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RACIAL DISCRIMINATION IN THE ADMINISTRATION OF THE DEATH PENALTY: THE EXPERIENCE OF THE UNITED STATES ARMED FORCES (1984–2005)*

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** The late Joseph B. Tye Professor, University of Iowa College of Law. Professor Baldus passed away in June 2011, after this paper was accepted for publication.

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This Article presents evidence of racial discrimination in the administration of the death penalty in the United States Armed Forces from 1984 through 2005. Our database includes military prosecutions in all potentially death-eligible cases known to us (n = 105) during that time period.

Over the last thirty years, studies of state death-penalty systems have documented three types of evidence of racial disparities in the treatment of similarly situated death-eligible offenders. The most common disparity or "race effect" is that capital charging and sentencing decisions are applied more punitively in cases involving one or more white victims than they are in similar cases with no white victims. These disparities are generally viewed as evidence of "race of victim" discrimination in the system. The next most common race-based disparity is the more punitive treatment of cases involving a black or minority defendant and one or more white victims compared to the treatment of cases involving all other similarly situated defendant/victim racial combinations. These disparities are viewed as evidence of "minority-defendant/white-victim" discrimination in the system. The least common racially based disparity is the more punitive treatment of cases involving black and minority defendants compared to the treatment of similarly situated white-defendant cases, regardless of the race of the victim involved in the case. These race effects are usually referred to as evidence of "independent" or "main effect" racial discrimination.

The data in this study document white-victim and minority-accused/white-victim disparities in charging and sentencing outcomes that are consistent with these findings. The data also document independent minority-accused disparities of a magnitude that is rarely seen in state court systems.

The principal source of the white-victim disparities in the system is the combined effect of convening authority charging decisions and court-martial panel findings of guilt at trial—decisions that advance death-eligible cases to capital sentencing hearings. The principal source of the independent minority-accused disparities in the system is the death-sentencing decisions of panel members in capital sentencing hearings.

The evidence in the sixteen cases with multiple victims, which are the principal source of the race effects in the system, supports Supreme Court Justice Byron White's hypothesis that in death-eligible murder cases, the greatest risk of "racial prejudice" exists in highly aggravated minority-accused/white-victim cases.

There is, however, little or no risk of racial prejudice among the small group of cases that constitute the most aggravated military cases—those with substantial military implications because they involve lethal attacks on United States troops or commissioned officer victims.

Limiting death eligibility to death-eligible murders with substantial military implications could substantially reduce or entirely eliminate the risk of racial bias in the administration of the military death penalty. Without regard to the race of the defendant and victims, those cases uniformly receive more punitive treatment than "civilian-style" murder cases that have no military implications. This has particularly been the case between 1990 and 2005. Militarily implicated cases have accounted for 75% (6/8) of the military death sentences imposed during that period.

I. INTRODUCTION

This Article presents the results of an empirical study of racial discrimination in the administration of the death penalty in the United States Armed Forces between 1984, the year military law was brought into conformity with the requirements of *Furman v. Georgia* (1972), and 2005.[1] A main theme of this paper is the difference between the military system and the civilian systems that have been similarly studied in the operation, outcomes, racial disparities, and the sources of those disparities.

Our military evidence takes two forms. The first is evidence of systemic racial disparities in the charging and sentencing decisions of convening authorities and court-martial members that non-racial case characteristics do not explain.[2] The second is quantitative and qualitative assessments of the risk of racial discrimination in each case in which a minority accused was sentenced to death.

Our database includes military prosecutions for all "potentially death-eligible" murder cases known to us (n = 105), including all "factually death-eligible" murder cases that resulted in a capital murder conviction (by plea or at trial) with one or more statutory aggravating factors found or present (n = 97).[3] The sentencing dates of these cases range from July 16, 1984, to October 13, 2005. Fifteen of these cases resulted in a death sentence.

Part I of the Article identifies death-eligible offenses under military law, including premeditated and felony murder, which are the focus of this

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[1] 408 U.S. 238 (1972). As discussed below, an executive order brought the system into conformance. Exec. Order No. 12,460, 49 Fed. Reg. 3169 (Jan. 24, 1984).

[2] Jurors are known as "members" in military courts.

[3] See *infra* Part III.A.1 for a discussion of death eligibility and our method of identifying cases for inclusion in our study. Of our 105-case sample of "potentially death-eligible" cases, we removed eight cases in which the convening authority capitally charged the accused but guilt trial members acquitted him. This reduced the sample of "factually death-eligible" cases to 97. Our analysis of the charging decisions of the convening authorities is based on the 105-case sample of "potentially death-eligible" cases, while our analysis of the members' death-sentencing decisions is based on the 97-case sample of "factually death-eligible" cases.

study. Part II describes the military capital charging and sentencing process for death-eligible murder cases. Part III explains our methodology. Part IV presents evidence of systemic racial disparities. Part V assesses the risk of racial discrimination in ten cases in which a minority accused received the death sentence. Part VI contrasts the findings of racial disparities in death-eligible capital cases with the evidence of racial disparities in non-capital sentencing outcomes among the sixty-six death-eligible murder cases that did not advance to a capital sentencing hearing.

Part VII presents our conclusions and policy recommendations. We found compelling evidence that the race of the accused and of the victim has influenced charging and sentencing decisions in the processing of death-eligible murder cases in the system since 1984. There is, however, an important distinction between the decisions made in the processing of these cases. The risk of racial prejudice is confined entirely to the decisions of convening authorities and members that lead up to and include the members' death-sentencing outcomes. Among the sixty-seven cases that did not advance to a capital sentencing hearing, the first sentencing issue was whether a life sentence or a term of years would be given. In the cases where an individual was sentenced to a term of years, the second issue was the duration of that sentence. There is no evidence of systemic racial effects in either of these decisions.[4]

Among the 105 cases in our study that potentially implicate the death penalty, there is evidence of a substantial risk of three forms of racial prejudice: white-victim discrimination, minority-accused/white-victim discrimination, and independent minority-accused discrimination. There is a risk of all three forms of prejudice in the imposition of death sentences among all death-eligible cases.[5] Closer scrutiny reveals that the source of the white-victim and minority-accused/white-victim effects in the imposition of death sentences among all death-eligible cases is convening authority decisions seeking death sentences[6] and the guilt trial decisions of court-martial members that advance cases to a capital sentencing hearing by a unanimous verdict on the accused's liability for capital murder.[7] The combined effects of these two decisions produce a substantial and statistically significant white-victim disparity in the rates that cases advance to a capital sentencing hearing.[8] The evidence further suggests that the principal source of the independent minority-accused racial disparity

[4] *Infra* note 200 and accompanying text.

[5] *Infra* note 118 and accompanying text.

[6] *Infra* Part IV.C.

[7] *Infra* Part IV.C.2.

[8] *Infra* Part III.

documented in the imposition of death sentences among all death-eligible cases is members' life/death decisions in capital sentencing hearings. Specifically, in white-victim cases, which constitute 97% of capital sentencing hearing cases, minority accused face a significantly higher risk of a death sentence than do similarly situated white accused.[9]

Our evidence also supports the hypothesis propounded by Justice Byron White that the risk of racial prejudice is greatest in highly aggravated minority-accused/white-victim cases, which are illustrated in this study by sixteen multiple-victim cases.[10]

Finally, our findings suggest that the risk of racial prejudice in the administration of the military death penalty for death-eligible murder would be greatly reduced if death sentencing in such cases were limited to cases with significant military implications in which the risk of the imposition of a death sentence has been low to non-existent since 1984.

A. DEATH-ELIGIBLE OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE

There is a long tradition of the use of capital punishment in the United States Armed Forces. There are currently fifteen death-eligible offenses in the Uniform Code of Military Justice (UCMJ).[11] All but two of them currently relate to crimes with important national security or military implications that have no counterparts in civilian death-penalty systems. Mutiny, sedition, and espionage are in the first, national security category.[12] There are also eight death-eligible offenses with serious military implications that apply only "in time of war" or during combat operations against a foreign power.[13] In addition, two other offenses have important military implications but no "time of war" requirement.[14] These are long-standing offenses that to our knowledge have not been applied since the Korean War.[15]

The fourteenth and fifteenth death-eligible offenses are murder

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[9] *Infra* Part IV.A.

[10] *Infra* Part IV.G.

[11] 10 U.S.C. §§ 801–940 (2006).

[12] § 894 (mutiny and sedition); § 906A (espionage).

[13] § 895 (desertion); § 890 (assaulting or willfully disobeying a superior commissioned officer); § 899 (misbehavior before the enemy); § 900 (subordinate compelling surrender); § 901 (improper use of countersign); § 904 (aiding the enemy); § 906 (spies); § 913 (misbehavior of a sentinel).

[14] § 902 (forcing a safeguard); § 910 (willfully hazarding a vessel).

[15] The Court of Military Appeals treated the Korean and Vietnam conflicts differently. *Compare* United States v. Bancroft, 3 C.M.A. 3 (1953), *with* United States v. Averette, 19 C.M.A. 363 (1970).

(premeditated and felony murder)[16] (Section 118) and rape[17] (Section

[16] Article 118 of the UCMJ as adopted in 1950 reads as follows:

> Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he –
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> (1) has a premeditated design to kill; or
>
> (2) intends to kill or inflict great bodily harm; or
>
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard for human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, 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 paragraph (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

Pub. L. No. 81-506, art. 118, 64 Stat. 107, 140 (1950) (codified as amended at 10 U.S.C. § 918).

[17] The UCMJ authorizes the death penalty for rape. Article 120(a) of the UCMJ as adopted in 1950 reads as follows: "Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." Art. 120, 64 Stat. at 140 (codified as amended at 10 U.S.C. § 920(a)).

The current UCMJ also defines rape as an offense punishable by death: "Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. § 920(a). The only service member executed for rape since 1950 was Pvt. John Bennett (convicted of rape and attempted murder and executed in 1961). Since then, the United States Supreme Court held in *Coker v. Georgia* that the death penalty is unconstitutional as excessive punishment for the rape of an adult woman. 433 U.S. 584, 599 (1977). Military courts have held that *Coker* applies to military law, at least when applied to the rape of an adult woman. *See* United States v. McReynolds, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (holding that rape of an adult woman is not a capital offense); United States v. Matthews, 16 M.J. 354, 380 (C.M.A. 1983). Moreover, a state's use of the death penalty as punishment for the rape of a child under twelve years of age was invalidated by the United States Supreme Court in 2008. Kennedy v. Louisiana, 554 U.S. 407, 413 (2008). However, unknown to the Court, the 2006 National Defense Authorization Act had amended military law to redefine sexual assault as adult rape and child rape, and to authorize the death penalty for child rape. Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3257 (2006). On a motion for a rehearing in *Kennedy* based on this amendment and the executive order intended to implement it, the parties sharply disagreed with respect to the new law's authorization of the death penalty for child rape. Kennedy v. Louisiana, 129 S. Ct. 1, 2 (2008) (statement of Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer denying rehearing) (stating that "[t]he parties disagree on the effect of Congress' and the President's actions" with respect to the death penalty for child rape). The Court took no position on this dispute, writing "[i]t is unclear what effect, if any, that reclassification worked on the availability of the military death penalty." *Id.* However, the Court held that that even if the new law were deemed to authorize a military death penalty for child rape, it would have no bearing on the original *Kennedy* holding that such an execution by a U.S. state would violate the Eighth Amendment. *Id.* ("[A]uthorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context."). No current member of the military death row has been convicted of rape alone. *See The U.S. Military*

120(a)) committed by U.S. military personnel during peacetime anywhere in the world.[18] A murder conviction is the basis of all of the military death sentences imposed since 1960. With one exception, murder and rape are the most recently established death-eligible military offenses, having been enacted by the UCMJ in 1950.[19]

Death eligibility for murder requires no connection between the murder and military interests or functions. Military status alone makes the statute applicable to military personnel and gives courts-martial jurisdiction.[20] In terms of the definition of capital murder, therefore, the UCMJ mirrored the provisions of typical 1950s civilian death-penalty statutes that defined first-degree and felony murder as capital offenses. Like the civilian systems of that era, the UCMJ also vested in the sentencing authority complete and untrammeled discretion to decide whether a sentence for capital murder should be death or life imprisonment.

This second feature of the military death-penalty system became important after *Furman v. Georgia* (1972), which held that the unguided discretion of sentencing authorities in civilian jurisdictions violated the cruel and unusual punishments provision of the Eighth Amendment to the

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Death Penalty, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/us-military-death-penalty (last visited July 28, 2011).

[18] Courts-martial were first granted jurisdiction to try murder and rape cases during the Civil War when these acts were "committed by persons who are in the military service of the United States" during times of "war, insurrection, or rebellion." Articles of War, ch. 75, § 30, 12 Stat. 731, 736 (1863). In 1916, an amendment to the Articles of War added, "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." Pub. L. No. 64-242, art. 92, 39 Stat. 619, 664 (1916). These provisions, which denied courts-martial jurisdiction to try murder and rape offenses when committed within the geographical limits of the United States during times of peace, survived many revisions to the Articles of War, including the Elston Act in 1948. Pub. L. No. 759, § 235, 62 Stat. 604 (1948). It was not until the adoption of the UCMJ in 1950 that courts-martial were granted the jurisdiction to try crimes of murder and rape committed in the United States during peacetime. Pub. L. No. 81-506, arts. 118, 120, 64 Stat. 107, 140 (1950) (codified as amended at 10 U.S.C. § 918). The Seventh and Tenth Circuits have affirmed that courts-martial have jurisdiction to prosecute a capital offense in peacetime under the UCMJ. Owens v. Markley, 289 F.2d 751, 752 (7th Cir. 1961); Burns v. Taylor, 274 F.2d 141, 142 (10th Cir. 1959). No other circuits have considered the issue.

[19] It appears that Congress has added one other capital crime—espionage—since 1950. Department of Defense Authorization Act for Fiscal Year 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634 (1985) (codified at 10 U.S.C. § 906A).

[20] During the 1960s, the Supreme Court found that courts-martial had jurisdiction to try servicemen only when the crime had a service connection. O'Callahan v. Parker, 395 U.S. 258, 272 (1969). However, in 1987 the Court abandoned the "service connection" requirement, holding 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).

United States Constitution.[21] *Furman* facially applied only to state death-penalty systems. Nevertheless, the military procedures in place in 1972 were identical to the civilian death-penalty procedures condemned in *Furman*. More than a decade passed, however, before a military court acknowledged the relevance of *Furman* to the military system.

In the meantime, the United States Supreme Court ruled in *Gregg v. Georgia* (1976) and *Proffitt v. Florida* (1976)[22] that the adoption of statutory lists of aggravating circumstances comparable to those found in the Model Penal Code[23] and the use of bifurcated guilt and penalty trials satisfied the requirements of the Eighth Amendment because they materially reduced the breadth of capital charging discretion. In the Court's view, these reforms limited death sentences to the most aggravated cases, thereby eliminating the risk of arbitrariness and discrimination in the administration of capital punishment.[24]

In 1983, eleven years after *Furman*, military courts ruled that *Furman v. Georgia* did apply to the military death-penalty system and that existing military procedures did not meet the requirements of *Furman* and *Gregg*.[25] To cure this defect, President Reagan issued a 1984 executive order that limited death eligibility to capital cases in which the fact-finder determined that one or more statutory aggravating circumstances were present in the case and "any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances."[26] The aggravating circumstances, known as aggravating "factors" in current military parlance, embrace a number of situations with distinct military and national security implications[27] that facially apply to all death-eligible offenses, but in

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[21] Furman v. Georgia, 408 U.S. 238 (1972).

[22] Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[23] MODEL PENAL CODE § 210.6 (withdrawn 2009).

[24] *Gregg*, 428 U.S. at 191–96; *Proffitt*, 428 U.S. at 258–61.

[25] A June 1983 Air Force Court of Military Review ruling was the first to hold that *Furman*'s requirements applied to courts-martial and that the courts-martial system was not in compliance with those requirements. *See* United States v. Gay, 16 M.J. 586, 602 (A.F.C.M.R. 1983) (en banc). In fact, the Navy–Marine Corps Court of Military Review had held that the military's capital punishment system met *Furman*'s requirements without amendment. *See* United States v. Rojas, 15 M.J. 902, 927–30 (N.M.C.M.R. 1983). In October 1983, the Court of Military Appeals (C.M.A.) settled the conflict between the lower military courts, ruling that *Furman* did apply to courts-martial. *See* United States v. Matthews, 16 M.J. 354, 379–80 (C.M.A. 1983). In 1984, the appeal in *Gay* reached the C.M.A., which affirmed the decision. United States v. Gay, 18 M.J. 104 (C.M.A. 1984).

[26] Exec. Order No. 12,460, 49 Fed. Reg. 3169 (Jan. 24, 1984) (amending MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 75(g)(2)(d)(ii) (1969)).

[27] *Id.* (amending MANUAL FOR COURTS-MARTIAL para. 75(g)(3)(b)) ("[The accused had intent to] (i) cause substantial damage to the national security of the United States; or (ii) cause substantial damage to a mission, system, or function of the United States" if such

practice have no applicability to "civilian-style" premeditated and felony murders, which constitute the vast majority of death-eligible murders committed by military personnel in peacetime. Another distinctly military aggravating circumstance applies to murder and rape "committed in time of war"—a condition that has not existed since the Korean War.[28]

The executive order does, however, specifically exclude from murder offenses two omnibus aggravators with significant military implications.[29] In fact, only one of the omnibus aggravators applicable to all death-eligible military offenses (grave risk to non-decedent victims) has frequent relevance to murder cases.[30]

The executive order also defines, for premeditated murder cases under Article 118(1) of the UCMJ, an extensive list of distinctly civilian-style aggravating circumstances.[31] These aggravating circumstances were inspired by the typical state death-penalty statute whose aggravating circumstances are modeled after those found in the Model Penal Code.[32] The focus of the executive order on civilian-style aggravating

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damage "would have resulted had the intended damage been effected."); *id.* (amending MANUAL FOR COURTS-MARTIAL para. 75(g)(3)(e)) ("[T]he accused committed the offense with the intent to avoid hazardous duty.")). See *infra* note 62 and accompanying text on the distinction between "militarily implicated" and "civilian-style" murders within the military criminal justice system.

[28] *Id.* (amending MANUAL FOR COURTS-MARTIAL para. 75(g)(3)(f)) (stating that a crime is committed "in time of war" when the United States or an ally is an "occupying power" or United States forces were "then engaged in active hostilities"). The current Manual for Courts-Martial defines a "time of war" to be "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists for the purposes [of this manual]." MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 103(19) (2008). See *supra* note 15 and accompanying text for a discussion of "in the time of war" and the military courts' construction of the phrase.

[29] Exec. Order No. 12,460 § 1 (amending MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 75(g)(3)(a) (1969)) (excluding cases where the crime was "committed before or in the presence of the enemy"); *id.* (amending MANUAL FOR COURTS-MARTIAL para. 75(g)(3)(c)) (excluding cases where "the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage").

[30] *Id.* (amending MANUAL FOR COURTS-MARTIAL para. 75(g)(3)(d)) ("[T]he lives of persons other than the victim, if any, were unlawfully and substantially endangered.").

[31] *Id.* (amending MANUAL FOR COURTS-MARTIAL para. 75(g)(3)(g)) (listing the following aggravating circumstances for premeditated murder: (i) accused under confinement for thirty-plus years, (ii) felony murder, (iii) pecuniary motive, (iv) compulsion or contract murder, (v) escape or avoid apprehension, (vi) victim an important federal official, (vii) victim a commissioned or noncommissioned officer knowingly killed "in the execution of office," (viii) obstruction of justice, (ix) infliction of substantial pain and suffering (7G), and (x) multiple victims). The executive order also defines one aggravating circumstance limited to felony murder alone: "the accused was the actual perpetrator of the killing." *Id.* (amending MANUAL FOR COURTS-MARTIAL para. 75(g)(3)(h)).

[32] MODEL PENAL CODE § 210.6(3) (withdrawn 2009).

circumstances for premeditated murder was understandable, given that six of the seven murder cases in which a death sentence had been imposed in a military court between 1979 and 1984 involved a distinctly civilian-style murder with no special military implications.[33]

In fact, only one part of one of the premeditated murder aggravating circumstances in the executive order is uniquely tailored to military circumstances. This aggravator (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.[34] 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.[35]

The 1984 executive order does not list specific mitigating circumstances, which means under the Eighth Amendment that defense counsel may present any mitigating factor bearing on the circumstances of the offense or the character of the accused.[36]

The drafters of the executive order likely shared the opinion of the Supreme Court in *Gregg v. Georgia* (1976) that the limitations which the military aggravating factors place on the exercise of discretion by sentencing hearing members would significantly reduce the risk of arbitrariness and racial discrimination by limiting death eligibility to the most highly aggravated murder cases. Additional protections in this regard

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[33] The exception is *United States v. Gay*, which involved two victims, one of whom was an officer killed in the line of duty. 16 M.J. 586 (A.F.C.M.R. 1983). The civilian-style death sentences included: United States v. Redmond, 21 M.J. 319 (C.M.A. 1986) (defendant convicted of killing his friend's fiancé); United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986) (defendant convicted of raping and killing an acquaintance); United States v. Artis, 22 M.J. 15 (C.M.A. 1986) (wife victim); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (defendant accused of rape and robbery); United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983) (defendant convicted of robbery and premeditated murder of an acquaintance); United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1983) (defendant convicted of robbery and premeditated murder of an acquaintance).

