disparities in Charging and Sentencing Outcomes in Death-Eligible Cases: U.S. Armed Forces, 1984–2005

|                                |                                   | A  | B  | C   | D                                    |
|--------------------------------|-----------------------------------|--|--|---|--------------------------------------|
|                                |                                   | Death Sentencing Among All Death-Eligible Cases (n=96) | Decisions to Advance Case to a Capital Court Martial (n=104) | Decision to Advance Case to a Capital Sentencing Hearing (n=96) | Decision to Sentence to Death (n=30) |
| <b>Part 1. Selection Rates</b> |                                   |  |  |   |                                      |
| 1                              | Domestic Homicides                | 4%<br>(1/25)   | 32%<br>(8/25)  | 22%<br>(5/23)   | 20%<br>(1/5)                         |
| 2                              | All Other Homicides               | 18%<br>(14/79)   | 46%<br>(36/79)   | 34%<br>(25/73)  | 56%<br>(14/25)                       |
| <b>Part 2. Disparities</b>     |                                   |  |  |   |                                      |
| 3                              | Difference in Rates (Row 1–Row 2) | –14 points<br>(4–18)<br>$p = .10$                      | –14 points<br>(32–46)<br>$p = .26$                           | –12 points<br>(22–34)<br>$p = .31$                              | –36 points<br>(20–56)<br>$p = .33$   |
| 4                              | Relative Risk (Row 1/Row 2)       | .22<br>(4/18)  | .69<br>(32/46)   | .65<br>(22/34)  | .36<br>(20/56)                       |

Significance is reported using Fisher's exact test of two-sided probabilities.

While none of the disparities of the comparison are significant at the 0.05 level, the consistency and magnitude of the disparities warrant notice. At every stage of the charging and sentencing process, domestic cases advance through the system at a lower rate than nondomestic cases. In addition, the fourteen-point disparity among all death-eligible cases documented in Table 1, Part 2, Row 3, Column A is

94. If the predatory homicides are included in the analysis, there is a twenty-point decline between all death-eligible cases and the cases in which a death sentence is imposed (Column A: 33%, n=30; Column B: 23%, n=10; Column C: 23%, n=7; Column D: 13%, n=2). With the child only cases included, there is a sixteen-point decline (Column A: 29%, n=30; Column B: 23%, n=10; Column C: 20%, n=6; Column D: 13%, n=2).

significant at the 0.10 level. Part 2, Row 3, Column B, documents that the convening authority advances domestic cases to a capital court martial at a significantly lower rate than nondomestic cases. Likewise, Column C documents a twelve-point disparity between domestic homicide cases and nondomestic homicide cases in the rates that the cases advance to a capital sentencing hearing. Column C, Row 4, also documents that the risk of advancing to a capital sentencing hearing for domestic homicides is 65% of the risk for all other homicides. The largest disparity, however, appears in the final life versus death decision, presented in Column D. The death sentencing rate is thirty-six percentage points lower for domestic homicides than for nondomestic homicides. The pattern is similar if predatory homicides, or the cases in which the accused killed only his or her children, are included.<sup>95</sup>

These unadjusted disparities clearly suggest that a domestic discount may be influencing charging and sentencing decisions at each stage of the process, especially in the final sentencing decisions.

### C. Adjusted Findings

The next step in the analysis was to determine if the identified disparities remained after factoring in the culpability and racial characteristics of the cases. To introduce controls for criminal culpability, logistic regression models were developed for each stage of the charging and sentencing process. Previous work on capital punishment charging and sentencing and, in particular, prior analysis of the military capital punishment dataset in the context of the authors' larger race study informed the identification of theoretically or practically important control variables for the study.<sup>96</sup> The core models from the previous charging and sentencing study provided the foundation for this analysis controlling for culpability and race. In addition, the authors analyzed a number of variables unique to the domestic homicide subset, such as the presence of evidence of habitual beating or a prior attempt on the victim's life.<sup>97</sup> The goal at each phase was to identify the factors, other than the relationship between the accused and the victim, that might be influencing sentencing decisions at each phase. Next the study controlled for the factors, that is, factored them into the analysis, before considering the influence of the domestic variable.