[34] MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 1004(c)(7)(G) (2008). See also *supra* text accompanying note 31, which lists all of the aggravating factors tailored to premeditated murder.

[35] Although the text of 7G protects all "officers" (i.e., commissioned, noncommissioned, and police officers), within military culture, as reflected in the cases studied here, an "officer victim" case is strictly perceived to be one with a commissioned officer victim—whether or not the officer was acting in the "execution of office" and whether or not the accused knew that the victim was a commissioned officer so acting.

[36] Lockett v. Ohio, 438 U.S. 586 (1978) (holding that the fact-finder may not be precluded from considering any mitigating factor bearing on the circumstances of the offense or the character of the accused).

are provided by the UCMJ's two important predicates for the imposition of a military death sentence: (a) a unanimous finding of liability for capital murder by the court-martial members,[37] and (b) a unanimous finding by court-martial members "beyond a reasonable doubt" that one or more "aggravating circumstances" exist and that "any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances."[38]

However, in spite of these protections, there are good reasons for concern about the risk of arbitrariness and discrimination in the administration of the military death penalty. First is the breadth of discretion exercised by senior commanders ("convening authorities") who make capital charging decisions in the system. Second, the discretion of the officers and enlisted personnel (the "courts-martial members") who determine capital murder liability and impose life and death sentences in capital sentencing hearings is also very broad.

In addition, there are historical and cultural grounds for concern that the 1984 executive order may have fallen short of its intended effect. First, there is historical evidence of racial disparities in the administration of the military death penalty. Most striking are Professor Lilly's studies of military executions in Europe during World War II, suggesting that black soldiers accused of rape and murder of white victims were disproportionately executed for their crimes.[39] Race relations and attitudes within the Armed Forces and within U.S. society generally have changed dramatically since then. Nevertheless, a 1970s Pentagon-sponsored study of the military justice system documented continuing race disparities at a number of levels.[40]

Second, the literature from 1980 through 2008 documents race effects

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[37] UCMJ, 10 U.S.C. §§ 818, 845(b) (2006). Military judges are not authorized to impose death sentences and an accused may not plead guilty to capital murder. § 845(b).

[38] MANUAL FOR COURTS-MARTIAL, RCM 1004(b)(4)(C). The rule uses the phrase "aggravating factors" in most instances. In this section, "aggravating circumstances" include the aggravating factors discussed above.

[39] J. Robert Lilly & Michael Thomson, *Executing US Soldiers in England, World War II: Command Influence and Sexual Racism*, 37 BRIT. J. CRIMINOLOGY 262, 280–83 (1997). During World War II, the Armed Forces stationed in England employed policies to segregate African-American soldiers from European white women after violence was anticipated and reported between African-American soldiers and white soldiers who objected to having African-American soldiers appear socially with white women. *Id.* at 282–83.

[40] DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF JUSTICE WITHIN THE ARMED FORCES 17 (Washington, D.C., Nov. 30, 1972) ("The Task Force believes that the military system does discriminate against its members on the basis of race and ethnic background. The discrimination is sometimes purposive; more often it is not.").

in the administration of comparable civilian death-sentencing systems.[41] In terms of the scope of the discretion of civilian prosecutors and sentencing authorities, the state systems are comparable to the current military system. There is a risk, therefore, that the racial attitudes that commanders and court-martial members bring to the military from civilian life may similarly affect their decisions in the military justice system.[42]

Another concern is that the military justice system lacks the transparency of civilian systems. The capital charging decisions of civilian prosecutors operating in multiracial communities are often subject to close scrutiny.[43] So also are the decisions of civilian juries in highly visible cases.[44] In contrast, the decisions of commanders and courts-martial members typically receive little scrutiny either within or outside the military.[45] The main exceptions are highly aggravated murders that implicate the authority and effectiveness of the military command.[46]

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[41] The literature from 1980 to 1990 is reviewed in DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 254–67 (1990). The post-1990 literature is reviewed in 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).

[42] DEP'T OF DEF., *supra* note 40, at 38 ("It is clear to us that many white individuals entering the military service come with severe disabilities resulting from being raised in a racist society.").

[43] Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of* Vincent Chin, 1 MICH. J. RACE & L. 347, 452 (1996) (noting that the prosecutor's role involves consideration of public opinion, among other things, when making charging decisions); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1589 (2010) (noting that most prosecutors are conscientious public servants who pay attention to public opinion, among other things, as part of their jobs).

[44] Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 656–60 (1991) (discussing the role of jurors and the value of jurors who are aware of events in the community).

[45] *See generally* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1 (2002) (discussing in part the limited engagement of civilians and scholars with the military system).

[46] Capital prosecutions of soldiers for the murder of their officers in combat situations ("fragging") attract substantial attention in the civilian media. *See, e.g.*, *Soldier Gets Death Penalty for Killing Officers in Kuwait*, MSNBC (Apr. 29, 2005), http://msnbc.msn.com/id/7667169 (reporting that Hassan Akbar murdered two officers in Kuwait in 2003 and was sentenced to death); *see also* Hema Easley, *Court-Martial to Begin in Suffern Captain's Slaying*, J. NEWS, Oct. 22, 2008, at 7A; *Sergeant Is Acquitted of Killing Two Officers*, N.Y. TIMES, Dec. 5, 2008, at A32 (reporting that Alberto Martinez was acquitted on capital murder charges in connection with the deaths of two officers in Iraq in 2005).

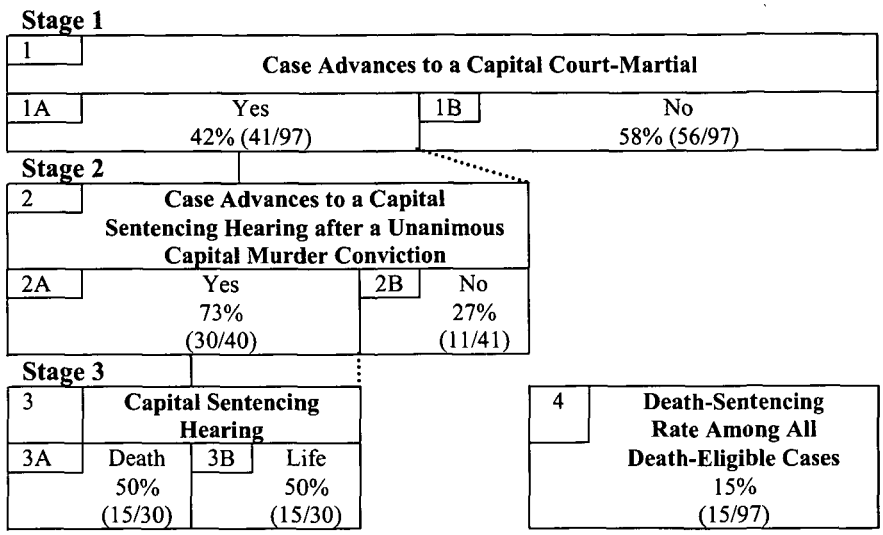
II. DECISIONMAKING IN DEATH-ELIGIBLE MURDER CASES

The following Section presents an overview of decisionmaking in the U.S. military capital punishment system by documenting how the cases in the study move through different decision points.

A. CAPITAL CHARGING AND SENTENCING DECISIONS

Under military law and practice, the death-penalty statute is applied in a three-stage process by two decisionmakers—the convening authority and the court-martial members.

Figure 1
Capital Charging and Sentencing Outcomes Among Death-Eligible Cases: United States Armed Forces, 1984–2005[47]



A capital prosecution in a death-eligible case is commenced by the "convening authority," normally a general or admiral in the accused's command, who has total discretion whether or not to seek a death sentence in a death-eligible case. A decision to seek a death sentence in the case is known as a "capital referral," a decision that is heavily influenced by the "advice" letter of the commander's staff judge advocate (SJA), his chief

[47] *See* Parts III.A.1 and III.A.2, pp. 1249–1252 for a description of the death-eligible cases. The cases of eight accused but acquitted of capital murder by members are not included in this figure. However, their cases are included in the analysis of convening authority charging decisions.

legal advisor.[48]

At stage one, 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.[49] As shown in Figure 1, at stage one, the capital referral and plea bargaining decisions of the convening authority took death off the table in 58% of the death-eligible cases (Box 1B). The remaining 42% advanced to a capital court-martial with the government seeking a death sentence. This rate is comparable to the 39% rate in the eight civilian jurisdictions on which post-*Furman* data are available from the 1970s and 1980s,[50] but it is higher than the civilian rates in most jurisdictions since 1990.[51] However, since 1990, the military

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[48] The "R^2" between the SJA's recommendation and the commander's referral is .74. This statistic means that 74% of the variation in the capital referral decisions of the convening authorities is explained by the SJA recommendations. Advice letters take a variety of forms. Some 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 his or her signing the sheet will implement the SJA's recommendation. In a few cases, the letter tells the convening authority what must exist factually to justify a capital referral with no suggestion of what the referral should be.

[49] In many cases that are not charged capitally, the decision of the convening authority not to bring a capital case is based on a pretrial agreement (PTA) 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. 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. If the government seeks a death sentence, the case must be tried and sentenced by members.

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. 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.

[50] BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 233 (Georgia 52%; Maryland 41%; Dallas County, Tex., 14%; Cook County, Ill., 30%; California, 51%; North Carolina, 33%; Mississippi, 65%; New Jersey, 23%).

[51] For example, a study in Maryland found that prosecutors advanced to trial seeking a death sentence in 27% of the death-eligible cases (353/1,311). Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 24 (2004). Similarly, a Virginia study of cases prosecuted between 1995 and 1999 found the state sought a death penalty 30% of the time during that period. JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 51 tbl.17 (Jan. 2002), *available at* http://jlarc.state.va.us/reports/rpt274.pdf.

capital charging rate has declined sharply,[52] as it has in many civilian jurisdictions.[53]

Since November 18, 1997, the military life-sentence option has included a life sentence without possibility of parole (LWOP), and four such sentences have been imposed in non-capital sentencing hearings during the period of this study.[54] The availability of LWOP may also have contributed to an increase in the frequency with which convening authorities have waived the death penalty in death-eligible cases by declining to charge them capitally or withdrawing a capital charge, usually as part of a plea bargain.

At stage two, a unanimous finding of liability for capital murder by the court-martial members will advance the case to a capital sentencing hearing.[55] Death came off the table for 27% of those found guilty of premeditated or felony murder by virtue of a non-unanimous finding of guilt (Box 2B). The remaining thirty cases with a unanimous guilty verdict advanced to a capital sentencing hearing.

At stage three, court-martial members consider the aggravating factors and mitigating circumstances and make a life or death determination. At this stage, members sentenced 50% of the accused to death (Box 3A). This rate is also comparable to the 53% penalty trial death-sentencing rate in the twelve civilian jurisdictions on which data are available from the 1970s and 1980s,[56] but it is higher than the average civilian penalty trial rate since 1990.[57] In that regard, since 1984, panel members' death-sentencing rates have steadily risen, although the number of capital sentencing hearings during that time has been small.[58]

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[52] In the roughly five-year intervals since 1984, the rates at which convening authorities have sought death sentences have declined from 63% (22/35) (1984–1989), to 43% (12/28) (1990–1994), to 20% (4/20) (1995–1999), and to 14% (2/14) (2000–2004).

[53] *See, e.g.*, DAVID WEISBURD & JOSEPH NAUS, REPORT TO SPECIAL MASTER DAVID BAIME: APPLYING THE RACE MONITORING SYSTEM TO MAY, 2005 PROPORTIONALITY REVIEW DATA 7–9 tbls.B1 & B2 (Nov. 9, 2005) (on file with author) (reporting the rate as 56% from 1983 to 1988 and 11% from 2000 to 2004).

[54] UCMJ, 10 U.S.C.A. § 856a(a) (2006).

[55] RCM 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." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008).

[56] BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 233 (Georgia, 55%; California, 48%; Colorado, 36%; Cook County, Ill., 64%; Dallas County, Tex., 100%; Delaware, 25%; Florida, 74%; Louisiana, 49%; Maryland, 42%; North Carolina, 50%; New Jersey, 36%; and Mississippi, 60%).

[57] *Id.* at 215–25.

[58] Since October 1984, the death-sentencing rates of members have risen from 41% (7/17) (1984–1989), to 50% (4/8) (1990–1994), to 67% (2/3) (1995–1999), and to 100% (2/2) (1995–1999). However, during that same period, the rates at which convening

Overall, the death-sentencing rate among all death-eligible cases since 1984 is 15% (15/97). This rate is higher than comparable figures in most states on which we have data both before[59] and after 1990.[60] However, because of the increasing selectivity of convening authorities in pursuing capital punishment, the overall death-sentencing rate in all death-eligible cases has remained quite stable in recent years (despite the members' rising death-sentencing rate), declining from 20% (7/35) during the first period (1984–1989) and holding thereafter at 14% (4/28) (1990–1994), 10% (2/18) (1995–1999), and 14% (2/14) (2000–2005).[61]

B. THE DEATH-SENTENCED ACCUSED

Table 1 lists the fifteen cases that resulted in the imposition of a death sentence between 1984 and 2005, classified by the year of the sentence and the status of the murder as a "civilian-style" or "militarily implicated" murder (Column D). This "crime type" distinction is based on compelling evidence that in terms of criminal culpability and deathworthiness, military decisionmakers perceive murders that threaten important military interests to be more aggravated than civilian-style murders that do not.[62]

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authorities have sought death sentences have steadily declined. *See supra* text accompanying note 52.

[59] BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 254–65.

[60] Compare Connecticut (4.8%), Maryland (5.8%), Nebraska (16%), New Jersey (9%), North Carolina (6.5%), and Virginia (11%). JOHN J. DONOHUE III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973–2007: A COMPREHENSIVE EVALUATION FROM 4600 MURDERS TO ONE EXECUTION 100 (2008), *available at* http://works.bepress.com/john_donohue/55/; ISAAC UNAH & JOHN CHARLES BOGER, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS: 1993–1997, at 24 tbl.2 (2001), *available at* http://www.unc.edu/~jcboger/NCDeathPenaltyReport2001.pdf; WEISBURD & NAUS, *supra* note 53, at 6 (New Jersey); JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, *supra* note 51, at 17 fig.7; David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 545 (2002); Paternoster et al., *supra* note 51, at 52 fig.1 (Maryland).

[61] Among the branches of the Armed Forces, there is substantial variability in the rates that death sentences are sought and imposed. The convening authority capital charging rates are highest in the Air Force (66%, 6/9) and Marine Corps (54%, 14/26) and lowest in the Army (35%, 18/51) and Navy (25%, 3/12). Death-penalty rates in capital sentencing hearings are comparable in the Army (50%, 6/12) and Air Force (40%, 2/5), higher in the Marine Corps (70%, 7/10), and lowest in the Navy (0%, 0/3). The death-sentencing rates among all death-eligible cases are highest in the Marine Corps (27%, 7/26), followed by the Air Force (17%, 2/12), the Army (13%, 6/46), and the Navy (0%, 0/12). The Coast Guard appears to have had no death-eligible homicides during the period of this study.

[62] For detail on the military/civilian-style murder distinction, see Catherine M. Grosso, David C. Baldus & George Woodworth, *The Impact of Civilian Aggravating Factors on the Military Death Penalty (1984–2005): Another Chapter in the Resistance of the Armed Forces to the Civilianization of Military Justice*, 43 U. MICH. J.L. REFORM 569 (2010). See

Militarily implicated cases involve lethal attacks on United States troops while on duty, any cases where the victim is a commissioned officer,[63] and other murders that directly threaten the authority or effectiveness of the military mission.[64] The following research note provides an example of a militarily implicated case involving a lethal attack on U.S. troops on duty and one or more officer victims:

> At night in Kuwait four days before the 2003 United States led invasion of Iraq, Hassan Akbar, a 31-year-old Army E5 with 4 years of military service, feigned an attack on his unit by rolling live hand grenades into three tents with sleeping officers and opened fire on the occupants as they fled their tents. He killed one officer with a shot in the back. A second officer died of 87 shrapnel wounds. He also injured 14 other military victims, many seriously.[65]

The following note exemplifies a case with fewer significant military implications:

> Motivated by a perceived racial attack on a black marine by white marines, Kenneth Parker, a 21-year-old Marine Corps E3 with 3 years of military service, and five military co-perpetrators kidnapped, robbed and killed with a shot to the heart the first white person they encountered who happened to be a fellow marine. Parker was the shooter. On another occasion he killed the male spouse of a fellow marine's paramour with a shotgun blast to the chest at request of the follow marine.

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id. at 609 tbl.3 for a classification of all of the cases in this study in terms of their status as "military implicated" and "civilian-style" murder. As of November 2010, the military death row also included a case not included in the study or listed in Table 1. Master Sgt. Timothy Hennis, a white male, was sentenced to death April 15, 2010, for a multiple-victim civilian-style murder committed in 1985. *See From Military Times: Death Sentence for Master Sgt.*, MARINE CORPS TIMES, May 3, 2010, at 28.

[63] In Table 1, *Akbar* and *Kreutzer* involved attacks on U.S. troops on duty, while *Akbar*, *Kreutzer*, *Curtis*, and *Quintanilla* involved commissioned officer victims. Note, in this footnote and throughout this paper, we reference the cases of individual defendants by citing their last name in italics in the footnotes. For example, the case of Hassan Akbar is referenced here as *Akbar*. These references point to the case files, coding materials, data collection instruments, and narrative summaries on file with the author. The process for collecting and preparing these materials is explained in Part III.A.3 below. The cases of those defendants who received a death sentence are also summarized briefly in Table 1 and Appendix B.

[64] In Table 1, *Parker*, *Walker*, and *Simoy* otherwise threatened the military mission.

[65] This research note, and the others that follow in this Article, are taken from the narrative summaries on file with the author. *See supra* text accompanying note 63.

Table 1
Death-Sentenced Accused Listed by Year of Sentence and Type of Offense: United States Armed Forces, 1984–2005

A	B	C	D
	Thumbnail Sketches	**Year of Sentence**	**Crime Type**[66]
1	*Dock, Todd A.* Dock robbed a cab driver and then murdered him with multiple stab wounds.	1984	C
2	*Turner, Melvin* Turner murdered his own 11-month-old daughter with a razor blade.	1985	C
3	*Murphy, James T.* Three victims. Murphy bludgeoned his wife with a hammer and then drowned her in the bathtub. He then drowned his 5-year-old stepson who had tried to intervene, and finally drowned his own 21-month-old son.	1987	C
4	*Curtis, Ronnie A.* Two victims. Curtis robbed and stabbed to death his commanding officer and the officer's wife for perceived racial slights.	1987	M
5	*Gray, Ronald A.* Gray abducted, raped, sodomized, beat, and fatally shot an Army private four times. Two and a half weeks later, Gray raped, sodomized, bound, gagged, beat, and fatally stabbed a cab driver. He also raped and attempted to kill an Army private, stabbing her in the neck and side multiple times after tying her hands behind her back.	1988	C
6	*Thomas, Joseph L.* Thomas killed his wife with a tire iron to collect insurance proceeds.	1988	C
7	*Loving, Dwight J.* Loving robbed and fatally shot two cab drivers in the head in one evening and later attempted to kill a third.	1989	C
8	*Gibbs, Curtis A.* Gibbs killed and nearly decapitated a female drinking companion with a sword.	1990	C

[66] "C" denotes "civilian-style" murder while "M" denotes "militarily implicated" murder, which are described *supra* note 62 and accompanying text.

A	B	C	D
	Thumbnail Sketches	**Year of Sentence**	**Crime Type[66]**
9	*Simoy, Jose F.* The accused and four co-perpetrators robbed individuals delivering proceeds to a bank on an airbase and in the process killed a police officer with pipe blows to the head and nearly killed another person. The accused was not the trigger person.	1992	M
10	*Parker, Kenneth G.* Two victims. Motivated by a perceived racial attack on a black marine by white marines, the accused and five co-perpetrators kidnapped, robbed, and killed with a shot to the heart the first white marine they encountered. The accused was the shooter. The second victim was the male spouse of the paramour of a marine friend. The accused killed the second victim with a shotgun blast to the chest.	1993	M
11	*Walker, Wade L.* Two victims. The accused was a co-perpetrator of Kenneth Parker in both of his murders. Walker prevailed upon Parker to kill the spouse of Walker's paramour and was part of the group of marines who participated in the killing of the first white marine they could seize and kill. The accused, Walker, was not a trigger person in either of these murders.	1993	M
12	*Kreutzer, William J.* Kreutzer fired a rifle on his unit while it was in an outdoor drill formation on an Army post; the ambush wounded several others, including at least one officer.	1996	M
13	*Quintanilla, Jessie A.* In retaliation for perceived discriminatory treatment, the accused killed his executive officer with a shot in the back. The accused also attempted to kill his commanding officer with a nearly fatal shot to his chest.	1996	M
14	*Witt, Andrew* Two victims. Witt stabbed to death an airman and the airman's wife after they repeatedly phoned him, alleging sexual misconduct. Witt also stabbed but did not kill another airman on the premises.	2005	C

A	B	C	D
	Thumbnail Sketches	**Year of Sentence**	**Crime Type**[66]
15	*Akbar, Hassan K.* Two victims. At night in wartime, the accused feigned an attack on the unit by rolling live hand grenades into three tents with sleeping officers and opened fire as the occupants fled their tents. The accused killed one officer with a shot in the back. A second officer died of eighty-seven shrapnel wounds. The accused injured fourteen other non-decedent military victims.	2005	M

In contrast, civilian-style murders involving family and acquaintance victims[67] or stranger victims in felony murders[68] pose comparatively little threat to military discipline and control and the effectiveness of the military mission. The following research notes provide good examples of strictly civilian-style murders:

> In 1987, to collect a life insurance payment, Joseph Thomas, a 28-year-old field wireman (Marine Corps E5) with 10 years of military service, along with an accomplice, killed his white wife with a tire iron. They moved the body into Thomas' car and drove the car off a cliff and set it on fire.
>
> Todd Dock, a 19-year-old armor crewman (Army E3) with 3 years of military service, stabbed a

[67] In Table 1, *Gibbs*, *Murphy*, *Turner*, *Witt*, and *Thomas* exemplify this type of civilian-style murder.

[68] In Table 1, *Dock*, *Loving*, and *Gray* exemplify this type of civilian-style murder. These de facto distinctions between types of murder since 1984 are reminiscent of traditional limitations in American and British courts-martial jurisdiction to "military crimes" as distinguished from "civilian crimes." A "military crime" in this context is a crime that has a "reasonably direct and palpable" impact on "good order and military discipline." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 723 (2d ed. 1920); *see also* Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 435 (1960). This might include some crimes that could also be recognized in civilian courts, but if the circumstances in which they occurred "directly affect military relations and prejudice military discipline" they may be considered military crimes. WINTHROP, *supra* at 724. The limitation of jurisdiction to military crimes followed naturally from the perception that the main function of courts-martial jurisdiction, including its most severe punishments, was to maintain military discipline, control, and authority. This rationale was hard to defend when, in 1950, the jurisdiction of military courts-martial jurisdiction, including the use of the death penalty, was expanded to cover both military and civilian murders committed anywhere in the world during both war and peace. The vast bulk of murders committed by military personnel have no military implications and consequently little relevance to the courts-martial goal of maintaining military discipline, control, and authority. Highly aggravated homicides with significant military implications comprise only a small proportion of death-eligible military murders that have been committed since 1950 and more specifically since 1984.

German taxi driver in the neck until he lost consciousness. After the cab came to a stop, Dock dragged the driver's body from the car. At that point, the driver regained consciousness and attempted to grab Dock's arm. Dock then repeatedly stabbed the victim in the abdomen and chest until he died. Dock stole the victim's wallet and fled.

Fifty-three percent (8/15) of the cases in Table 1 involve civilian-style murders that are reminiscent of the civilian-style death-sentenced cases that immediately antedated the adoption of the 1984 executive order.[69] However, since 1990, 86% (6/7) of the death sentences have been imposed in cases with military implications. These data suggest that since 1990 there has been a de facto presumption against the use of capital punishment in civilian-style murders. The only death sentence imposed in a civilian-style murder since 1990 is *Witt*,[70] a brutal two-victim case with five aggravating factors, which plausibly could overcome this presumption. The nearly complete absence of death sentencing for civilian-style murder since 1990 is not explained by the absence of highly aggravated civilian murders since then. Rather, what explains the decline is a substantial shift by convening authorities and members away from death sentencing in civilian-style murders.[71]

C. THE APPELLATE REVIEW PROCESS

The appellate review process following the imposition of a military death sentence commences with the accused's request for clemency by the convening authority, who has complete discretion to reduce both the crime of conviction and its punishment.[72] No comparable authority exists in civilian courts. Convening authorities disallowed the death sentence in two of the fifteen death-sentenced cases in this study.

For death sentences approved by the convening authority, appeals lie to the branch-specific courts of military review, the Court of Appeals of the Armed Forces (CAAF), and the United States Supreme Court.[73] Table 2 classifies appellate outcomes in the fifteen death sentences imposed since 1984 in terms of their risk of execution.

Rows 1 and 2 identify the cases with no continuing risk of execution. Melvin Turner and Curtis Gibbs in Row 1 are the two cases in which the convening authority exercised its clemency authority to overturn the death

[69] *See supra* note 26 and accompanying text.

[70] *See* Case 14 in Table 1.

[71] *See* Grosso, Baldus & Woodworth, *supra* note 62, at 609 tbl.3 (documenting the extreme brutality of many civilian-style murders).

[72] Convening authorities also had the power to reduce a life sentence to a term of years throughout the time period of this study.

[73] In addition, the Supreme Court exercises discretionary jurisdiction over CAAF's decisions. UCMJ, 10 U.S.C. § 867(a) (2006).

sentence. In Row 2, death was taken off the table for seven accused by an appellate military court decision, a decision on remand by the convening authority, or court-martial members in a second capital sentencing hearing.

Table 2
Death-Sentenced Accused Listed by Risk of Execution: United States Armed Forces, 1984–2005

		NO. OF CASES
1	No risk because death sentence was disapproved by Convening Authority (*Turner* and *Gibbs*).	2
2	No risk because death sentence was vacated on appeal and judicial action or a subsequent decision of the convening authority or members removed the risk of reinstatement (*Curtis*, *Dock*, *Kruetzer*, *Quintanilla*, *Simoy*, *Thomas*, and *Walker*).	7
3	Continuing risk because judicial and federal habeas appeals are not exhausted or death sentence was vacated subject to reimposition (*Akbar*, *Gray*, *James Murphy*, *Kenneth Parker*, and *Witt*).	5
4	High risk because military and civilian direct appeals have been exhausted (*Loving*).	1
5	*Total Cases*	15

Row 3 identifies five cases with a continuing risk of execution because military judicial appeals have not been exhausted, the case is in federal habeas corpus proceedings, or the death sentence was vacated subject to reimposition. Row 4 identifies one accused with a high risk of execution because he has exhausted his military and direct appeals to the United States Supreme Court.[74]

[74] Gray v. United States, 532 U.S. 919 (order denying cert.), *reh'g denied*, 532 U.S. 1035 (2001); Loving v. United States, 517 U.S. 748 (1996). President George Bush approved Ronald Gray's death penalty on July 28, 2008, as required under the UCMJ. 10 U.S.C. § 871(a) (requiring that a death sentence be approved by the President before execution). This decision exhausted Gray's direct appeals and allowed him to initiate habeas corpus proceedings in federal courts. *See* Steven Lee Myers, *Execution by Military Is Approved by President*, N.Y. TIMES, July 29, 2008, at A13. However, before Gray filed his first federal habeas petition, the Secretary of the Army scheduled an execution date for early December 2008. Gray then sought and obtained a stay of his execution in federal court with leave to file his first habeas petition, which he subsequently did. *See Execution Stayed for Ex-Soldier Who Murdered Women*, USA TODAY (Dec. 2, 2008, 2:35 PM), http://www.usatoday.com/news/nation/2008-12-02-execution-stay_N.htm.

III. METHODOLOGY

This Part presents the methodology supporting the substantive racial findings presented in Parts IV through VI of this Article.

A. THE UNIVERSE AND SAMPLE

The universe of death-eligible cases between 1984 and 2005 is indeterminate because no branch of the military maintains a record of the death-eligible cases processed through its courts, and no military authority is responsible for tracking such information throughout the system.[75] To identify death-eligible cases we conducted an exhaustive search of every identified data source with information on military homicides.

1. Identifying Potentially Death-Eligible Cases

The first step was to search for the names of all accused who were prosecuted in the military criminal justice system and convicted of a homicide whose cases may have been factually death-eligible. For this purpose, we consulted all reported military court homicide decisions, appellate briefs of counsel in capital military appeals since 1985, a list of all offenders incarcerated for homicide at Fort Leavenworth as of June 2004, all Army homicide convictions from 1986 to 2004 maintained by the Army, and all Army unreported homicide decisions from 1984 to 2004. We also screened the *Army Times*, *Navy Times*, *Marine Corps Times*, and *Air Force Times* since 1984 for the names of accused in reported homicides. Finally, the judge advocates with whom we have had contact during the course of this research brought to our attention several cases based on their personal experiences. This search produced a master list of 440 homicide cases.

2. Collecting Data to Assess the Death Eligibility of Accused in Homicide Cases

The second step in our search for death-eligible cases was to obtain sufficient information on each homicide on our master list to determine the likelihood that the accused was death-eligible. We sought access to the complete military file for each case we deemed likely death-eligible and consulted judicial opinions concerning the accused and their co-perpetrators. We also obtained the full files of co-perpetrators (where appropriate) and media reports of the accused's crimes through extensive online searches.

To bring a case into the study, our standard was "factual" death

[75] The closest approximation to such information is a record maintained by the Army of its murder cases that advanced to a capital court-martial.

eligibility. This required strong evidence that (a) a case that was not capitally charged would, if it had been so charged, have supported a conviction of capital murder and a finding of one or more aggravating factors in the case, and (b) both of these findings would have been sustained on appeal if the sufficiency of the evidence supporting the death eligibility of the case had been challenged. We limited the application of this rule by what we describe as the "controlling fact finding" rule. This rule holds that if a case advances to a court-martial on a capital murder charge but the members find the accused not guilty of the capital offense, the case will not be viewed as death-eligible, even though the evidence would have supported a capital murder conviction on appeal had the members returned a unanimous capital murder verdict. Unless the decision of acquittal on the capital charge appears to have been a clear case of member nullification (and we found no such case), we treated such a judgment as a factual finding that the elements of death-eligible murder were not present in the case.

We identified eight cases that appeared to be factually death-eligible in the eyes of the convening authority where the defendants were charged with capital murder, but the members acquitted on the capital charge and instead found liability for a lesser-included non-capital form of murder or manslaughter.[76] Because we saw no evidence of jury nullification in those cases, they were excluded from the portion of the study that focused on the death-sentencing outcomes. However, we included these cases in our analysis of convening authorities' charging decisions.[77] For those analyses, therefore, our sample of cases included 105 cases.

We excluded one factually death-eligible case that was committed abroad in a country that would not surrender custody of the accused until the United States agreed that the case would not be referred capitally.[78] We

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[76] For example, five were found guilty of non-capital murder under Article 118(2) of the UCMJ (*Burkes*, *Chrisco*, *Groveman*, *Shelton*, and *Tarver*). 10 U.S.C. § 918(2). There are eleven other cases in the study that might have been implicated by the controlling fact-finding rule. In these cases, the members found the accused guilty of capital murder under Article 118(1), but the guilt finding was not unanimous and lack of unanimity precludes a death sentence. 10 U.S.C. § 918(1). We decided, for the purposes of this study, that the capital murder conviction distinguishes these cases from those convicted of lesser offenses and supports a finding of death eligibility.

[77] Four of the eight cases (*Burkes*, *Chrisco*, *Hamilton*, and *Tarver*) advanced to a guilt trial with the government seeking a death sentence.

[78] United States v. Youngberg, 38 M.J. 635 (A.C.M.R. 1993), *aff'd*, 43 M.J. 379 (C.A.A.F. 1995) (finding that the German authorities refused to release jurisdiction of Lawrence Youngberg until the death penalty was waived in writing); *see generally* Kathryn F. King, *The Death Penalty, Extradition, and the War Against Terrorism: U.S. Responses to European Opinion About Capital Punishment*, 9 BUFF. HUM. RTS. L. REV. 161 (2003) (discussing *Youngberg*); John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S. Military Death*

also excluded approximately four cases that, on the basis of news reports, appeared likely to be factually death-eligible under military law, because the military authorities deferred to the jurisdiction of civilian authorities who sought to prosecute them. All of these crimes were committed off the accused's military facility, had no military implications, and normally were sufficiently aggravated to attract substantial attention in the civilian community in which they were prosecuted.[79] Because none of these cases resulted in a criminal prosecution by U.S. military officials, they were excluded from our sample of death-eligible cases.[80]

Appellate courts vacated three of the death sentences in our sample on appeal, and convening authorities then prosecuted the cases a second time. Because of the first prosecution and death sentence, there is legitimate concern about the independence of the second charging decision.[81] Due to our small sample size, we included these three cases in our primary analyses of charging decisions. We replicated the final analysis without these three cases, and their elimination had no impact on the results.

Penalty in Europe: Threats from Recent European Human Rights Developments, 129 MIL. L. REV. 41 (1990) (same).

[79] For example, Sgt. Cedric Ramon Griffin, the only one of four Fort Bragg soldiers accused of killing their wives in less than six weeks who did not commit suicide, was prosecuted in state court. These murders garnered widespread national attention. *News Breaks: Bragg Sergeant Indicted in Stabbing*, ARMY TIMES, Jan. 13, 2003, at 5, *available at* http://www.armytimes.com/legacy/new/0-ARMYPAPER-1443024.php; *see* Jane McHugh, *Emotional Wounds Still Raw One Year After Bragg Slayings*, ARMY TIMES, Aug. 4, 2003, at 18 (discussing a widely reported series of spousal murders at Ft. Bragg in North Carolina and noting that Cedric Ramon Griffin, a cook with the U.S. Army XVIII Airborne Corps, was being prosecuted by the Cumberland County district attorney for stabbing his estranged wife, Marilyn, fifty times and then dousing her with a flammable liquid and setting her on fire); David Enders, *Convicted Killer Sentenced in 3 More*, S. BEND TRIB., July 4, 2001, at D4 (reporting that Navy sailor John Eric Armstrong was convicted in state court of killing at least five prostitutes); *Navy Man Pleads Not Guilty in Deaths*, L.A. TIMES, July 31, 1992, at B2 (noting that Sailor Eric Charles Lockhart was prosecuted in state court for the murder of two prostitutes in San Diego on June 20, 1992); Glenn Smith, *Killer Gardner Executed*, CHARLESTON POST & COURIER (Dec. 6, 2008), http://www.postandcourier.com/news/2008/dec/06/killer_gardner_executed64233/ (reporting that on December 5, 2008, South Carolina executed a sailor for the 1992 rape, torture, and murder of a twenty-five-year-old woman); Ian Urbina, *Retired F.B.I. Agents Join Cause of 4 Sailors Convicted in '97 Rape-Murder*, N.Y. TIMES, Nov. 11, 2008, at A14 (discussing state prosecution of four sailors for rape and murder).

[80] If one views the civilian-style murder cases in which prosecution was waived by the military to civilian courts to be considered part of our universe of death-eligible cases, we have no basis for believing that our eighty-five case sample of civilian-style cases that were actually prosecuted by the military is not a random sample of the entire universe of civilian-style death-eligible cases.

[81] In two of the cases, *Turner* and *Gibbs*, the convening authority waived the death penalty in a pretrial agreement in the early stages of the second prosecution.

Additionally, because military sentencing is done by court-martial members, there is little or no risk of a lack of independence in their decisions. For this reason, we included the second prosecution in one case[82] in our analysis of the imposition of death sentences in capital sentencing hearings.

Our final sample consisted of ninety-seven death-eligible cases, thirty of which advanced to a capital sentencing hearing; of these, fifteen resulted in a death sentence. Eighty of the ninety-seven death-eligible cases involved one or more white victims.[83]

3. Data Collection and Entry

For every case identified as death-eligible and included in the study, we sought access to the accused's full file from the National Records Center in Suitland, Maryland. Army, Navy, and Marine Corps judge advocates facilitated this effort and permitted our interns to copy relevant portions of the files in their offices in Washington, D.C. Air Force judge advocates facilitated our access to their files through the Freedom of Information Act (FOIA). Without the support of these officers, for which we are grateful, we could not have conducted this study.

For each full case file that we accessed, law student interns in the District of Columbia copied the relevant portions of the case files. This copying process was directed by a protocol prepared by the investigators of this study. Moreover, the investigators trained the interns who did the copying in Washington, D.C., at the outset of their internships. They also received long-term on-the-job training from the Army, Navy, and Marine Corps judge advocates in whose offices they copied the cases. For the Air Force cases that were copied through our FOIA request, we submitted the same copying guidelines for the personnel copying the cases.

We could not locate full files for certain cases at the National Records Center or otherwise. For those cases, we relied on the information found in military judicial opinions and the information that we could find online in the media, including military newspapers, such as the *Army Times*, and local newspapers. Law students at the University of Iowa College of Law coded the data on each case into a fifty-three-page detailed data collection instrument (DCI) prepared by the investigators.[84] This process produced a

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[82] *Dock*.

[83] *See supra* note 3 and accompanying text (explaining the distinction between the 105 "potentially death-eligible" case sample and 97 "factually death-eligible" case sample); *infra* note 112 and accompanying text (discussing the implications of sample size issues in this study).

[84] Copies of the Data Collection Instrument (DCI) are available from the authors upon request.

machine-readable database for all of the cases in the study. With this information, we created recoded variables that are suitable for statistical analysis. Appendix A reports the distribution of our data for each of these recoded variables for each of the ninety-seven death-eligible cases in our sample. The coders also prepared a detailed narrative summary of each case.

B. ANALYSIS

This Section provides details on each method of analysis and each measure of culpability used in the study.

1. Overview

We estimated racial disparities in the imposition of death sentences among all death-eligible cases. We then focused separately on (1) convening authority decisions advancing cases to a capital court-martial, (2) members' unanimous capital murder convictions advancing cases to a capital sentencing hearing, and (3) members' death-sentencing decisions in capital sentencing hearings. All of these decisions combine to produce the racial disparities documented in the first step, the threshold analysis of death sentencing among all death-eligible cases. The threshold analysis considers only whether a case ultimately received a death sentence.

2. Unadjusted Disparities

We commenced each phase of the analysis with estimates of unadjusted racial disparities that take no account of the differential culpability levels of the accused. These analyses focus on minority-accused disparities, white-victim disparities, and minority-accused/white-victim disparities.[85]

3. Adjusted Disparities

We principally used three different methods to control for the culpability of cases: logistic regression, a regression-based scale, and a salient factors scale. This section explains these three alternative measures of offender culpability.

i. Logistic Regression Analysis

For each stage in the analysis, our first set of controls was a logistic regression model based on legitimate non-racial variables and race

[85] The unadjusted disparities at various points in the system are reported in Figures 2 and 3, and in Column C of Tables 3, 5, 7, 9, 11, and 12.

variables.[86] At each stage, we considered a large number of candidate variables for inclusion in the model. In screening variables for inclusion, our goal was to produce a legally acceptable model to verify whether any unadjusted racial disparities persisted, declined, or disappeared upon adjustment for measures of criminal culpability.[87]

These models document the linear effect of each variable, meaning the enhanced or diminished *probability* that, on average, the applicable charging or sentencing outcome will occur when a variable is present in the

[86] We developed three core models that focus on specific outcomes. The first model (Table 4) focused on death-sentencing outcomes among all death-eligible cases. The second model (Table 6) focused on the decisions of convening authorities advancing death-eligible cases to a capital court-martial with the government seeking a death sentence. The third model (Table 10) focused on the advancement of death-eligible cases to a capital sentencing hearing, an outcome that is the product of convening authority charging decisions and members' court-martial guilt decisions. For the first two models, we commenced the analysis with a four-variable, legally coherent "threshold" model informed by what we learned in a quantitative analysis of the statutory aggravating factors, a close reading of narrative summaries of each case, and the perceptions of judge advocates. For each analysis the point of departure was a model consisting of the number of statutory aggravating factors, multiple victims, great danger to non-decedent victims, and an accused/victim relationship salient factor. We then produced an index that, for each case, carried the information on the four threshold variables. With this in place, we screened hundreds of additional candidate variables, listed in Appendix A, for possible entry into the core model. For this purpose, we conducted a partial correlation analysis, which controlled for the index, and screened the candidate variables to identify any that demonstrated a statistical relationship with the outcome variable at the .10 level or beyond after controlling for the index. For the death-sentencing screen, we identified eleven variables that met this test, and for the analysis of the convening authority decisions, we identified thirty-three such variables. In this process, we limited consideration of race-neutral candidate variables to those whose impact was in the expected direction, i.e., aggravating factors that increased the likelihood of an adverse outcome and mitigating factors that reduced the likelihood of an adverse outcome. We then entered the candidate variables that met this test along with the four variables included in the threshold index into a stepwise regression analysis to identify the variables that continued to show a significant relationship with the outcome variable at the .15 level or beyond after controlling for the other variables in the model. For the third model, which focused on the advancement of cases to a capital sentencing hearing, we started with the variables contained in the first two models and screened the database for additional variables that could enter the model with a p value of .10 and could remain in the analysis at the .15 level. For our analysis of the members' thirty capital sentencing decisions, we used the model estimated for death sentencing among all death-eligible cases to control for accused culpability.