Table 2 (below) presents the results of this analysis for each stage of charging and sentencing. The question at each stage was whether the fact of being a domestic homicide has an aggravating or mitigating effect; that is, whether domestic cases

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95. For domestic homicides including predatory cases, the disparities are as follows: Column A: -12 points (7%–19%); Column B: -13 points. (33%–46%); Column C: -9 points (25%–34%); Column D: -28 points (57%–29%). For nonpredatory domestic homicides including child-only victim cases, the disparities are as follows: Column A: -12 points (19%-7%); Column B: -13 points (46%–33%); Column C: -14 points (35%–21%); and Column D: -21 points (54%–33%).

96. See, e.g., DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 254–67 (1990) (reviewing studies of capital punishment systems between 1980 and 1990); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 215–26 (2003) (reviewing studies of capital punishment between 1990 and 2003).

97. These variables were the following: accused previously attempted to kill the victim; evidence of a history of assaultive conduct by the accused against the victim; accused's prior announced intention to kill the victim (to a third party); and accused planned the homicide for more than five minutes.

**TABLE 2.** Domestic Homicide Disparities Overall and in Successive Stages of Charging and Sentencing, Unadjusted and Adjusted for Alternative Combinations of Culpability Measures: U.S. Armed Forces, 1984–2005

|  | A  |                         | B  |                         | C  |                         | D                                    |                         |
|--|--|-------------------------|--|-------------------------|--|-------------------------|--------------------------------------|-------------------------|
|  | Death Sentencing Among All Death-Eligible Cases (n=96) |                         | Decisions to Advance Case to a Capital Court Martial (n=104) |                         | Decision to Advance Cases to a Capital Sentencing Hearing (n=96) |                         | Decision to Sentence to Death (n=30) |                         |
|  | odds ratio   | $\beta$                 | odds ratio   | $\beta$                 | odds ratio   | $\beta$                 | odds ratio                           | $\beta$                 |
| <b>Part 1.</b> Unadjusted Effects, Domestic Homicide | 0.19   | -1.65<br><i>p</i> = .12 | 0.56   | -0.58<br><i>p</i> = .23 | 0.53   | -0.63<br><i>p</i> = .26 | 0.20                                 | -1.63<br><i>p</i> = .17 |
| <b>Part 2.</b> Adjusted Effects                      |  |                         |  |                         |  |                         |                                      |                         |
| <b>A.</b> Domestic Homicide                          | 0.37   | -0.98<br><i>p</i> = .40 | 1.98   | .68<br><i>p</i> = .42   | 2.00   | .69<br><i>p</i> = .43   | 0.34                                 | -1.09<br><i>p</i> = .46 |
| <b>B.</b> Control Variables                          |  |                         |  |                         |  |                         |                                      |                         |
| 1. Number of aggravating circumstances               | 2.66   | .98                     | 5.19   | 1.64***                 | 1.39   | 0.32                    | 3.02                                 | 1.10                    |
| 2. Multiple victims                                  | 9.31   | 2.23***                 | 12.57  | 2.53**                  | 8.39   | 2.12**                  | 3.30                                 | 1.19                    |
| 3. Accused slashed throat of victim                  | ---  | ---                     | 19.61  | 2.98***                 | ---  | ---                     | ---                                  | ---                     |
| 4. Hate or revenge motive                            | 7.64   | 2.03**                  | ---  | ---                     | ---  | ---                     | 4.06                                 | 1.40                    |
| 5. Killing involved a bizarre weapon                 | 6.10   | 1.94                    | ---  | ---                     | >100   | 4.63***                 | 1.97                                 | 0.68                    |
| 6. Substantial forensic or physical evidence         | ---  | ---                     | 18.31  | 2.91***                 | 4.81   | 1.57**                  | ---                                  | ---                     |
| 7. Accused took responsibility for crime             | ---  | ---                     | 0.21   | -3.88***                | 0.04   | -3.16                   | ---                                  | ---                     |
| 8. Accused provided support to family                | ---  | ---                     | ---  | ---                     | ---  | ---                     | 0.22                                 | -1.50                   |
| 9. Defense of insufficient evidence                  | ---  | ---                     | 5.76   | 1.75**                  | ---  | ---                     | ---                                  | ---                     |
| 10. Militarily implicated                            | 11.14  | 2.41***                 | 19.90  | 2.99***                 | 5.61   | 1.72**                  | 3.80                                 | 1.33                    |
| 11. Offense date after 1990                          | .25  | -1.37                   | .10  | -2.28***                | .37  | -0.98                   | 0.85                                 | -0.17                   |
| 12. Case involves at least one white victim          | ---  | ---                     | ---  | ---                     | 21.24  | 3.06**                  | ---                                  | ---                     |

\* *p* < .10; \*\* *p* < .05;  
\*\*\* *p* < .01

$r^2 = .54$

$r^2 = .73$

$r^2 = .55$

$r^2 = .49$

are more or less likely to be advanced to the more aggressive outcomes, such as a capital prosecution, a capital conviction, and a death sentence.