[87] *See, e.g.*, David Baldus et al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 153, 174–75 (Charles S. Lanier, William J. Bowers & James R. Acker eds., 2009) (stating that the variable screening process "should be viewed as a method of verifying whether racial and/or geographic disparities derived from models selected a priori on the basis of the law of the jurisdiction . . . are not accounted for by other variables"). We consider this subject further below. *See infra* note 104 and accompanying text.

case, after controlling for all other variables in the model.[88] For example, our core analysis of death sentences imposed among all death-eligible cases indicates that, on average, accused in multiple-victim cases had an adjusted 18-percentage-point higher probability of being sentenced to death than accused in single-victim cases.[89]

Logistic regression analysis produces another measure of impact estimating the extent to which the presence of individual case characteristics enhance or diminish the *odds* rather than the probability that a given outcome will occur. For example, in the multiple-victim analysis noted above, the adjusted 8.3 "odds ratio" or "odds multiplier" estimated that, on average, the odds of a death sentence being imposed were 8.3 times higher in multiple-victim cases than they were in single-victim cases. We also report the odds ratios.[90]

ii. Regression-Based Scale

On the basis of these logistic regression results, we created our second culpability measure—three five-level scales.[91] Although these scales are

[88] In this procedure, we used the fully specified regression models to estimate a "culpability index" that reflected the probability (denoted p-hat, or $\hat{p}$) of an adverse outcome on the basis of "race purged" legitimate variables for each member of the relevant racial subgroups. We took three steps to purge the index of race effects. First, we estimated the models with both racial and race-neutral variables included in the model. Second, we omitted the coefficients for the race variables in the construction of the culpability index. However, we used coefficients for the race-neutral variables that had been estimated in a model that included the race variables. This assures that the race-neutral variables will have no indirect racial effect on the index if they are highly correlated with the race variables.

On the basis of this culpability index, the average estimated probability of a death sentence was 23% for minority accused, while the average estimated rate for white accused was 11%. These predictions for each racially defined group of cases are known as "standardized" estimates because they have been adjusted to account for the culpability level of each case as determined by the culpability index produced by the regression analysis. The 12-point difference between the standardized estimates for the two groups (23% compared to 11%) is the "adjusted" linear racial disparity based on the race of the accused.

[89] The adjusted linear race effects for four models are reported in Column C of Tables 4, 6, 8, and 10. They are also reported in Column D of Tables 3, 5, 9, 11, and 12.

[90] The odds multipliers for our three core models are reported in Column D of Tables 3, 5, and 9. Because many readers lack familiarity with odds-based disparities, in this Article we rely principally on the linear-based measures of impact estimated in logistic regression analyses and secondarily on odds multipliers.

[91] The scaling process begins with the culpability index produced by the logistic model mentioned above. We sorted the cases into five levels based on the culpability index score estimated for each case. We then estimated a racial disparity within each cell and combined those disparities to compute a weighted average of the disparities across all of the cells. Mantel–Haentzel is the procedure we use to create these overall estimates. *See* Nathan Mantel & William Haenszel, *Statistical Aspects of the Analysis of Data from Retrospective Studies of Disease*, 22 J. NAT'L CANCER INST. 719 (1959) (establishing this methodology).

substantially based on regression results, the process by which race effects are estimated with these scales is more transparent than the regression analysis. Also, the validity of the estimated disparities is more verifiable through close analysis of the facts of the cases that we define as similar in terms of accused culpability. Each of these scales discriminates well in predicting charging and sentencing outcomes.[92]

iii. Salient Factors Scale

Our third measure of accused culpability is a six-level scale based on three salient case factors that bear on offender culpability.[93] This

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The assumption that the cases in each cell are comparable can be tested by qualitative assessments of the facts of the cases in each cell. If misclassifications are detected they can be corrected with the estimation procedure repeated to see if the "corrections" make a difference in the magnitude and statistical significance of the estimated racial disparities.

[92] For the scale based on the imposition of death sentences among all death-eligible cases, the death-sentencing rate among the two least aggravated levels of the scale was 0% (0/42) and for the two most aggravated levels on the scale the rate was 42% (14/34). For the scale based on the advancement of cases to a capital court-martial, the advancement rate was 0% (0/23), 13% (3/23) for the two least aggravated case categories, and 71% (15/21) and 100% (18/18) for the two most aggravated case categories. For the advancement of cases to a capital sentencing hearing the scale rates ranged from 5% (1/20) for the least aggravated cases to 83% (15/18) for the most aggravated cases.

[93] We created three salient-factor-based measures designed to capture what we perceive to be military perceptions of criminal culpability based on the statistical evidence, discussion with military officers, and our reading of the narrative summaries and records of the cases and their charging and sentencing outcomes. We describe them as (1) the vileness factor, (2) the accused/victim relationship factor, and (3) the high aggravation factor.

The vileness salient factor has three levels: low, medium, and high. The default is low. An offender receives a medium classification if the case involves a rape, robbery, sodomy, or burglary, or a racial animosity motive. If, in addition to a homicide, a case involves multiple victims, an ambush, or a serious threat of death or bodily injury to non-decedent victims, then the case receives a high classification. For the purpose of creating the six-level overall measure, the three levels are scored 0, 1, 2.

The accused/victim relationship salient factor has three levels—(1) victim is a family member or acquaintance of the accused, (2) victim is a stranger to the accused, and (3) the victim is a military police or commissioned officer. The third category is broader than the aggravating factor based on an officer victim because it includes officer-victim cases whether or not they were acting in the execution of their office. The data and the opinions of officers with whom we have spoken suggest that killing an officer is a highly aggravated military offense whether or not the officer is acting in the "execution" of his or her office. For the purpose of creating the six-level overall scale three levels of this factor are also scored 0, 1, 2.

The third salient factor distinguishes between cases with a single statutory aggravating factor and multiple aggravating factors. For the purpose of creating the six-level overall scale, the two levels of this salient factor are scored 0 and 1.

The six-level salient factors scale is based on the sum of the scores for the three salient factors. The procedure for creating the scale is modeled after one based on three comparable salient-factor variables developed by Arnold Barnett with Georgia data from the 1970s.

culpability measure is completely independent of the regression results. It also lends itself to validation through qualitative assessments of the cases deemed to be comparable by the procedure.[94] The measure also discriminates very well in explaining charging and sentencing outcomes.[95]

Our assessment of the risk of systemic race effects overall and at each stage of the process depends on the magnitude, statistical significance, and consistency of the estimated racial disparities. Particularly important in this regard is the consistency of the disparities estimated with controls for the salient factors scale and the disparities estimated with controls for the two regression-based measures of criminal culpability.[96]

4. Other Approaches

We conducted a comparable analysis of death-sentencing disparities among the sixteen multiple-victim cases in the database, which have an unusually high death-sentencing rate (50%) and account for 53% (8/15) of the death sentences imposed since 1984.[97] In this analysis, we applied an additional measure of offender culpability based on the qualitative assessments of five law students who analyzed the comparative culpability of the sixteen multiple-victim cases.[98]

We also conducted case-specific quantitative and qualitative analyses, in which we assessed the risk of racial prejudice in the ten minority-accused cases that resulted in a death sentence. This analysis is based on an analysis of charging and sentencing outcomes in cases with levels of criminality that are comparable to each death-sentenced minority defendant.[99] Finally, we estimated race effects in sentencing outcomes among the sixty-six death-eligible cases that did not advance to a capital sentencing hearing as a basis for comparing those racial effects with the racial effects documented among the cases that did advance to a capital sentencing hearing.[100]

BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 94–95, 575–77.

[94] We produced the overall racial estimate with this measure by computing a weighted average of racial disparities across the six levels of this scale in exactly the same way that we apply the five-level regression-based scales.

[95] The death-sentencing rate among the cases in the two least aggravated categories was 6% (3/47), although it was 50% (4/8) and 80% (4/5) respectively in the two most aggravated case categories of cases.

[96] In Tables 5, 9, 11, and 12, the disparities estimated with the regression-based coefficients and scale are reported in Columns D and E and the disparities based on the salient-factors scale are reported in Column F.

[97] The results of the multiple-victim analysis are presented in Part IV.G.

[98] The procedure is described in more detail later in the Article. *See infra* text accompanying note 173.

[99] The results of this analysis are presented in Part V.

[100] In this analysis, reported in Part VI, we first estimated racial disparities in the

We conducted generally accepted diagnostics for the six logistic multiple-regression models that are the centerpiece of our analysis of racial disparities. If a regression diagnostic suggested a possible problem, we took corrective measures to determine if the suggested modification affected the magnitude and statistical significance of our core findings.[101]

5. Methodological Issues

In this Section we consider methodological issues that may be of interest to social science methodologists and statisticians.

i. Adjustment and Modeling

The first issue concerns the importance of adjusting the unadjusted racial disparities that we estimate in this Article with multivariate statistical analyses that control for offender culpability. We agree with Professor John Tukey's argument in an influential paper[102] addressed to professional statisticians that in an observational study, which focused on the impact of an anesthetic (halothane) on surgical mortality rates, "adjusting for a variety of covariates was essential. Otherwise, the results of the analysis [of anesthetics] might have been dominated by the practices of anesthesiologists, rather than by the effects of different anesthetics. Here defense is not at all a casual matter: it is vital."[103] Similar concerns convinced us of the importance of adjusting all of our important racial disparities for the criminal culpability of the accused involved in each analysis.

The second issue concerns the behavioral accuracy of the models and measures of offender culpability on which we based our adjusted racial disparities. In this regard, it is important to recognize that we are not attempting to construct a behaviorally correct model of the military charging and sentencing system. Instead we are investigating the simpler question of whether unadjusted racial disparities can be explained away by

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sentences of life imprisonment versus a term of years. Among those sentenced to a term of years, we estimated racial disparities in the length of those sentences.

[101] A typical diagnostic recommendation is that the removal of certain cases from the analysis would improve the "fit" of the model. Adjustments of this type based on the extensive diagnostics that we conducted had no material effects on our substantive findings.

[102] John W. Tukey, *Use of Many Covariates in Clinical Trials*, 59 INT'L STAT. REV. 123 (1991). One example mentioned in this paper is the 1969 National Halothane Study, which investigated the disparity in death rates between patients receiving the anesthetic halothane and those receiving other forms of anesthesia.

[103] *Id.* at 133. At another point Tukey states: "The main purpose of allowing for covariates [in the halothane study] . . . is defensive: to make it clear that analysis has met its scientific obligations . . . . If we must lose some sensitivity, so be it." *Id.* at 136. "Sensitivity" here means a small margin of error. *Id.* at 131.

the presence or absence of some combination(s) of legally relevant, legitimate case characteristics.[104]

With respect to adjustment methodology, Tukey urges restraint, but not abstention, in using regression methods for statistical adjustment.[105] He also strongly recommends using composite covariates as a complement to and a check on regression methods, advice we endorse and have followed in the analysis reported in this paper. Tukey proposed two broad methods for constructing such composites: weighted sums and "smear and sweep."[106] We used weighted sums.[107]

ii. The Identification of Non-Racial Control Variables to Include in the Logistic Regression Analysis

In addition to meeting potential statistical challenges, we believe that capital charging and sentencing studies must also meet standards of legal acceptability.[108] In our screening of candidate variables for inclusion in the logistic regression models and the creation of our salient factors scale, we did two things to meet this requirement. First, we based the foundations of the culpability measures on legally mandated case characteristics. We also constructed a composite that we call the "salient factors scale," based entirely on statutory relevance and expert knowledge of how the charging and sentencing system does and should operate.[109]

Second, experience indicates that exclusive reliance on tests of statistical significance as a basis for screening variables for inclusion in regression models can produce erroneous substantive results.[110] With this

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[104] Baldus et al., *supra* note 87. The following two quotes from Tukey are of particular relevance to this issue: "There is no sense in which such a composite *need* be supposed to be '*correct*' when it is used for adjustment. *We are not using regression to help reveal behavior (still less to reveal mechanism)! We are using it for adjustment* . . . ." Tukey, *supra* note 102, at 129. "[W]e are likely to be able to find a very useful composite without coming close . . . to the truly behavior-describing composite." *Id.* at 131 (emphasis omitted).

[105] Tukey, *supra* note 102, at 127–28.

[106] *Id.* at 132–36.

[107] Tukey mainly discusses binary covariates representing the presence or absence of a case characteristic. For these he suggested giving the presence of a characteristic a "score," or "weight," in the range -4 to +4, with the weight derived from the *p*-value of that characteristic as a predictor of the outcome variable. Our "regression-based" composite measure is based on a very similar method. *Id.* at 124.

[108] The theme of "sociological" acceptability in the creation of logistic regression models is developed in Adrian E. Raftery, *Bayesian Model Selection in Social Research*, 25 SOC. METHODOLOGY 111, 157 (1995) ("Theory is essential and should be used to the greatest extent possible to define the model to be used.").

[109] *See supra* text accompanying note 93.

[110] Raftery, *supra* note 108, at 155–56 ("When there are many candidate independent variables, standard model selection procedures [based strictly on *p*-value assessments] are

in mind, we assessed candidate variables not only on the basis of their impact on the goodness of fit of the models, but also on the basis of our a priori understanding of military law and how the system should operate and did operate in fact. So guided, we rejected candidate variables that were statistically significant in the model but had a "perverse" sign (e.g., a statutory aggravating circumstance with a negative sign suggesting that it had a mitigating effect in the system) and included some statistically insignificant variables whose effect was substantial and consistent with theory.[111]

iii. Sample Size Limitations on the Number of Control Variables Included in the Logistic Regression Analysis

Although our sample includes the entire universe of death-eligible cases prosecuted in the Armed Forces during the period of our study, the total sample (n = 97) is small compared to similar studies of state court capital charging and sentencing. Also, death sentences were imposed in only fifteen (15%) of the cases, and the estimated race-of-victim effects are based on a sample of only seventeen (17%) non-white-victim cases.

The small number of military death sentences imposes limits on the number of racial and non-racial variables (covariates) that may be included in a logistic regression analysis. Professor Tukey reports a broad spectrum of opinion among statisticians, from "optimist" to "pessimist" in terms of the number of covariates that may be included in a logistic regression model. He summarizes this opinion to the effect that each additional covariate added to a regression model in effect reduces the "equivalent number of rarer endpoints" by from "one or two" to "at least 10 rarer end points for each parameter fitted."[112] In our military study, the "rare endpoint" is the more punitive outcome at each decision point.[113] Thus, under the two "rare endpoints" test per covariate, the appropriate number of explanatory variables for our model of death sentences imposed among all death-eligible cases would be 7.5 (15/2). We share these concerns and, in the construction of our regression models, strived to follow the guidelines referred to by Tukey. In those models, the ratio of death sentences to

misleading and tend to find strong evidence for effects that do not exist.").

[111] *See* Table 4 (number of statutory aggravating circumstances found or present in the case), Table 6 (accused hid a dying victim), Table 8 (defense of self or other invoked by the accused), and Table 10 (murder had military implications).

[112] Tukey, *supra* note 102, at 124.

[113] In particular, the rarer endpoints are: (1) fifteen death sentences imposed among all ninety-seven death-eligible cases, and (2) among these death-eligible cases, thirty advanced to a capital sentencing hearing.

covariates ranged from 1.9 to 5.2.[114] Because our models fall on the low end of the guidelines accepted by statisticians, we place particular weight on our composite culpability scales, one of which—the salient factors scale—is completely independent of multiple regression results.

The comparatively small number of non-white-victim cases (n = 17) also affects the number of non-racial explanatory variables that may be included in a multiple regression analysis with the white-victim variable included. The potential of the non-racial variables (covariates) to explain away the white-victim effect has the same implications for the total number of variables included in the model as the capacity of the model to predict an outcome variable with a small number of adverse outcomes, such as the imposition of capital punishment. The same concern applies to the application of our offender-culpability scales to the extent they could explain away the race-of-victim effect.[115] Therefore, statistical practice, as reported by Tukey, suggests at a minimum no more than one non-racial explanatory variable per two non-white-victim cases, a test all of our regression models met.

The effect of the unbalanced distribution of non-white-victim cases is to increase the standard deviation (margin of error) of the racial disparity estimate. However, this is not a hidden flaw because the increased standard deviation announces itself through the level of statistical significance (*p* value) reported for the white-victim disparity. The magnitude of the *p* value for the race-of-victim effect bears directly on the strength of the evidence that the race of victim is a factor in the relevant charging and sentencing decisions.

IV. EVIDENCE OF SYSTEMIC RACIAL DISPARITIES IN CAPITAL CHARGING AND SENTENCING DECISIONS

In our analysis of racial disparities in the system, we focus first on evidence of systemic race disparities in the imposition of death sentences among all death-eligible cases. This is a disparate treatment inquiry, in which the focus is on evidence of a pattern and practice of purposeful

[114] Specifically for our model of death sentencing among all death-eligible cases (Table 4), the ratio of death sentences to parameters fitted was 1.9 (15/8). For the model of charging decisions (Table 6), the ratio was 4.4 (41/10); for the model of unanimous guilt trial verdicts (Table 8), the ratio was 5.0 (30/6); and for the advancement of cases to a capital sentencing hearing (Table 10), the ratio was 3.3 (30/9).

[115] This would occur under a culpability scale if, at each level of the scale, the white- and non-white-victim cases were treated the same or there were only white- or only non-white-victim cases at each level of the scale. In fact, this did not occur for our three culpability scales, with the exception of one level of the six-level salient-factors scale that contained a total of five cases but no non-white-victim cases.

differential treatment of similarly situated accused. There is no suggestion here that any participant in the military criminal justice system consciously and knowingly discriminated on the basis of the race of the accused or the victim. However, there is substantial evidence that many actors in the U.S. criminal justice system are unconsciously influenced by the race of defendants and their victims.[116]

Although the mechanism by which unconscious discrimination affects capital changing and sentencing outcomes is not fully understood, Justice Byron White in *Turner v. Murray* expounded one theory with particular relevance to this research.[117] His argument is straightforward: the risk of racial prejudice against black and minority defendants in capital cases is substantially enhanced when the victim is white and the case is highly aggravated.[118]

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[116] We define purposeful discrimination in this study as the differential treatment of similarly situated defendants that cannot be explained by race-neutral case characteristics. The literature suggests that these racial disparities are the product of stereotypes and other racially based preconceptions that unconsciously influence decisionmaking. *See* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Racial Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). Unconscious racial discrimination is also recognized in the courts. For example, in a memorandum prepared for the other members of the United States Supreme Court in connection with *McCleskey v. Kemp*, 481 U.S. 279 (1987), Justice Scalia refers to the "*unconscious* operation of irrational sympathies and antipathies, including racial" on prosecutorial and jury decisionmaking. David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994) (emphasis added).

[117] Turner v. Murray, 476 U.S. 28 (1986).

[118] *Id.* at 35. In Justice White's view, racial bias in such cases takes two forms. First, it can *inflate aggravation*—by erroneously and improperly *increasing* the risk that a fact-finder will find that a defendant was *more culpable* than was factually the case. Second, it can *deflate mitigation*—by erroneously and improperly *decreasing* the weight that a fact-finder places on the mitigation that is factually present in the case. *Id.* This form of bias is consistent with stereotypical perceptions of minorities, such as the violence-prone and moral-inferiority stereotypes mentioned by Justice White. The second form of bias (deflating mitigation) is also consistent with stereotypical perceptions of minorities, whereby the race of the defendant and victim may affect the empathy of fact-finders toward each. Moreover, Caucasian charging and sentencing authorities may be more likely to identify sympathetically with white defendants than with black defendants and to identify more strongly with white victims than with black victims, thereby producing a more punitive response in the white-victim cases. *See* CRAIG HANEY, DEATH BY DESIGN 205 (2005) (explaining that in experiments conducted by the author and colleagues, student jurors "rendered significantly more death sentences if the defendant was African American and if his victim was white. When we tried to determine how and why this occurred by asking

At each stage of our analysis of racial disparities, we first consider "unadjusted" disparities in charging and sentencing outcomes that ignore differential levels of accused criminal culpability. When such disparities appear, we test two rival hypotheses. The first is that the disparity is a product of chance operating in a race-neutral system. We test the plausibility of this hypothesis by measuring the disparity's statistical significance, which indicates the probability that the documented race effect could arise by chance in a race-neutral system.

Because our sample includes virtually all death-eligible cases prosecuted in the system between 1984 and 2005, some may argue that the study includes the "universe" and therefore that tests of statistical significance are irrelevant. From this perspective, the only relevant consideration is the magnitude of the racial disparities. We agree that statistical tests are less important when the database includes the universe of cases than when the database is a random or stratified sample of a clearly defined universe. However, we view the military cases that provide the basis for this study as a sample of the operation of the military system over time or as a sample of cases that could have been prosecuted during the relevant time period.[119] We also believe that highly discretionary decisionmaking in a military criminal justice system is subject to random and unpredictable impacts whose potential effects can be assessed with tests of statistical significance. For both these reasons, we believe that tests of statistical significance provide important evidence in assessing racial disparities. However, we reject the view that disparities that do not meet a .05 or .10 level of statistical significance are irrelevant. In studies such as this, involving the universe of cases during a prescribed period of time, causal inference should be based on both the magnitude of the estimated effects and their statistical significance.

The second rival hypothesis is that the race disparity in the treatment of racially defined groups of cases is the product of differential culpability levels in different cases rather than the race of the accused and their victims. To test this hypothesis, we compute adjusted racial disparities that control

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participants in each condition to explain their sentencing decisions, we found that white participants interpreted aggravating and mitigating circumstances differently as a function of the racial characteristics of the case. In particular, they tended to weigh aggravating circumstances more heavily when the defendant was African American. Similarly, they were reluctant to attach much significance at all to mitigating circumstances when they were offered on behalf of an African American defendant."). We test the plausibility of this theory in the military system in our analysis of sixteen multiple-victim cases presented in Section G of this Part.

[119] *See* RAMONA L. PAETZOLD & STEVE L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 2.06 (2010). Federal courts generally apply statistical tests in assessing disparities based on the "universe" of cases.

for the comparative levels of accused culpability and deathworthiness among the cases in each analysis.

A. RACIAL DISPARITIES IN THE IMPOSITION OF DEATH SENTENCES AMONG ALL DEATH-ELIGIBLE CASES

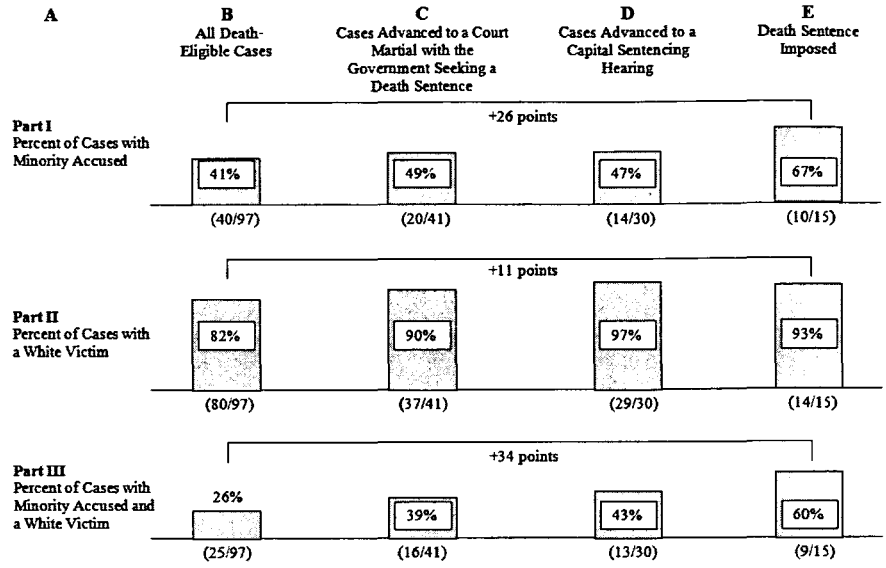
This Section presents our analysis of what we have called the "threshold inquiry," death sentencing among all death-eligible cases. This analysis considers the combined impact of all decisionmaking as reflected in the imposition of a death sentence.

1. Unadjusted Racial Disparities

Figures 2 and 3 present an overview of potential race effects as the cases advance through the system. They document at successive stages in the process the representation rates for each subset of cases, meaning the proportions of minority-accused, white-victim cases, and minority-accused/white-victim cases at each stage of the process.[120] For example, Part I of Figure 2 indicates that minorities comprised 41% of the accused in all death-eligible cases (Column B), while they comprised 67% of the fifteen death-sentenced offenders (Column E). This 26-point difference in representation rates (reported between Column B and E) indicates that as they move through the different stages of the charging and sentencing process, which are indicated in Columns C through E, minority accused face a higher risk of unfavorable outcomes than do white accused. Part II, which focuses on white-victim disparities, reports a smaller 11-percentage-point disparity between Columns B and E. In contrast, Part III reports a substantial 34-percentage-point minority-accused/white-victim disparity. A comparison of the 26-point minority-accused disparity reported in Part I and the 11-point white-victim disparity reported in Part II suggests that the 34-point minority-accused/white-victim disparity reported in Part III is principally the product of the 26-point minority-accused disparity reported in Part I.

[120] A "representation rate" is the proportion or percentage of a population with a given characteristic that has received a favorable or unfavorable outcome, e.g., minorities account for 67% (10/15) of death-sentenced accused in this study. In contrast, a "selection rate" indicates the proportion of a defined subpopulation that receives a favorable or unfavorable outcome, e.g., 26% (10/39) of death-eligible minorities in this study were sentenced to death.

Figure 2
Evidence of Racial Disparities in Capital Charging and Sentencing Among All Death-Eligible Cases: U.S. Armed Forces, 1984–2005[121]



Three items in Figures 2 and 3 should be underscored. First, of the thirty cases that advanced to a capital sentencing hearing, all but one included one or more white victims.[122] Second, of the fourteen minority-accused cases that advanced to a capital sentencing hearing, all but one, or 93% (13/14), involved one or more white victims.[123] Every death-sentenced case at risk of execution as of August 2010 had one or more white victims.[124]

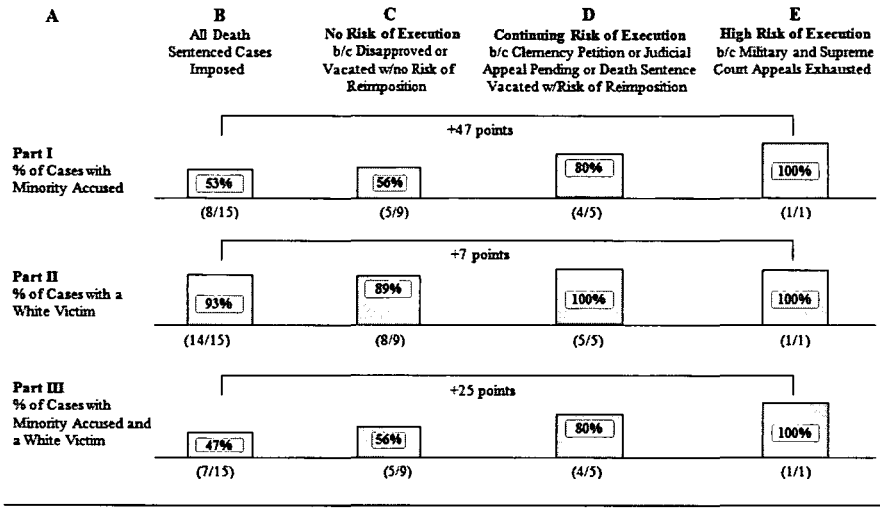
[121] The percentage-point measure between Columns C and D for each part indicates the increase in the rates of representation between Columns B and F. For example, the "26 points" notes in Part I indicates that the proportion of minorities among those sentenced to death (Column E) is 26 percentage points higher than the proportion of minorities among all death-eligible accused, i.e. 67% in Column E v. 41% in Column B.

[122] Figure 2, Part II, Column D.

[123] Figure 2, Part I, Column D indicates that fourteen minority accused advanced to a capital sentencing hearing and Part III, Column C indicates that thirteen of those cases involved a white victim.

[124] Figure 3, Part II, Columns D and E.

Figure 3
Racial Characteristics of Accused and Victims in Death-Sentenced Cases Broken Down by Risk of Execution as of August 2010: United States Armed Forces, 1984–2005[125]



Column C of Table 3 presents the unadjusted racial disparities based on death-sentencing rates among all death-eligible cases estimated for six racially defined subgroups of cases. Part I, Row (c) of Column C reports a 16-percentage-point independent minority-accused disparity in the risk of receiving a death sentence, with a 2.8 relative risk (Part I, Row (d)) that is statistically significant at the .05 level. Part II, Rows (c) and (d) report an 11-point white-victim disparity and a relative risk of 2.8 that are not statistically significant at the .10 level. Part III, Rows (c) and (d) report a 28-point minority-accused/white-victim disparity and a relative risk of 4.5 that are statistically significant at the .01 level.

[125] The percentage-point measure between Columns C and D for each part indicates the increase in the rate of representation between Columns B and E. For example, the "47 points" in Part I indicates that the proportion of minorities among those whose appeals are exhausted (Column E) is 47 percentage points higher than the proportion of minorities among the accused sentenced to death, i.e. 100% in Column E v. 53% in Column B. In each part, the cases in Column B are distributed across Columns C, D, and E depending of the level of risk of execution. Column C consists of *Turner*, *Gibbs*, *Curtis*, *Dock*, *Gray*, *Kreutzer*, *Simoy*, and *Thomas*. Column D consists of *Akbar*, *Murphy*, *Parker*, *Quintanilla*, *Walker*, and *Witt*. Column E consists of *Loving*.

Table 3

Unadjusted and Adjusted Racial Disparities in the Imposition of Death Sentences Among All Death-Eligible Cases: United States Armed Forces, 1984–2005[126]

A	B	C	D	E	F
		Unadjusted Disparities	**Adjusted Disparities** *(applying alternate measures of culpability)*		
			Non-Racial Case Character-istics in a Logistic Regression Analysis	Five-Level Race-Purged Regression Based Culpability Scale[127]	Six-Level Salient Factors Based Culpability Scale
	PART I: MINORITY-ACCUSED DISPARITY				
(a)	Minority Accused	25% (10/40)	23%	20%	21%
(b)	White Accused	9% (5/57)	11%	12%	10%
(c)	Disparity (*Row a – Row b*)	16 pts.**	12 pts.	8 pts.	11 pts.
(d)	Relative Risk (*Row a/Row b*)	2.8	2.1	1.7	2.1
	PART II: WHITE-VICTIM DISPARITY				
(a)	White-Victim Cases	17% (14/80)	18%	18%	17%
(b)	Other Cases	6% (1/17)	6%	4%	6%
(c)	Disparity (*Row a – Row b*)	11 pts.	12 pts.	14 pts.**	11 pts.
(d)	Relative Risk (*Row a/Row b*)	2.8	3.0	4.5	2.8

[126] As a point of reference, the average death-sentencing rate for all cases is 15% (15/97). In Columns D, E, and F, the death-sentencing rates reported in rows (a) and (b) of each Part are standardized rates estimated after adjustment for the culpability levels of the cases.

[127] This scale is based on the culpability index that underlies the analysis presented in Column D.

A	B	C	D	E	F
		Unadjusted Disparities	**Adjusted Disparities** *(applying alternate measures of culpability)*		
	Part III: MINORITY-ACCUSED/WHITE-VICTIM DISPARITY				
(a)	Minority-Accused/White-Victim Cases	36% (9/25)	26%	23%	23%
(b)	Other Cases	8% (6/72)	12%	11%	10%
(c)	Disparity (*Row a – Row b*)	28 pts.***	14 pts.*	12 pts.**	13 pts.
(d)	Relative Risk (*Row a/Row b*)	4.5	2.2	2.1	2.3

Level of significance of disparity: * = .10; ** = .05; *** = .01.

The 11-point unadjusted white-victim disparity documented in Part II of Table 3 and the 28-point minority-accused/white-victim disparity reported in Part III of Table 3 are consistent with the findings of many studies of civilian death-penalty systems.[128] However, the 16-percentage-point independent minority-accused disparity reported in Part I sharply distinguishes the military system from the typical civilian system. We know of no comparable post-*Furman* study from a state system that reveals an independent minority- or black-defendant disparity of this magnitude among all death-eligible cases. With two exceptions, in every civilian system on which comparable data exist, the unadjusted analysis of death sentencing among all death-eligible cases reports a *lower* death-sentencing rate for the minority- or black-defendant cases than it does for the white-defendant cases.[129] This counterintuitive outcome in the typical state system is the product of a strong white-victim disparity that suppresses the death-sentencing rate among the black- and minority-defendant cases. This occurs in state systems because defendants in the vast majority of black-

[128] For example in the 1973–1979 Georgia research on which the petitioner based his claims in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the unadjusted white-victim disparity was 10 percentage points. BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 315 tbl.50, pt. I.

[129] For one exception, see David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1676, 1677 tbl.1 (1998), reporting an unadjusted independent 7-percentage-point black-defendant disparity in the imposition of death sentences among all death-eligible cases. *See also* Scott Phillips, *Status Disparities in the Capital of Capital Punishment*, 43 LAW & SOC'Y REV. 807, 824 tbl.3, 829 tbl.5 (2009) (reporting 2.12 and 1.85 (tbl.3) and 1.92 and 1.78 (tbl.5) odds ratios for the black-defendant and white-victim variables in analysis of prosecutors seeking death and death sentences imposed among all death-eligible cases).

and minority-victim cases in those systems are also black or minorities. As a result, the very low death-sentencing rate in black- and minority-*victim* cases dramatically reduces the civilian death-sentencing rate in black- and minority-*defendant* cases.[130] Table 3, Part I, Row (c) of Column C, which reports an unadjusted statistically significant 16-percentage-point minority-accused disparity in the imposition of death sentences among all death-eligible cases, indicates that this effect does not occur in the military system.

2. Adjusted Racial Disparities

The Figure 2 and the Table 3 (Column C) findings considered above reflect no controls for the criminal culpability of the accused that properly bear on charging and sentencing decisionmaking within the system. To account for accused culpability, we computed disparities after adjustment for four different culpability measures. Our core analysis, reported in Table 4, estimates race disparities in the imposition of death sentences among all death-eligible cases in a logistic regression analysis that holds constant all of the variables for non-racial case characteristics included in the analysis. The non-racial variables include the number of aggravating factors in the cases and other conceptually important or statistically significant factors that have a demonstrable impact on death-sentencing outcomes. These factors, shown in Part A, were identified in a systematic screen of all of the culpability-related variables in the database.[131] The measures of principal interest in Table 4 are the adjusted racial disparities reported in Part B, Columns C and D. The Column C measures indicate, on average, the impact of the presence of each case characteristic listed in Column B on the probability that an accused with these characteristics will be sentenced to death, while holding constant all of the other variables listed in Column B. For example, Row 2 of Part A indicates that after adjustment for all of the other factors listed in Column B, on average, the risk of a death sentence being imposed is enhanced by 18 percentage points when the case involves multiple victims.[132]

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[130] *See* BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 315 tbl.50 (noting a 10-percentage-point (11% v. 1%) white-victim disparity results in a -3 percentage-point black-defendant disparity (4% for black defendants v. 7% for white defendants) in the imposition of death sentences among all death-eligible cases).

[131] See Appendix A for a list of the variables and their values in the military cases; see also *supra* text accompanying note 86 for a description of our variable screening and selection process.

[132] This standardized measure of impact is the difference between (a) the average of the individual race-purged predicted probabilities of a death sentence for all multiple-victim cases, and (b) the average of the individual race-purged predicted probabilities of a death sentencing for all single-victim cases after adjustment for all of the variables in the analysis.

Table 4

Race-of-Accused and Race-of-Victim Disparities Controlling for Conceptually and Statistically Important Case Characteristics Associated with the Imposition of Death Sentences Among All Death-Eligible Cases: United States Armed Forces, 1984–2005

A	B	C	D	E
	Case Characteristics	**Adjusted Linear Effect** (percentage-point disparity)	**Odds Multiplier**	**Regression Coefficient (*p*-value)**
Part A: Non-Racial Variables				
1	Number of aggravating factors in the case	4	3.0	1.1 (.08)
2	Multiple deceased victims	18	8.5	2.1 (.08)
3	Accused/victim relationship factor	10	4.5	1.5 (.03)
4	Bizarre weapon, e.g., ice pick	32	26.8	3.3 (.02)
5	Accused had a hate or revenge motive	19	11.2	2.4 (.02)
6	Accused provided financial or personal support for his/her family	-9	0.2	-1.6 (.24)
Part B: Racial Variables[133]				
1	Minority accused	11	5.2	1.6 (.15)
2	White victim	12	12.5	2.5 (.11)
$R^2 = .63$				(n = 97)

Column D presents each variable's adjusted odds multiplier, which indicates how the case characteristics listed in Column B affect the estimated odds that a death sentence will be imposed after controlling for all of the other variables in the analysis.[134] For example, the odds multiplier for the multiple-victim variable indicates that, on average, the odds of receiving a death sentence are enhanced by a factor of 8.5 in multiple-

[133] In an alternative model with the minority-accused/white-victim variable as the sole racial variable in the analysis in addition to the Part A non-racial variables, the adjusted linear effect for that variable was 15 points with a 6.6 odds multiplier significant at the .09 level. The R^2 for that analysis was .62.

[134] The relationship between odds (O) and probabilities (P) is:

$$O = \frac{P}{1-P} \text{ and } P = \frac{O}{1+O}.$$

victim cases compared to the odds of a death sentence being imposed in single-victim cases. Column E reports the magnitude of the estimated logistic regression coefficient and the level of statistical significance of the estimated coefficient for each variable.[135]

Part B of Table 4 reports the independent impact of the racial variables on the death-sentencing outcomes. Part B, Row 2 of Column C indicates that accused in white-victim cases are 12 percentage points more likely to be sentenced to death than are similarly situated accused in cases with no white victims present, an estimate that is significant at the .11 level. Further, the 12.5 odds multiplier in Column D indicates that defendants in white-victim cases face odds of receiving a death sentence that are 12.5 higher than the odds faced by similarly situated defendants with no white victims. As a point of comparison, in the Georgia research presented to the United States Supreme Court in *McCleskey v. Kemp* the odds multiplier for the white-victim variable was 4.3.[136]

Table 4 also documents a substantial independent minority-accused disparity. Row 1, Column C of Part B indicates that, on average, minority accused were 11 percentage points more likely to be sentenced to death than white accused. In terms of the odds-based disparity, Column D reports that minority accused faced odds of being sentenced to death that were 5.2 times higher than similarly situated white accused. As a point of comparison, the Georgia research considered by the United States Supreme Court in *McCleskey* indicated that, statewide, black defendants faced odds of being sentenced to death that were 0.94 of the odds faced by white defendants, a finding of no effect at all.[137]

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[135] The logistic regression "coefficient" reported in Column E is not easily interpreted. It provides the basis for estimating the linear effect reported in Column C and the odds-multiplier reported in Column D. A positive regression coefficient means that the presence of the case characteristic enhances the probability and odds that a death sentence will be imposed, although a negative coefficient indicates that the presence of the case characteristic, on average, reduces the odds and probability that a death sentence will be imposed.

[136] 481 U.S. 279, 287 (1987). *See* BALDUS, WOODWORTH & PULASKI *supra* note 41, at 319–20 tbl.52, row 30. The 4.3 white-victim odds ratio in the *McCleskey* research was statistically significant at the .001 level, while the 12.6 white-victim odds ratio reported in Table 3 was significant at the .11 level.