Part 1 of Table 2 presents unadjusted effects. This part shows the impact of being a domestic homicide on prosecution and sentencing choices without regard to any other factor. It replicates the analysis in Table 1 using a different methodology. Part 1 is included as a point of comparison to the results documented in Part 2.<sup>98</sup>

Part 2 of Table 2 presents the adjusted disparities for domestic homicide status in Section A and the controls included in each regression model (in Section B). Columns A–D present the four different models. The model in Column A addresses all decisions in the dataset overall. The models in columns B–D focus on each significant decision point in the prosecution and sentencing process. The presence of a number in a given column cell indicates that the specified variable was included in the model defined at the top of the column. Most variables were included because the analysis shows they were significant to the decision. The authors also included a few theoretically important variables even though those variables' impacts were not statistically significant. Three dashes in a column indicate that the variable was not statistically or theoretically significant at that decision point.

Given the literature and the theoretical importance of aggravating factors in capital sentencing, the authors included in every model the variable for the number of aggravating circumstances and the offense date.<sup>99</sup> Each was most important in the model of the convening authority's decision to seek the death penalty (Part 2.B, Column B). The clear importance of the control for offense date was limited to this model, but it is consistently mitigating across all four models.

Different control variables entered different models as would be expected when each model deals with a different subset of cases and the cases relate to death-eligible murder. Race of defendant and race of victim were always included as variables that could step into the model. Only the race-of-victim variable came in to the model as significant, and only in the second decision point (n=30), recorded in Part 2.B, Row 12, Column C.

Finally, the reader should note that none of the controls considered in Table 2, Column D, are statistically significant in the fourth stage, death sentencing. The controls in this model are based on the model of death sentencing among all death-eligible cases in Column A. The limited sample size at this decision point makes it particularly difficult to rely on a test of significance to determine the impact of variables.

After identifying a model for each stage, the authors introduced the domestic homicide variable. Part 2.A in Table 2, shows the odds ratios, regression coefficients ( $\beta$ ), and significance level for the domestic homicide variable. The 0.37 adjusted odds ratio in Part 2.A, Column A suggests that the fact of being a domestic homicide may be mitigating overall in the system. Specifically, the odds of a death sentence imposed among all death-eligible cases are only a third of the odds faced

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98. Compare tbl.1, *supra* Part V.B, with tbl.2, pt. 1.

99. Aggravating circumstances in death sentencing statutes are intended to measure culpability. The presence of an aggravating circumstance should indicate increased culpability. BLACK'S LAW DICTIONARY 277 (9th ed. 2009).

by accused in other cases. The reader should note, however, that the odds increase from 0.19 to 0.37 after the introduction of controls.<sup>100</sup>

Replacing the domestic homicide variable with the expanded variable for domestic homicides including the five predatory homicides in this model decreased the mitigating effect to 0.81 ( $p=0.83$ ). This outcome is consistent with the expectation that predatory domestic homicides would be treated more aggressively than passionate domestic homicides.<sup>101</sup> In contrast, introducing the expanded variable for domestic homicides (including the five child-only victim cases) increased the mitigating effect, producing a variable of 0.36 ( $p=0.32$ ).

The  $p$ -values are presented in Table 2 below the findings in Part 2.A. None of the findings are statistically significant, perhaps, at least in part, due to the small samples. Because the  $p$ -values are not significant, the findings must be treated as merely suggestive. Nonetheless, the 0.37 odds multiplier, reported in Part 2.A, Column A, is a sizeable coefficient with practical significance in understanding the treatment of death-eligible murder cases in this criminal justice system.

Column B of Table 2 examines the decision to advance a case to a capital court martial. At this stage, unexpectedly, being a domestic homicide has a small aggravating effect with a small positive coefficient, as reflected in the odds ratio of 1.98 in Part 2.A, Column B. The aggravating effect increases and approaches significance when the domestic homicide variable is replaced with the expanded variable that includes the five predatory murders (5.32), and approaches significance ( $p=0.06$ ), but the aggravating effect decreases and loses significance when it is replaced with the variable that includes child-only victim cases in the domestic subset (1.64,  $p=0.55$ ).