[137] The 0.94 black-defendant odds multiplier reported in BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 319 tbl.52, was estimated with all forty-one of the variables in the table included in the analysis, while the exhibit before the Court with the 1.1 odds multiplier was limited to the race-neutral variables in the model that were statistically significant. The black-defendant effect in the *McCleskey* research was concentrated among the most aggravated 492 cases in which the black defendants, after adjustment for offender culpability, faced odds of receiving a death sentence that were 2.4 points higher ($p = .01$) than similarly situated white defendants. *Id.*

The combined effect of both accused and victim race is reported in footnote 133 of Table 4. It documents that minority-accused/white-victim cases are 15 percentage points more likely to be sentenced to death among all death-eligible cases than accused in all other cases with different accused/victim racial combinations.[138]

Table 3 summarizes our findings on the risk of racial prejudice in the imposition of death sentences among all death-eligible cases. As noted above, Column C reports the *unadjusted* racial disparities. Columns D, E, and F present the disparities *adjusted* with three alternative measures of offender culpability. Also, as noted above,[139] our assessment of the extent to which race is a factor in the system is influenced by the magnitude, consistency, and statistical significance of the racial disparities computed with alternative measures of criminal culpability. Column D presents the disparities estimated in our core regression model reported in Table 4, while Column E presents disparities after adjustment for criminal culpability measured with the five-level race-purged scale based on the core model. Column F presents racial disparities after adjustment for the salient factors scale.

When the magnitude, consistency, and statistical significance test is applied to the findings in Part I of Table 3, we see that the 16-percentage-point statistically significant unadjusted minority-accused disparity reported in Column C declines upon the introduction of controls for accused culpability. Although not statistically significant, the magnitude and consistency of the disparities reported in Columns D, E, and F support a conservative estimate of the impact of accused race in the 8- to 11-percentage-point range, with relative risk ranging from 1.7 to 2.1.[140]

Parts II and III of Table 3 reveal consistently larger adjusted white-victim and minority-accused/white-victim effects. Columns D, E, and F report white-victim disparities in the 11- to 14-percentage point range and measures of relative risk ranging from 2.8 to 4.5. Although only two Part III adjusted disparity findings are statistically significant to at least the .10 level (Columns D and E), the magnitude and consistency of these findings convince us that the minority-accused/white-victim effect is real.

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[138] The odds multiplier for this variable is 6.7. Both measures are statistically significant at the .09 level. In the Georgia research presented in the *McCleskey* case, the black-defendant/white-victim effect was statistically significant only in cases prosecuted in rural Georgia judicial districts. *Id.* at 364 tbl.11 (noting a 5.36 black-defendant/white-victim odds multiplier).

[139] *See supra* text accompanying note 118.

[140] The lack of statistical significance calls for interpretative caution. However, since we are dealing with virtually the entire population of death-eligible cases, we have confidence that we are seeing real effects in the system.

The observed overall 15% (15/97) death-sentencing rate among all death-eligible cases highlights the practical effect of these systemic racial disparities. The analysis presented in Column D of Part I in Table 3 suggests that if all accused prosecuted since 1984 had been racial minorities, the system would likely have produced twenty-two instead of fifteen death sentences and if all accused during that period of time had been white, the system would likely have produced eleven instead of fifteen death sentences.[141] Looked at another way, after adjustment for the criminal culpability of the accused (Column D), the death-sentencing rate was 2.1 times higher (Part I, Row (d)) in minority-accused cases than it was in white-accused cases, and the rate was 3.0 times higher (Part II, Row (d)) in white-victim cases than it was in cases with no white victims. Finally, the death-sentencing rate was 2.2 times higher (Part III, Row (d)) in minority-accused/white-victim cases than it was in cases with all other accused/victim racial combinations.[142]

In comparable studies of state systems, adjusted white-victim disparities and black-defendant/white-victim disparities of this magnitude are not unusual.[143] However, the substantial independent adjusted minority-accused disparities reported in Tables 3 and 4 are much larger than the independent adjusted black-defendant effect reported in any study of a state system of which we are aware.[144]

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[141] The 23% adjusted minority-accused death-sentencing rate shown in Part I, Column D, Row (a) yields the twenty-two (23% of 97) death sentences estimate while the adjusted white-accused death-sentencing rate shown in Part I, Column D, Row (b) yields the eleven (11% of 97) death sentences estimate.

[142] These measures of relative risk are the ratios of adjusted death-sentencing rates reported in Row (d), Column D, of each part.

[143] *See* Donahue, *supra* note 60, at 112–13 tbls.16 & 17, 132–33 tbls.20 & 21 (reporting statistically significant unadjusted and adjusted black-defendant/white-victim disparities in the imposition of death sentences among all death-eligible cases (Connecticut, 1970–2007)); Paternoster et al. *supra* note 51, at 61 tbl.3 (Test #5), 65 tbl.4C (Test #5) (reporting statistically significant 3.5 (14%/4%) ratio of rates (Maryland, 1978–1999) in black-defendant/white-victim cases versus all other cases in death sentencing among all death-eligible cases).

[144] The closest thing to the military results in a civilian system are discussed in Baldus et al., *supra* note 129, at 1688–89 (reporting an adjusted independent black-defendant effect with a statistically significant 29.0 odds multiplier in an analysis of 175 jury penalty trial death-sentencing decisions based on a weighing of aggravating and mitigating circumstances (Philadelphia County, 1983–1993)), and Phillips, *supra* note 129 (reporting an adjusted 1.5 independent black-defendant odds multiplier for the imposition of death sentences among all death-eligible cases (Houston, Tex., 1992–1999)).

B. SOURCES OF RACIAL DISPARITIES IN THE IMPOSITION OF DEATH SENTENCES AMONG ALL DEATH-ELIGIBLE CASES

This Section summarizes the results of the quantitative argument developed in Part IV, Sections C through F of this Article concerning the extent to which the racial disparities documented in the imposition of death sentences among all death-eligible cases are the product of charging decisions, guilt trial decisions, or capital sentencing decisions. Specifically, we estimated racial effects in: (1) convening authority decisions that advanced 42% (41/97) of the death-eligible cases to a capital court-martial, (2) the unanimous verdicts of capital murder that advanced 73% (30/41) of the capitally charged cases to a capital sentencing hearing, and (3) the capital sentencing decisions of members, which imposed a death sentence 50% (15/30) of the time.

White-victim disparities in the typical state system are principally the product of prosecutorial charging decisions with only a small contribution from penalty decisions by juries at trial. In the military system, the decisions of both convening authorities and members contribute to the overall white-victim effect. Convening authorities contribute to the effect in their charging decisions.[145] Members contribute to the white-victim effect not through death-sentencing decisions (only one minority-victim case advanced to a penalty trial), but through their unanimous decisions that advance cases to a capital sentencing hearing.[146] As we document in Section E below, the combined effect of these two decisions produces a large and statistically significant adjusted race-of-victim disparity in the rates that cases advance to capital sentencing hearings.[147]

By contrast, the principal source of the independent *minority-accused* disparity among all death-eligible cases in the military is the members' death-sentencing decisions in capital sentencing hearings. As we document in Section F below, their sentencing decisions contribute to the independent minority-accused disparity because, in white-victim cases (which constitute 97% of the cases that advanced this far in the process), court-martial members sentenced minority accused to death at a much higher rate than similarly situated white accused.[148] In addition, members' unanimous guilt trial decisions, advancing cases to capital sentencing hearing, reveal a moderate disparity based solely on the race of the accused.[149] In contrast, the decisions of convening authorities reveal very little if any minority-

[145] *Infra* note 154 and accompanying text.

[146] *Infra* note 158 and accompanying text.

[147] *Infra* note 164 and accompanying text.

[148] *Infra* Table 11 and accompanying text.

[149] *Infra* Table 8 and accompanying text.

accused race effect in their charging decisions.[150]

Finally, both convening authorities and members contribute to the *minority-accused/white-victim* disparity in death sentencing among all death-eligible cases. There is a modest minority-accused/white-victim disparity in (a) the convening authorities' advancement of cases to capital guilt trials,[151] and (b) in the members' unanimous guilt trial decisions advancing cases to a capital sentencing hearing.[152] In addition, in white-victim cases, courts-martial members contribute to the overall effect by sentencing minority accused to death at a substantially higher rate than white accused.[153]

C. RACIAL DISPARITIES IN CONVENING AUTHORITY DECISIONS ADVANCING CASES TO A CAPITAL COURT-MARTIAL

This Section explores charging and plea bargaining decisions of convening authorities as a possible source of the racial disparities among all death-eligible cases documented in Section A above.

1. Unadjusted Disparities

Table 5, Column C reports unadjusted racial disparities in convening authority decisions that advance cases to a capital court-martial with the government seeking a death sentence.[154] Part I, Row (c) reports a 14-percentage-point minority-accused disparity. The 20-percentage-point white-victim disparity reported in Part II, Row (c) is larger but not statistically significant, while the 29-percentage-point minority-accused/white-victim disparity reported in Part III, Row (c) is large and statistically significant, suggesting that convening authority charging decisions may be a source of this racial disparity among all death-eligible cases.

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[150] *Infra* Table 5 (Part I) and accompanying text.

[151] *Infra* Table 5 (Part III) and accompanying text.

[152] *Infra* Table 8, note 161, and accompanying text.

[153] *Infra* Table 11 and accompanying text.

[154] The advancement of a case to a capital court-martial requires a capital referral by the convening authority and a refusal of the convening authority to withdraw the capital referral unilaterally or as part of a plea bargain. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE §§ 6-1, 9-2, 16-3(A) (7th ed. 2008).

Table 5

Unadjusted and Adjusted Racial Disparities in Convening Authority Decisions to Advance Death-Eligible Cases to a Capital Court-Martial: United States Armed Forces, 1984–2005[155]

A	B	C	D	E	F
		Unadjusted Disparities	**Adjusted Disparities** *(applying alternate measures of culpability)*		
			Non-Racial Case Character-istics in a Logistic Regression Analysis	Five-Level Race-Purged Regression Based Culpability Scale[156]	Six-Level Salient Factors Based Culpability Scale
	Part I: MINORITY-ACCUSED DISPARITY				
(a)	Minority Accused	51% (23/45)	47%	46%	53%
(b)	White Accused	37% (22/60)	40%	40%	36%
(c)	Disparity (*Row a – Row b*)	14 pts.	7 pts.	6 pts.	17 pts.
(d)	Relative Risk (*Row a/Row b*)	1.4	1.2	1.1	1.5
	Part II: WHITE-VICTIM DISPARITY				
(a)	White-Victim Cases	46% (40/86)	46%	46%	47%
(b)	Other Cases	26% (5/19)	32%	30%	25%
(c)	Disparity (*Row a – Row b*)	20 pts.	13 pts.	16 pts.*	22 pts.*
(d)	Relative Risk (*Row a/Row b*)	1.8	1.4	1.5	1.8
	Part III: MINORITY-ACCUSED/WHITE-VICTIM DISPARITY				
(a)	Minority-Accused/White-Victim Cases	64% (18/28)	48%	47%	56%
(b)	Other Cases	35% (27/77)	41%	41%	38%
(c)	Disparity (*Row a – Row b*)	29 pts.**	7 pts.	6 pts.	18 pts.*
(d)	Relative Risk (*Row a/Row b*)	1.8	1.2	1.2	1.5

Level of significance of disparity: * = .10; ** = .05; *** = .01.

[155] As a point of reference, 43% (45/105) of the death-eligible cases advanced to a capital court-martial with the government seeking a death sentence.

[156] *See supra* note 127.

Table 6

Race-of-Accused and Race-of-Victim Disparities in the Rates that Convening Authorities Advance Death-Eligible Cases to a Capital Court-Martial Controlling for Non-Racial Case Characteristics: United States Armed Forces, 1984–2005

A	B	C	D	E
	Case Characteristics	**Adjusted Linear Effect** (percentage-point disparity)	**Odds Multiplier**	**Regression Coefficient (*p*-value)**
Part A: Non-Racial Variables				
1	Number of aggravating factors in the case	13	4.6	1.5 (.01)
2	Multiple victims	29	17.3	2.8 (.01)
3	Victim's throat was slashed	28	13.9	2.6 (.01)
4	Forensic evidence linking accused to the murder, e.g., DNA, fingerprints	26	12.6	2.5 (.01)
5	Accused hid dying victim making rescue unlikely	45	>100	5.0 (.06)
6	Accused took responsibility for his crime	-31	0.03	-3.4 (.02)
7	Accused's principal defense was to challenge the sufficiency of the evidence	26	11.2	2.4 (.01)
8	Case had significant military implications	19	6.2	1.8 (0.3)
Part B: Racial Variables[157]				
1	Minority Accused	8	2.1	0.8 (.35)
2	White Victim	13	4.1	1.4 (.14)
$R^2 = .71$				(n = 105)

[157] In an alternative analysis that included the minority-defendant/white-victim variable in lieu of the minority-accused and white-victim variables, the Column C linear effect was 7 points, with a 2.0 odds multiplier, significant at the .39 level.

2. Adjusted Disparities

Table 6 presents the results of our core logistic regression model of convening authority charging decisions. Column C, Part B, Row 1 of the table reports a 8-percentage-point minority-accused disparity, while Part B, Row 2 reports a 13-point white-victim disparity that is not statistically significant. Moreover, the footnote in Table 6 reports a 7-point disparity for the minority-accused/white-victim interaction term, suggesting some impact for that accused/victim racial combination.

Columns D, E, and F of Table 5 summarize all of the adjusted disparities. The minority-accused (Part I) disparity from the Table 6 regression model reported in Column D (7 points) is quite consistent with Column E, but inconsistent with the 17-point disparity in Column F. However, the white-victim effects in Part II, Row (c) of Columns D, E, and F (13, 16, and 22 points) are large and more consistent, providing persuasive evidence that the race of the victim affects convening authority decisions. In addition, two of the three are statistically significant at the .10 level.

Part III, Row (c) of Column F reports an 18-percentage-point minority-accused/white-victim disparity, but, like in Part I, that estimate is inconsistent with the 7-point disparity reported in Column D for the core regression model and the 6-point disparity in Column E. The inconsistency of these findings draws into question the hypothesis that the accused/victim racial combination is a significant factor in convening authority charging decisions.

D. RACIAL DISPARITIES IN UNANIMOUS CAPITAL MURDER CONVICTIONS

We focus here on race effects in unanimous capital murder convictions among the forty cases that advanced to a capital court-martial. In ten courts-martial, the accused was convicted of premeditated or felony murder by a vote of at least three-fourths of the court-martial members. As noted above, this vote was enough to support a capital murder conviction, but because the vote was not unanimous, the case could not advance to a capital sentencing hearing.[158] The lack of unanimity on the capital murder verdict is evidence of the kind of ambiguous situation in which inappropriate factors such as the race of the accused or of the victim could have an effect.[159]

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[158] UCMJ, 10 U.S.C. § 852(a)(1) (2006) ("No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.").

[159] A vote with less than three-quarters support for the finding of premeditation would

1. Unadjusted Disparities

Table 7 reports the unadjusted racial disparities for the unanimous liability decisions. Part I, Row (c) reports a minus 6-point minority-accused effect and Part III, Row (c) reports a 13-percentage-point minority-defendant/white-victim disparity that is not statistically significant because of the small numbers involved. However, Part II, Row (c) reports a 53-percentage-point white-victim disparity that is statistically significant at the .05 level.

Table 7

Unadjusted Racial Disparities in Courts-Martial Unanimous Murder Convictions that Advance Cases to a Capital Sentencing Hearing: United States Armed Forces, 1984–2005[160]

A	B	C
	Case Characteristics	**Unadjusted Disparities**
Part I: MINORITY-ACCUSED DISPARITY		
(a)	Minority Accused	70% (14/20)
(b)	White Accused	76% (16/21)
(c)	Disparity (*Row a – Row b*)	– 6 pts.
(d)	Relative Risk (*Row a/Row b*)	0.9
Part II: WHITE-VICTIM DISPARITY		
(a)	White-Victim Cases	78% (29/37)
(b)	Other Cases	25% (1/4)
(c)	Disparity (*Row a – Row b*)	53 pts.**
(d)	Relative Risk (*Row a/Row b*)	3.1
Part III: MINORITY-ACCUSED/WHITE-VICTIM DISPARITY		
(a)	Minority-Accused/White-Victim Cases	81% (13/16)
(b)	Other Cases	68% (17/25)
(c)	Disparity (*Row a – Row b*)	13 pts.
(d)	Relative Risk (*Row a/Row b*)	1.2

Level of significance of disparity: * = .10; ** = .05; *** = .01.

have resulted in an acquittal on that charge. § 852(b)(2) ("No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.").

[160] The outcome measure in this table was a unanimous murder verdict. As a point of reference, 73% (30/41) of the courts-martial with the government seeking a death sentence resulted in a unanimous capital murder conviction that advanced the case to a capital sentencing hearing.

2. Adjusted Disparities

An analysis of the impact of non-racial factors at this point in the process revealed that our measures of the overall criminal culpability of the accused had little relationship to the members' unanimous votes. However, unanimous votes for capital murder are highly correlated with (a) the absence of evidence of long-range planning for the murder (a 39-point mitigating effect ($p = .10$)), (b) the accused's claims of self defense or defense of others (a 56-point mitigating effect ($p = .05$)), and (c) a claim of insufficient evidence to establish premeditation beyond a reasonable doubt (a 28-point mitigating effect ($p = .10$)). In contrast, a mens rea defense based on mental illness or intoxication actually enhanced the probability of a unanimous verdict for capital murder by 28 percentage points ($p = .10$).

Table 8

Race-of-Accused and Race-of-Victim Disparities in Unanimous Courts-Martial Findings of Liability for Premeditated Murder Controlling for Accused Defenses and Mitigating Evidence: United States Armed Forces, 1984–2005

A	B	C	D	E
	Case Characteristics	**Adjusted Linear Effect** (percentage-point disparity)	**Odds Multiplier**	**Regression Coefficient (*p*-value)**
Part A: Non-Racial Variables				
1	Defense of self or other	-38	0.1	-2.1 (.21)
2	No evidence of a long range plan to kill	-24	0.2	-1.4 (.31)
3	Defense of insufficient evidence to prove § 118 (1) culpability	-23	0.2	-1.5 (.23)
4	Defense of lack of mens rea for § 118(1) because of mental illness or intoxication	19	4.6	1.5 (.24)
Part B: Racial Variables[161]				
1	Minority Accused	10	2.1	1.0 (.47)
2	White Victim	25	4.2	1.6 (.38)
$R^2 = .36$				(n = 41)

[161] In an alternative model that substitutes the minority-accused/white-victim variable for the race-of-accused and victim variables, the adjusted linear effect for that variable was 11 points with a 2.3 odds multiplier ($p = .40$).

Table 8 presents the results of a logistic regression analysis that includes these four non-racial variables and variables for the race of the accused and of the victim. Part A indicates that the effects for the four non-racial variables are substantial and in the expected direction, but none is statistically significant. Part B presents the racial disparities. Row 1 reports a 10-point minority-accused disparity and Row 2 reports a 25-point white-victim disparity, neither of which is statistically significant. These data suggest that the presence of a minority accused or white victim in a case has an aggravating effect on the capital murder vote that approximates or exceeds the aggravating effect of a mens rea defense based on a claim of mental illness or intoxication (shown in Row 4 of Part I).

E. RACIAL DISPARITIES IN THE RATES THAT DEATH-ELIGIBLE CASES ADVANCE TO A CAPITAL SENTENCING HEARING

We also estimated race effects in the rates that all death-eligible cases advance to a capital sentencing hearing. This analysis reflects the combined effects of convening authority charging decisions and members' unanimous guilt trial decisions advancing cases to a capital sentencing hearing.

1. Unadjusted Disparities

Table 9, Column C presents the unadjusted disparities. Part I, Row (c) reports a 7-point minority-accused effect that is not significant. However, Part II, Row (c) and Part III, Row (c) report, respectively, 30- and 28-point disparities that are statistically significant beyond the .05 level.

2. Adjusted Disparities

Table 10 presents the results of the core logistic regression analysis of this decision point with seven non-racial variables that have a substantial relationship with the advancement of cases to a capital sentencing hearing. The racial disparities presented in Part II of the Table show a modest 7-point minority-accused disparity that is not statistically significant, and a very large 27-point white-victim effect that is statistically significant (p = .03).

Table 9
Unadjusted and Adjusted Racial Disparities in Convening Authority and Unanimous Courts-Martial Decisions that Advanced Death-Eligible Cases to a Capital Sentencing Hearing: United States Armed Forces, 1984–2005[162]

A	B	C	D	E	F
		Unadjusted Disparities	**Adjusted Disparities** *(applying alternate measures of culpability)*		
			Non-Racial Case Character-istics in a Logistic Regression Analysis	Five-Level Race-Purged Regression Based Culpability Scale[163]	Six-Level Salient Factors Based Culpability Scale
	Part I: MINORITY-ACCUSED DISPARITY				
(a)	Minority Accused	35% (14/40)	35%	36%	35%
(b)	White Accused	28% (16/57)	29%	28%	27%
(c)	Disparity (*Row a – Row b*)	7 pts.	6 pts.	7 pts.	8 pts.
(d)	Relative Risk (*Row a/Row b*)	1.2	1.2	1.3	1.3
	Part II: WHITE-VICTIM DISPARITY				
(a)	White-Victim Cases	36% (29/80)	36%	36%	35%
(b)	Other Cases	6% (1/17)	9%	6%	6%
(c)	Disparity (*Row a – Row b*)	30 pts.**	27 pts.**	31 pts.***	29 pts.**
(d)	Relative Risk (*Row a/Row b*)	6.0	4.0	6.0	5.8

[162] As a point of reference, 31% (30/97) of the death-eligible cases advanced to a capital sentencing hearing.

[163] *See supra* note 127.

A	B	C	D	E	F
		Unadjusted Disparities	**Adjusted Disparities** *(applying alternate measures of culpability)*		
	Part III: MINORITY-ACCUSED/WHITE-VICTIM DISPARITY				
(a)	Minority-Accused/White-Victim Cases	52% (13/25)	42%	42%	40%
(b)	Other Cases	24% (17/72)	27%	27%	26%
(c)	Disparity *(Row a – Row b)*	28 pts.***	15 pts.	15 pts.*	14 pts.
(d)	Relative Risk *(Row a/Row b)*	1.9	1.6	1.6	1.5

Level of significance of disparity: * = .10; ** = .05; *** = .01.

When we substituted the minority-accused/white-victim variable for the minority-accused and white-victim variables, the disparity for that variable was 15 points ($p = .13$).[164]

As noted above, Table 9, Column C reports the impact of race without adjustment for the culpability of the accused. Columns D, E, and F report those disparities after adjustment for the three alternative measures of culpability. The results in Part I, Row (c) are modest but consistent, ranging from 6 points in the core model to 7 and 8 points in the Columns E and F scales, which may suggest that the race of the accused has a modest independent effect. Part III, Rows (c) and (d) also indicate that the introduction of controls for accused culpability (Columns, D, E, and F) diminishes the magnitude and statistical significance of the minority-accused/white-victim disparity reported in Column C.

[164] Because the liability votes of court-martial members contributed to the advancement of cases to capital sentencing hearings, we conducted an alternative logistic regression analysis that added to the analysis the four control variables based on the defenses of the accused discussed above. In that analysis the logistic regression coefficient for the white-victim variable (on which the odds multiplier is based) enlarge from 3.3 ($p = .03$) to 5.7 ($p = .01$). *See infra* Table 10 & note 165.

Table 10

Race-of-Accused and Race-of-Victim Disparities in the Rates that Death-Eligible Cases Advance to a Capital Sentencing Hearing Controlling for Non-Racial Case Characteristics: United States Armed Forces, 1984–2005

A	B	C	D	E
	Case Characteristics	**Adjusted Linear Effect** (percentage-point disparity)	**Odds Multiplier**	**Regression Coefficient (*p*-value)**
Part A: Non-Racial Variables				
1	Number of aggravating factors in the case	3	1.4	0.3 (.47)
2	Multiple victims	34	12.8	2.5 (.01)
3	Bizarre weapon, e.g., ice pick	57	140.5	4.9 (.01)
4	Forensic evidence linking accused to the murder, e.g., DNA, fingerprints	16	3.6	1.3 (.10)
5	Accused hid dying victim making rescue unlikely	41	26.5	3.3 (.14)
6	Accused took responsibility for his crime	-27	0.04	-3.2 (.02)
7	The murder had military implications	15	3.4	1.2 (.15)
Part B: Racial Variables[165]				
1	Minority Accused	7	1.8	0.6 (.48)
2	White Victim	27	28.1	3.3 (.03)
$R^2 = .60$				(n = 97)

The story is most clear in Part II, Rows (c) and (d) of Columns D, E, and F where we see strong and statistically significant disparities that are comparable to the unadjusted 30-point white-victim disparity reported in

[165] In an alternative analysis that included the minority-defendant/white-victim variable in lieu of the minority-accused and white-victim variables, the Column C linear effect was 15-points, with a 3.4 odds multiplier, significant at the .13 level. In a model that also included the four non-racial factors in Table 8 that showed a significant unadjusted association (*p* values of less than .10) with the members' unanimous guilty verdict, the white-victim logistic regression coefficient increased from 3.3 ($p = .03$) to 5.7 ($p = .01$) and the R^2 for the overall model increased from .60 to .70.

Column C. In terms of its magnitude and statistical significance, these adjusted white-victim effects are the strongest evidence documented in this study that the race of the victim influences decisions of the convening authority and the court-martial members and that these decisions are the principal source of the white-victim effects documented in the imposition of death sentences among all death-eligible cases. The findings in Part III also suggest that these decisions contribute in a small but distinct way to the minority-accused/white-victim disparity documented in the imposition of death sentences among all death-eligible cases.

F. RACIAL DISPARITIES IN THE RATES THAT DEATH SENTENCES ARE IMPOSED IN CAPITAL SENTENCING HEARINGS

Thirty death-eligible cases advanced to a capital sentencing hearing—the final stage in the process. As noted above, all but one of these cases involved a white victim, an outcome that nearly meets the "inexorable zero" standard, which, in other contexts, gets the attention of the courts.[166] In the twenty-nine white-victim cases, there were sixteen white and thirteen minority accused. The core issue, therefore, concerns the differential treatment of minority and white accused in white-victim cases.

1. Unadjusted Disparities

Table 11, Row (c), Column C, documents a 40-percentage-point unadjusted minority-accused disparity in death-sentencing rates in capital sentencing hearings that is significant at the .10 level. In a comparable unadjusted logistic regression analysis, the unadjusted odds multiplier for the minority-accused variable is 5.5, significant at the .03 level.

2. Adjusted Disparities

Columns D, E, and F of Table 11 report in Rows (c) and (d) the minority-accused disparities estimated after adjustment for three measures of accused culpability. Adjustment for these culpability measures reduces the 40-point unadjusted disparity by half or more to 18, 17, and 21 points respectively and with relative risk measures of 1.4, 1.4, and 1.6, none of which is significant because of the small samples involved. However, because of the magnitude and consistency of the minority-accused disparities, we believe that these findings reflect real and systemic effects of race in the members' death-sentencing decisions. These results also clearly identify the members' death-sentencing decisions as the principal source of

[166] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977) ("As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from '*the inexorable zero.*'" (emphasis added)).

the independent minority-accused disparity documented in the imposition of death sentences among all death-eligible cases.[167]

We know of only two comparable studies in a state court system that report independent, black-defendant effects of this magnitude in penalty trial decisionmaking.[168] Studies of penalty trial decisions in most states report no independent effects, or effects that are quite modest by comparison.[169]

Table 11

Minority-Accused Disparities in the Outcomes of Capital Sentencing Hearings: United States Armed Forces, 1984–2005[170]

A	B	C	D	E	F
		Unadjusted Disparities	**Adjusted Disparities** *(applying alternate measures of culpability)*		
			Non-Racial Case Character-istics in a Logistic Regression Analysis[171]	Five-Level Race-Purged Regression Based Culpability Scale	Six-Level Salient Factors Based Culpability Scale
(a)	Minority Accused	71% (10/14)	44%	59%	56%
(b)	White Accused	31% (5/16)	26%	42%	35%
(c)	Disparity (*Row a – Row b*)	40 pts.*	18 pts.	17 pts.	21 pts.
(d)	Relative Risk (*Row a/Row b*)	2.3	1.4	1.4	1.6

Level of significance of disparity: * = .10; ** = .05; *** = .01.

[167] In contrast to these death-sentencing findings, there are much weaker minority-accused effects in the analysis of convening authorities' and members' decisions advancing cases to penalty trial. *See supra* Table 9 and accompanying text.

[168] *See supra* text accompanying note 143.

[169] *See supra* text accompanying note 143.

[170] As a point of reference, the average death-sentencing rate in capital sentencing hearings was .50 (15/30).

[171] When this analysis is limited to the three non-racial variables in the Column D analysis that had a relationship to the death-sentencing outcomes that was statistically significant beyond the .10 level, the minority-accused effect is 14 points, with a 3.0 odds multiplier, significant at the .39 level.

G. RACIAL DISPARITIES IN CHARGING AND SENTENCING OUTCOMES AMONG HIGHLY AGGRAVATED WHITE-VICTIM CASES—THE HEREIN OF DECISIONMAKING IN SIXTEEN MULTIPLE-VICTIM DEATH-ELIGIBLE CASES

By any measure, multiple-victim cases play an important role in the military system, as they do in most state court systems. They account for 53% (8/15) of the death sentences imposed during the period of this study. The death-sentencing rate in multiple-victim cases is 50% compared to 9% in single-victim cases. Multiple victims play a prominent role in all of our core logistic regression models and our two principal measures of deathworthiness.

Multiple-victim cases also have important racial implications. Seventy percent (7/10) of the minority accused who were sentenced to death killed two or more victims, while only 40% (2/5) of the white accused who were sentenced to death had multiple victims. However, minority accused are overrepresented in multiple-victim cases, which may explain this disparity. Minority accused accounted for 56% (9/16) of the multiple-victim cases, compared to 41% (40/97) of all death-eligible cases. Similarly, minority-accused/white-victim cases account for 41% (7/16) of the multiple-victim cases, compared to 25% (24/97) of all death-eligible cases.[172] In a race-neutral system, such an overrepresentation of minority accused in multiple-victim cases might explain the overrepresentation of minority-accused, multiple-victim cases on death row.

Case law and the literature suggest alternative explanations for the high risk of racial prejudice in black-defendant/white-victim capital cases. One theory focuses on the reaction of decisionmakers to the "intergroup conflict" nature of interracial murder.[173] Another theory developed by Justice Byron White in *Turner v. Murray* (1986), a black-defendant/white-victim capital case from Virginia, perceives a high "risk of racial prejudice infecting" death-sentencing decisions in highly aggravated black-defendant/white-victim capital cases.[174] Justice White explained the

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[172] However, the 81% (13/16) proportion of white-victim cases among multiple-victim cases is comparable to the 82% (80/97) proportion of white-victim cases among all death-eligible cases.

[173] Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006) (suggesting one explanation for the elevated risk or racial prejudice in black-on-white murder cases is that the defendant-victim racial combination "renders race especially salient. Such crimes could be interpreted or treated as matters of intergroup conflict" whereas a black-on-black murder may "lead jurors to view the crime as a matter of interpersonal rather than intergroup conflict.").

[174] Turner v. Murray, 476 U.S. 28, 36–37 (1986) (holding that the interracial nature of the offense entitled the defendant to question prospective jurors "on racial prejudice," since a

basis for the Court's concern as follows:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[175]

The risk of prejudice is further exacerbated in extremely violent cases, such as multiple-victim cases, where the facts of the case heighten the salience of the perception of blacks as violence-prone.[176] In short, multiple-victim cases with minority accused and white victims are racially charged cases and provide an ideal vehicle to test Justice White's hypothesis.

1. Unadjusted Disparities

Table 12, Column C presents unadjusted race disparities in death-sentencing rates among the multiple-victim cases. Part I, Row (c) of Column C reports a 64-percentage-point minority-accused disparity and a relative risk of 5.6, both of which are statistically significant at the .05 level. Part II, Row (c) reports a 62-point white-victim effect that is not statistically significant, while Part III, Row (c) reports an 89-point minority-defendant/white-victim disparity, with a relative risk of 9.1, that is statistically significant at the .01 level. These unadjusted race effects are much larger than the unadjusted racial disparities that we have seen documented among any subgroup of cases in comparable empirical studies of post-*Furman* civilian courts.

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failure to permit such questioning created an unacceptable risk of "racial prejudice infecting" the jurors' sentencing decision).

[175] *Id.* at 35.

[176] The quote from *Turner* in the text above notes that fear of blacks could easily be "stirred up" by violent facts and incline a juror "to favor a death penalty." *See generally* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries: A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1008 (2003).

Table 12
Disparities in Death-Sentencing Rates Among Sixteen Multiple-Victim Cases: United States Armed Forces, 1984–2005

A	B	C	D	E	F
		Unadjusted Disparities	**Adjusted Disparities** *(applying alternate measures of culpability)*		
			Salient Factors Based Culpability Scale	Regression Based Culpability Scale	Law Student Rank Order Culpability Levels[177]
	Part I: MINORITY-ACCUSED DISPARITY				
(a)	Minority Accused	78% (7/9)	59%	67%	83%
(b)	White Accused	14% (1/7)	11%	28%	12%
(c)	Disparity (*Row a – Row b*)	64 pts.**	48 pts.	39 pts.	71 pts.**
(d)	Relative Risk (*Row a/Row b*)	5.6	5.4	2.4	6.9
	Part II: WHITE-VICTIM DISPARITY				
(a)	White-Victim Cases	62% (8/13)	55%	59%	62%
(b)	Other Cases	0% (0/3)	0%	0%	0%
(c)	Disparity (*Row a – Row b*)	62 pts.	55 pts.	59 pts.	62 pts.
(d)	Relative Risk (*Row a/Row b*)	Infinite	Infinite	Infinite	Infinite
	Part III: MINORITY-ACCUSED/WHITE-VICTIM DISPARITY				
(a)	Minority-Accused/White-Victim Cases	100% (7/7)	87%	94%	100%
(b)	Other Cases	11% (1/9)	8%	19%	12%
(c)	Disparity (*Row a – Row b*)	89 pts.***	79 pts.	75 pts.**	88 pts.**
(d)	Relative Risk (*Row a/Row b*)	9.1	10.8	4.9	8.3

Level of significance of disparity: * = .10; ** = .05; *** = .01.

What are the sources of these racial disparities? One of the seven white accused shown in Part I, Row (b) of Table 12 avoided the risk of a

[177] Law students assessed the culpability level of the accused based on a detailed summary of each case.

death sentence by virtue of a convening authority decision not to advance his case to a capital court-martial.[178] Two avoided the risk because the members did not unanimously find them guilty of premeditated murder.[179] Three other white accused received a life sentence in a capital sentencing hearing.[180] This evidence is consistent with the conclusion of Sections B and F above that the minority-accused effects in the system are principally the product of court-martial sentencing decisions. In Part II, Row (b) of Table 12, the three accused with non-white victims avoided the risk of a death sentence by virtue of a convening authority decision not to advance their cases to a capital court-martial.[181] These findings are consistent with the conclusion of Part IV, Sections B, C, and E above that the white-victim effects in the system are principally the product of the charging decisions of convening authorities.

2. Adjusted Disparities

Our first approach was to estimate separately in a single logistic regression analysis, which included all death-eligible cases, a minority-accused disparity among the multiple-victim cases and a comparable disparity among the single-victim cases. We did this by introducing "interaction terms" that can provide such estimates into our core analysis of death sentencing among all death-eligible cases.[182] To put the results in context, recall our core analysis of death sentencing among all death-eligible cases in Table 4 where the logistic regression coefficient for minority accused was 1.6, which generated an odds multiplier of 5.2, significant at the .15 level. In our replication of that analysis among the same ninety-seven death-eligible cases, the estimated minority-accused disparity among the multiple-victim cases was a 7.1 (p = .01) logistic regression coefficient, which generated a jumbo odds multiplier of 999.0. The six controls for legitimate case characteristics had very little effect in explaining away or reducing the level of statistical significance of the minority-accused effect among the two-victim cases. In contrast, those same control variables were quite effective in reducing the magnitude and statistical significance of the minority-accused disparity among the single-victim cases. Specifically, the comparable statistic among the single-victim cases was a non-significant logistic regression coefficient of 1.1 (p = .43),

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[178] *Fuhrman.*

[179] *K. Curry* and *Reliford. See id.*

[180] *Clark*, *Meeks*, and *Strom. See id.*

[181] *Fuhrman*, *Morgan*, and *Patterson.*

[182] In lieu of a minority-accused variable, we introduced two binary variables: (1) one for minority accused in single-victim cases, and (2) one for minority accused in multiple-victim cases.

which generated an odds multiplier of 3.1.

Because of the strong concentration of minority-accused effects among the multiple-victim cases, we tested their robustness with further analyses limited to those sixteen cases. With a sample of only sixteen cases, logistic multiple regression analysis was off the table. However, we were able to conduct three analyses which estimated adjusted racial disparities among those sixteen cases, controlling for three different measures of criminal culpability, two of which we used in previous sections.[183]

Table 12 presents the results of these analyses. In Column C, for purposes of comparison, we present the unadjusted minority-accused disparities, white-victim disparities, and minority-accused/white-victim disparities. The adjusted disparities are reported in Columns D, E, and F. As noted earlier, we believe that the salient factors scale applied in Column D closely approximates military assessments of criminal culpability and deathworthiness. For this reason, we place the greatest weight on those estimates.[184] The estimates in Column E control for the regression-based culpability scale that is based on our core model of death sentences imposed among all death-eligible cases,[185] while the estimates in Column F control for a qualitative culpability measure based on assessments by law students of the comparative culpability of the sixteen accused, which we believe approximate civilian rather than military assessments of criminal culpability.[186]

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[183] Salient factors and regression-based scales are applied in Columns E and F of Tables 3, 5, 9, 11, and 12.

[184] However, the estimates in Column D are based on less information than the estimates in Columns E and F. The disparities in each Part of the table are based solely on the disparities estimated in cells of the scale, which contain members of each racially defined group of accused. The facts and outcomes of cases that do not meet this test contribute no information to the estimated disparities in each Part of the table. In Parts I and III, the Column D disparities are based on nine cases in cells of the scale with accused from both racial groups, while in Part II the disparities of Column C are based on eleven cases in cells with accused from both racial groups. In contrast, the disparities in Columns E and F are based on cases in cells that, respectively, contain fifteen and sixteen cases from both racial groups.

[185] *See supra* Table 3, Column E & Table 11, Column E.

[186] The raters were five research assistants at the University of Iowa College of Law who based their culpability assessments on the facts presented in two- to four-page detailed narrative summaries of the cases that had been purged of all racial and procedural information that could influence coder assessments of accused culpability. Four of these students had exposure to the military cases, having coded from ten to fifteen of the cases in this study over the preceding year. The students ranked the sixteen multiple-victim cases in terms of their criminal culpability and deathworthiness based upon a weighing of the aggravating and mitigating circumstances of each case. We believe that, as civilians without any experience in the military, the judgments of the law students reflect a distinctly civilian rather than military assessment of offender culpability. We used the average rank-order

The key findings in Parts I, II, and III are found in Rows (c) and (d) of Columns D, E, and F, which should be compared with the unadjusted disparities reported in Rows (c) and (d) of Column C. After adjustment for accused culpability, the adjusted minority-accused/white-victim disparities reported in Part III, Rows (c) and (d) are the largest and most statistically significant in the table. They range from 75 to 88 percentage points and the measures of relative risk range from 4.9 to 10.8, with the disparities in Columns E and F statistically significant at the .05 level.[187]

The adjusted minority-accused disparities in Part I, Rows (c) and (d) range in Columns D, E, and F from 48 to 71 percentage points, although the Column D and E disparities are not statistically significant. The adjusted white-victim effects in Part II, Rows (c) and (d) range in columns D, E, and F from 55 to 62 percentage points, but none is statistically significant beyond the .10 level. These findings suggest that the very strong minority-accused/white-victim effects documented in Part III are equally the product of the independent minority-accused disparity shown in Part I and the independent, white-victim disparity shown in Part II.[188]

Overall, these findings document a significant risk of racial prejudice in the application of the death penalty in the multiple-victim cases, especially in those cases where the accused is a minority and the victim is white. Our findings further demonstrate that the multiple-victim cases are the principal source of the minority-accused disparities documented among all death-eligible cases. Viewed broadly, these findings of the military experience since 1984 support both the aggravation and mitigation prongs of Justice White's hypothesis that the risk of racial prejudice is particularly high in highly aggravated, interracial capital cases in which sentencing authorities are prone to "inflate aggravation" and "deflate mitigation."[189]

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score for each case to rank it from low to high in terms of accused culpability. We conducted an inter-rater reliability analysis of the student rank order decisions. The results met the general test of reliability of a correlation coefficient greater than .70.

[187] The Part III, Column D disparity is not statistically significant because only nine of the sixteen cases were in cells of the scale that included both minority-accused/white-victim cases and other cases, whereas Columns E and F of Part III contained respectively fifteen and sixteen cases in cells that included both groups of cases.

[188] An examination of detail in the analyses on which Table 12 is based (not reported here) indicates that in Columns D and E, the levels of the scales, which include members of both racial groups of cases (on which the disparities are based), have low-to-midrange levels of criminal culpability. In contrast, in Column F, the racial disparities are uniform across all levels of the scale.