Likewise in the logistic regression model for the decision to proceed to a capital sentencing hearing, documented in Column C, being a domestic homicide has a small aggravating effect, as reflected in the odds ratio of 2.00 in Table 2, Part 2.A. Again, this aggravating effect increases with the inclusion of predatory domestic homicides (4.33,  $p=0.08$ ) and decreases with the inclusion of child-only victim cases (1.23,  $p=0.81$ ).

The outcomes documented in Table 2, columns B and C, stand in contrast with the outcomes documented in Column D. The model for the decision to impose a death sentence in a capital sentencing hearing suggests that being a domestic homicide has a strong mitigating effect on court-martial member's decisions to impose a death sentence. The 0.34 odds ratio suggests that domestic homicides face about one-third the odds of receiving a death sentence in a capital sentencing hearing as compared with all other cases.<sup>102</sup> The overall domestic discount, documented in Column A (a 0.37 odds ratio), clearly reflects the impact of the decisions of members that is modeled in Column D (a 0.34 odds ratio). The influence of the inclusion of the predatory murders persists in the final decision to impose a death sentences. The odds remain low after including predatory murders, but increase to 0.72 ( $p=0.80$ ). Including the child-only victim cases in the domestic homicide subset

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100. Compare tbl.2, pt.1, col.A, with tbl.2, pt.2.A, col.A.

101. See *supra* Rapaport, *Capital Murder*, *supra* notes 13, 55–58 and accompanying text.

102. See tbl.2, pt.2.A, col.D (reporting a 0.34 odds ratio for a imposing a death sentence in a domestic homicide case).

decreases the mitigating effect the subset has on the decision to impose death sentences to 0.85 ( $p=0.89$ ).

When this model is limited to those variables showing statistical significance, only the variables for multiple victims (Part 2.B, Row 2) and the presence of a hate or revenge motive come into the model.<sup>103</sup> In this more limited model, the odds ratio for domestic homicides falls to 0.26. When the predatory murders are included in the domestic subset, the odds decrease to 0.51 ( $p=0.53$ ). When the child-only cases are included in the domestic subset, the odds decrease to 0.59 ( $p=0.64$ ).

The findings presented in Table 2, columns B and C, undermine the suggestion that the convening authority applies a “domestic discount.” Rather, they clearly suggest that the domestic discount in the military capital punishment system is the product of the life and death decisions made by court-martial members’ in penalty trials.

## VI. DISCUSSION AND CONCLUSIONS

The study described contributes to the understanding of whether a domestic discount operates in the military capital punishment system, and, if so, how the discount operates. It also endorses earlier findings regarding the importance of well-controlled stage-wise analyses of issues relating to the administration of the death penalty or the criminal justice system in general.

First, as noted in Part V, the study’s results lend qualified support for the proposition that a domestic discount operates in sentencing decisions in the military capital punishment system. Whatever effect a domestic discount may have, it appears to be almost entirely the product of the court-martial members’ death sentencing decisions rather than the product of decisions made by the convening authority.

Second, the importance of the year of crime in this analysis echoes the finding of Dawson as to the importance of controlling for date.<sup>104</sup> As noted in Part II, Dawson found the limited domestic discount in her study to result entirely from cases that entered the system in 1984 or earlier. She hypothesized that society and public officials may have become more sensitive to domestic violence over the period of her study.<sup>105</sup> Here however, the study’s findings are contrary to Dawson’s and the domestic discount is stronger in the more recent cases than it is in the older cases.

The convening authority brought 50% of the domestic homicides as capital cases between 1984 and 1990 (6/12), but brought 15% of the domestic homicides as capital cases after 1990 (2/13). Juries’ guilt and sentencing decisions also appear more punitive toward domestic homicides in the earlier period of the study. Juries found domestic homicide defendants guilty in 40% of the cases between 1984 and 1990 (4/10) but in only 8% of the cases after 1990 (1/13). The single death sentence

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103. See tbl.2, pt.2.B, rows 2 & 4.

104. Compare tbl.2, pt.2.B, row 11, *supra* Part V.C (indicating the importance of the date variable), with Dawson, *supra* note 14, at 109, 126.

105. See Dawson, *supra* note 14, at 109, 126 (discussing the legislative and policy initiatives intended to change the way police, prosecutors, and courts respond to domestic violence, and noting the impact of time on her findings).

among the twenty-five domestic homicides considered in the study was prosecuted during the earlier period.

The impact of time in this analysis may reflect an overall trend in the military capital punishment system away from aggressive prosecution of capital cases that do not implicate the command and control of the military.<sup>106</sup> The variable for offense date, however, is consistently mitigating in the models in Table 2 even though the models control separately for the military implications of the crime.<sup>107</sup> This trend may also support the conclusion that legislative and policy initiatives intended to change public responses to domestic violence generally and, in particular, in the U.S. Armed Forces, have not impacted the actors involved in military capital prosecutions. It is difficult, however, to make such a strong conclusion from such a small sample. This finding suggests the importance of replicating this study in jurisdictions with a larger number of domestic homicides.

Separate coding and analysis of predatory and passionate domestic homicides also appears to merit replication in future studies. The findings here lend support to Rapaport's suggestion that research on domestic violence and homicide law ought to focus on passionate homicides rather than predatory ones.<sup>108</sup> As noted in Part V, in every instance where the study's domestic homicide subset included the predatory domestic homicides, the evidence of discount diminished and the evidence of aggressive prosecution increased.<sup>109</sup>

This finding is most pronounced in the analysis of the decision to bring a case to a capital court martial (the charging decision) and the conviction decision. Including the predatory domestic homicides in the domestic violence subset increases the odds of a case receiving a capital charge from 1.98 to 5.32. The odds are more than two and one-half times greater. Likewise, the chance of a case receiving a capital conviction increases from 2.00 to 4.33 upon the inclusion of the predatory homicides, again more than doubling the odds. This finding suggests that the inclusion of predatory crimes in previous analyses of the domestic discount may be distorting conclusions regarding the treatment of (passionate) domestic homicides.

Separate coding and analysis of child-victim only cases also merits replication in a study with a larger number of cases. Adding the five child-victim only cases had an inconsistent effect in the study. The inclusion makes almost no change on the discount in the overall analysis of death sentencing among all death-eligible cases (presented in Column A of Table 2, 0.37 versus 0.37), but decreases the aggravating effect in charging decisions, (shown in Column B, 1.98 versus 1.69) and decreases the aggravating effect in the decision to advance to a capital sentencing hearing (Column C, 2.00 versus 1.23). This outcome may be surprising to some, as many jurisdictions, including the military, include a separate statutory aggravator

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106. See generally Catherine M. Grosso, David C. Baldus & George Woodworth, *The Impact of Civilian Aggravating Factors on the Military Death Penalty: Another Chapter in the Resistance of the Armed Forces to the Civilianization of Military Justice, 1984-85*, 43 U. MICH. J.L. REFORM 569 (2010).

107. See tbl.2, pt.2.B, row 11, *supra* Part V.C (documenting the mitigating effect of time on the decision to advance domestic homicides towards capital punishment).

108. See Rapaport, *Capital Murder*, *supra* note 55 and accompanying text.

109. See *supra* Part V.C.

for killing a child in the death penalty statutes or rules.<sup>110</sup> On the other hand, the outcome may just reflect unique difficulties in prosecuting child-only cases.<sup>111</sup> Introduction of the child-only victim cases decreases the mitigating effect of the domestic variable in the final death sentencing decisions (0.34 to 0.85).

Finally, these results highlight again the importance of focusing on individual decision points in case analyses and of including appropriate controls. The disparities that appeared across the board in Table 1 are confined to the final decision, documented in Table 2, Column D, where appropriate controls were introduced. Likewise, the apparently overall mitigating effect that appears in Column A of Table 2 can be understood more precisely through the decision-specific models in Columns B–D.

The findings of the study suggest the need for additional well-controlled, stage-wise, studies on the importance of the relationship between the defendant and the victim on charging and sentencing decisions.

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110. MANUAL FOR COURTS-MARTIAL UNITED STATES, R.C.M. 1004 (c)(7)(K) (2008) (“The victim of the murder was under 15 years of age.”). See *supra* Part III.A (quoting the Manual for Courts Martial R.C.M. 1004(c)(2)).

111. See discussion *supra* notes 39–40 and accompanying text.