[189] *See supra* note 181 and accompanying text. We document an exception to this rule in Part V below in which we focus on a form of aggravation that trumps multiple victims in terms of their perceived deathworthiness—the murder of commissioned officers and substantial lethal attacks on U.S. troops on duty. Among cases with this level of military implication, there is little or no evidence of race effects. *See also infra* note 196 and

For example, the evidence suggests that the presence of multiple victims in a case has a much larger aggravating effect in minority-accused cases than it does in white-accused cases. Specifically, when the accused is a racial minority, the imposition of a death sentence is 7.8 (78% compared to 10%) times more likely in multiple-victim cases than it is in single-victim cases, whereas in white-accused cases, the risk of a death sentence is only 1.7 (14% compared to 8%) times more likely in cases where the multiple victims are white than it is in cases where the multiple victims are minority. This interaction also holds for white-victim cases. Specifically, the risk of a death sentence is 6.8 (61% compared to 9%) times higher in multiple-victim cases than it is in single-victim cases. The races of both accused and victim, as well as the number of victims, persist in multivariate analyses.[190]

Our findings also support the mitigation prong of Justice White's hypothesis, which is that racial prejudice undervalues mitigating evidence in minority-accused cases. In our core model, the single mitigating circumstance (the accused provided support for his or her family) is given substantially more weight in white-accused cases than in black-accused cases.[191]

H. CONCLUSION

The findings presented in Part V document systemic racial disparities in the administration of the military death penalty across the sixteen multiple-victim cases. These disparities cannot be explained by legitimate case characteristics or the effects of chance in a race-neutral system. Also, a comparison of the findings presented in Table 12 for the sixteen multiple-victim cases with comparable findings presented in Table 3 for all ninety-seven cases in the sample clearly identifies multiple-victim cases as a particularly important source of racial disparities in the system.

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accompanying text.

[190] When the core model for the imposition of death sentences (Table 4) is estimated separately for minority accused and white accused, the logistic regression coefficient for the multiple-victim variable was 20.6 for the minority-accused cases and 1.2 for the white-accused cases, neither of which was statistically significant. Similarly, in the white-victim cases, the logistic regression coefficient for multiple victims was 3.5 compared to 2.8 among all cases. (There were too few minority-victim cases to sustain a comparable multiple-victim estimate among those cases.).

[191] The core model based on all cases is reported in Table 4. In the white-accused cases, the adjusted regression coefficient for this mitigator is -11.3 compared to -1.6 in the black-accused cases.

V. A CASE-SPECIFIC QUANTITATIVE AND QUALITATIVE ASSESSMENT OF THE RISK OF RACIAL DISCRIMINATION IN TEN MINORITY-ACCUSED DEATH-SENTENCED CASES

A. INTRODUCTION

The statistical evidence of minority-accused and white-victim disparities presented in Parts IV.C through IV.F (for all cases) and Part IV.G (for multiple-victim cases) documents a systemic risk of race-of-accused and race-of-victim discrimination. But that evidence does not assess the magnitude of the risk of conscious or unconscious racial prejudice in individual cases. In this Section, we develop case-specific quantitative and qualitative assessments of that risk for the ten death-sentenced minority-accused in our study and compare those assessments to the inferences suggested by the statistical analyses of all cases (n = 97) and multiple-victim cases (n = 16). This inquiry recognizes the limits of systemic statistical models as a basis for estimating the impact of race in individual cases. The ten death-sentenced minority-accused cases are listed in Table 13.

The bottom-line question for each case is the likelihood that the outcomes would have been a sentence less than death (a) if the race of the accused had been white rather than minority, and (b) in the nine cases with one or more white victims, if all of the victims had been racial minorities. For each case, we first consider a case-specific *quantitative* measure of the risk of race effects in the case. This measure is reported in Column G of Table 13. It is the difference between (a) the case-specific predicted likelihood of a death sentence among all death-eligible cases estimated with our core logistic regression model (Table 4) with race effects included (Column E of Table 13), and (b) the case-specific predicted likelihood of a death sentence for each case with race effects purged from the analysis (Column F of Table 13). For example, for case number 2 in Column D, Jessie Quintanilla, the 13-point measure of the risk of racial prejudice in Column G is the difference between a 96% predicted likelihood of a death sentence for the case reported in Column E, when the race of the accused and victim are included in the analysis, and the 83% predicted likelihood of a death sentence for the case shown in Column F, when the impact of race on the predicted likelihood of a death sentence has been purged from the analysis.

We next developed a *qualitative* risk of racial prejudice in each case based on a detailed factual analysis of each death-sentenced case and all factually similar comparison cases. For each death-sentenced case in Table 13, therefore, we report both a quantitative estimate of risk in Table 13, Column G, and a qualitative estimate of the risk of racial prejudice for the

case in Appendix B.

Table 13

Death-Sentenced Minority-Accused Rank-Ordered According to Qualitative Estimate of Culpability (from High (1) to Low (10)) (Col. D) and Reporting on Estimated Quantitative Risk of Racial Prejudice in the Case (Col. G): United States Armed Forces, 1984–2005

A		B	C	D	E	F	G
						Quantitative Estimate of the Risk of Racial Prejudice (Col. E – Col. F)	
					Predicted Likelihood of A Death Sentence with Race Effects Purged[192]		
				Predicted Likelihood of A Death Sentence with Race Effects Included			
				Qualitative Estimate of Criminal Culpability (1 High to 10 Low)			
			Race of Victim(s)[193]				
		Race of the Accused[194]					
	Name of Accused (Year of Sentencing)						
1	Hassan Akbar (2005)	B	W/W	1	99%	98%	1 pt.
2	Jessie Quintanilla (1996)	Pacific Islander	W	2	96%	83%	13 pts.
3	Ronnie Curtis (1987)	B	W/W	3	94%	74%	19 pts.
4	Ronald Gray (1988)	B	W/W	4	87%	56%	31 pts.
5	Dwight Loving (1989)	B	W/W	5	78%	42%	36 pts.
6	Kenneth Parker (1993)	B	W/B	6	78%	42%	36 pts.
7	James Murphy (1987)	B	W/W/B	7	48%	16%	32 pts.
8	Wade Walker (1993)	B	W/B	8	48%	16%	32 pts.
9	Jose Simoy (1992)	Filipino	W	9	41%	13%	28 pts.
10	Melvin Turner (1985)	B	B	10	27%	26%	1 pt.

An important background question in this analysis is whether the degree of risk of racial prejudice in individual cases is associated with the level of criminal culpability and deathworthiness of the accused. A threshold step, therefore, was to rank-order with two different measures the ten subject cases in terms of their criminal culpability. We document the

[192] These estimates are computed with the core model of death-sentencing outcomes among all death-eligible cases shown in Table 5 with the race effects purged from the analysis.

[193] The race of the accused and the race of the victims, e.g., "B" in Column B with "W/W" in Column C, means a black accused with two white victims.

[194] See *supra* note 193.

process for rank-ordering the cases in Table 13. The first measure, in Column D, is based on a case-specific qualitative comparative analysis of their facts. The second measure, in Column F, is based on the quantitative analyses presented above and shows the predicted likelihood of a death sentence in the case with race effects purged from the analysis.[195] The data in Columns D and F indicate that, with the exception of Melvin Turner (ranked tenth in Column D of Table 13), the quantitative rank-order classifications of criminal culpability, shown in Column F, are identical to the qualitative rank-order estimates shown in Column D.

B. THE RESULTS

1. Commissioned Officer Murder and Lethal Attacks on United States Troops While on Duty

Column C of Table 13 indicates that seven of its ten cases involved multiple victims. The quantitative results reported in Table 12 documented strong systemic race effects among the sample of sixteen multiple-victim cases and created a threshold inference of racial prejudice in the decisionmaking for all seven multiple-victim cases reported in Table 13, Column C. However, case-specific quantitative and qualitative analyses of three of those cases, involving lethal assaults on U.S. troops while on duty (*Hassan Akbar*) or commissioned officer victims (*Hassan Akbar*, *Ronnie Curtis*, and *Jessie Quintanilla*), reveals a zero-to-low risk of racial prejudice in those cases.[196] The reason is that such cases constitute the most highly aggravated category of military homicides.[197] However, we qualify this finding of a low risk of prejudice estimate with respect to race-of-victim effects in these minority-accused cases by noting that each of the commissioned officer victims in these three cases was white.

These findings provide some support for the "liberation hypothesis," which posits that decisionmakers in both the most highly and least aggravated cases are likely to be in the "grip of fact" and less likely to be influenced by arbitrary and irrelevant case characteristics. In contrast,

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[195] See *supra* text accompanying note 88 for a discussion of how we created the race-purged variables.

[196] In Part 1 of Appendix B, we present the details of our qualitative analysis supporting the inference of a zero-to-low risk of racial prejudice in the commissioned officer victim cases.

[197] For example, in the six officer-victim cases in our sample, the convening authority sought a death sentence in each case, and of the five cases that advanced to a capital sentencing hearing members returned a death verdict 80% (4/5) of the time. As a consequence, the predicted likelihood of a death sentence without regard to race for these cases reported in Column G of Table 13 is greater than 70%.

decisionmakers in cases in the mid-range of aggravation are less likely to be in the "grip of fact," which "liberates" their decisionmaking and makes it more susceptible to the influence of arbitrary and irrelevant case characteristics.[198] This theory has some application here because there is little or no evidence of prejudice among the most aggravated military cases. However, the strong evidence of prejudice among the five other highly aggravated multiple-victim cases in Table 13 (*Ronald Gray*, *Dwight Loving*, *Kenneth Parker*, *James Murphy*, and *Wade Walker*) and the substantial risk of prejudice in the two comparatively low culpability single-victim cases described below (*Jose Simoy* and *Melvin Turner*) weakens overall support for the liberation hypothesis in the military.

2. Other Multiple-Victim Cases

As noted above, the next five cases in Table 13 (*Ronald Gray*, *Dwight Loving*, *Kenneth Parker*, *James Murphy*, and *Wade Walker*) involved multiple-victim murder with one or more white victims. The results of our case-specific qualitative analysis for *Ronald Gray* and *Kenneth Parker* reported in Part 2 of Appendix B suggest a lower risk of racial prejudice than the estimates reported in Table 13, Column G, and the systemic race effects reported in Table 12 for all multiple-victim cases. However, our qualitative analyses of *Dwight Loving*, *James Murphy*, and *Wade Walker* are consistent with the estimates of racial prejudice reported in Table 13, Column G and suggested by the systemic race effects reported in Table 12 for all multiple-victim cases.

3. Single-Victim Cases

Jose Simoy and *Melvin Turner*, the final two cases in Table 13, involved single-victim civilian-style murders, although *Jose Simoy* had some military implications because the murder was committed on an Air Force base. The victim was white in the *Jose Simoy* case and black in the *Melvin Turner* case. The results of our qualitative analysis of these two cases reported in Part 3 of Appendix B suggest a substantial risk of race-of-accused and race-of-victim prejudice in *Jose Simoy*, which is consistent with the case-specific 28-point estimated risk of prejudice reported in Table 13, Column G. For *Melvin Turner*, our qualitative estimate of the racial

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[198] BALDUS, WOODWORTH & PULASKI, *supra* note 41, at 145 (citing H. KALVEN & H. ZEISEL, THE AMERICAN JURY 164–67 (1966)). A frequently cited example is the evidence before the United States Supreme Court in *McCleskey v. Kemp*. 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) (referencing the complete absence of white-victim effects among both the least and most aggravated cases in Georgia between 1973 and 1979). We found a similar pattern of black-defendant disparities in the jury death-sentencing decisions in Philadelphia County between 1983 and 1993. Baldus et al., *supra* note 129, at 1696 fig.3.

prejudice risk is much larger than the 1-point estimate reported in Column G of Table 13.

C. CONCLUSION

The statistical evidence reported for all cases in Parts IV.C through IV.G and for all multiple-victim cases in Part IV.F of this paper documents a systemic risk of discrimination based on the race of the victim and the accused. In Part V, we presented case-specific quantitative and qualitative estimates of the risk of racial prejudice in ten death-sentenced minority-accused cases, which vary somewhat from the inferences suggested by the systemic risk of discrimination documented in Part IV.

For the three most highly aggravated cases, which involved lethal attacks on U.S. troops while on duty or a commissioned officer victim, there appears to be little or no risk of racial prejudice.

Among the other five multiple-victim cases in Table 13, our case-specific qualitative analysis of *Ronald Gray* and *Wade Walker* suggests less risk of racial prejudice than the systemic evidence in Table 12 (for all multiple-victim cases) and the case-specific quantitative estimates reported in Table 13, Column G do. However, our case-specific qualitative analyses of *Kenneth Parker*, *Dwight Loving*, and *James Murphy* suggest a risk of racial prejudice that is consistent with both the quantitative estimates in Table 13, Column G, and the data in Table 12.

For the two single-victim cases, the qualitative and quantitative case-specific analyses produced consistent results for *Jose Simoy* (a moderate risk of prejudice) but inconsistent results for *Melvin Turner*. Our qualitative analysis for that case suggests a substantially higher risk of racial prejudice than the 1-point estimate reported in Table 13, Column G.

VI. THE COMPLETE ABSENCE OF SYSTEMIC RACE EFFECTS IN NON-CAPITAL SENTENCING OUTCOMES

The literature suggests that the risk of racial discrimination in charging and sentencing decisions is higher in capital murder cases than it is in non-capital cases, especially when interracial aspects of the cases have the potential to stir up stereotypes and empathies that are not implicated in non-capital cases.[199] To test that hypothesis for this study and to provide a point of comparison for the evidence of race effects documented in Part III, we estimated race effects in sixty-seven cases that did not advance to a capital sentencing hearing. In each of these cases, the accused appealed to the

[199] *See* WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM 106 (1987) (reviewing papers alleging that race effects are more likely to appear in capital cases than others).

sentencing authority for a reduction of his or her life sentence to a term of years. The request was denied 69% (46/67) of the time. For these decisions, we estimated race effects based on the race of the accused and the victim and the accused/victim racial combination exactly as we did in our analysis of capital charging and sentencing outcomes in Part III of this Article. We did not identify any racial disparities in these convening authority decisions.[200]

For the twenty-nine cases that did result in a term of years, we also estimated racial disparities in the length of those sentences. These sentences are the product of decisions by the convening authority, by the military judge, and by members in which the accused received the lesser of the sentence imposed by the court-martial sentencing authority or approved by the convening authority. Our analysis of these disparities showed only weak racial effects, none of which are statistically significant.[201]

The results of both of these analyses are exactly what one would

[200] We analyzed unadjusted race disparities in decisions by the convening authority denying requests to reduce life sentences to a term of years either before or after trial and identified no race effects at all. These findings stand in sharp contrast to the unadjusted racial disparities in the rates that death-eligible cases (a) advance to a court-martial with the government seeking a death sentence (a 20-point white-victim disparity and a 28-point minority-accused/white-victim disparity), and (b) advance to a capital sentencing hearing (a 56-point white-victim disparity and a 19-point minority-accused/white-victim disparity) that are documented in Part IV of this Article. We also estimated racial disparities in the rates that requests for a reduction of a life sentence to a term of years were denied after adjustment for the level of criminal culpability of the accused. The results were comparable. When we included in the analysis the fifteen life sentences imposed in a capital sentencing hearing the results were comparable.

[201] In terms of white-victim effects, the data document a five-year longer median sentence in the white-victim cases (a thirty-year median sentence in twenty-two cases) than in the minority-accused cases (a twenty-five-year median sentence in seven cases). There was a ten-year disparity in the average sentences (thirty-six years for the white-victim cases versus twenty-six years for the minority-victim cases). As for minority-accused effects, the median sentence was ten years shorter in the minority-accused cases (a twenty-five-year median sentence in eleven cases) than it was in the white-accused cases (a thirty-five-year median sentence in eighteen cases). There was a six-year difference in the average sentences (thirty years for the minority-accused cases versus thirty-six years for the white-accused cases). With regard to minority-accused/white-victim disparities, the median sentence was seven years longer in the minority-accused/white-victim cases (a thirty-two-year median sentence in six cases) than it was in the other cases (a twenty-five-year median in twenty-three cases). There was also a seven-year difference in the average sentences (thirty-nine years for the minority-accused/white-victim cases versus thirty-two years for the other cases). In a multiple regression analysis of these data that controls for the race of the accused and victim, without adjustment for offender culpability, the average sentence was 8.0 years longer for the white-victim cases than for the minority-victim cases and three years shorter for the minority accused than it was for the white accused. None of these disparities is close to statistical significance (p = .34 and .65 respectively) and the introduction of controls for accused culpability does not change the results.

expect to see in a decisionmaking process that is race-neutral. The sharp contrast they present to the substantial systemic disparities documented in Part III for charging and sentencing decisions that implicate the death penalty further supports the inference that those systemic disparities are real.

VII. CONCLUSIONS

The findings of this study indicate that the 1984 executive order designed to bring military law into conformity with *Furman* failed to purge the risk of racial prejudice from the administration of the death penalty in the United States Armed Forces from 1984 through 2005.[202] Our database includes military prosecutions in all potentially death-eligible cases known to us (n = 105) during that period of time, in which fifteen death sentences were imposed.

The data document white-victim and minority-accused/white-victim disparities in the imposition of death sentences among all death-eligible cases that are consistent with findings in numerous state systems on which comparable data are available.[203] On average, after adjustment for non-racial case characteristics, the probability that a death sentence would be imposed in white-victim cases was 12 percentage points higher (p = .11) than it was in similarly situated minority-victim cases.[204] In addition, on average, the probability that a case would result in a death sentence was 15 percentage points higher (p = .09) in minority-accused/white-victim cases than it was in all other cases with different accused/victim racial combinations.[205]

The data also document an independent minority-accused disparity in the imposition of death sentences among all death-eligible cases of a magnitude that is rarely seen in comparable studies of state court systems.[206] On average, after adjustment for non-racial case characteristics, the probability of a death sentence being imposed among all death-eligible cases was 11 percentage points higher (p = .15) in minority-accused cases than in white-victim cases.[207]

Because of the small sample of ninety-seven death-eligible cases in

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[202] Exec. Order No. 12,460, 49 Fed. Reg. 3169 (Jan. 24, 1984).

[203] *See supra* text accompanying note 143.

[204] *Supra* Table 4, Part B, Row 2, Column C. When the racial disparity is stated in terms of odds enhancement, the adjusted odds multiplier for the white-victim cases was 12.5.

[205] When the racial disparity is stated in terms of odds enhancement, the adjusted odds multiplier for the black-accused/white-victim cases was 6.6.

[206] *See supra* text accompanying note 144.

[207] When the racial disparity is stated in terms of odds enhancement, the adjusted odds multiplier for the minority-accused cases was 5.2.

which only fifteen death sentences were imposed, few of the racial disparities estimated overall and at three different decision points are statistically significant beyond the .05 level.[208] Nevertheless, because of their magnitude and consistency, we believe these findings support an inference of real race effects in the system.

The principal source of the white-victim disparities in the system is the combined effect of convening authority charging decisions and court-martial members' guilt trial decisions that advance cases to capital sentencing hearings. Specifically, after adjustment for non-racial case characteristics, on average, the probability that a white-victim case will advance to a capital sentencing hearing is 27 percentage points higher ($p = .03$) than the probability that a similarly situated minority-victim case will advance that far in the process.[209] This is the strongest race effect that we documented in the system and it is consistent after adjustment for all three of our measures of offender culpability.[210]

When the convening authority and member decisions that jointly advance cases to a capital sentencing hearing are analyzed separately, the white-victim effect is substantial in each analysis but in neither is it statistically significant.[211]

With respect to race-of-accused disparities, there are no such effects in convening authority decisions advancing cases to a capital guilt trial.[212] In contrast, there are accused race effects in two sets of members' decisions. First, when panel members decide on guilt in capital trials, there is a moderate, though not statistically significant, minority-accused effect in their unanimous guilt decisions.[213] Second, the minority-accused effect is much more substantial in the members' death-sentencing decisions. Specifically, there is an unadjusted 40-percentage-point minority-accused

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[208] The three different decision points were capital charging decisions by convening authorities, guilt trial decisions by courts-martial members, and death-sentencing decisions by members in a capital sentencing hearing.

[209] *See supra* Table 10 & note 165. When the racial disparity is stated in terms of odds enhancement, the adjusted odds multiplier for the white-victim cases was 28.1.

[210] *See supra* Table 9, Part II, Row (c) (reporting statistically significant disparities of 28 points, 31 points, and 29 points).

[211] The analysis of the convening authority decisions that advance cases to a capital court-martial, reported in Table 6, documents a 13-percentage-point white-victim disparity, significant at the .14 level. The analysis of the members' unanimous guilt trial decisions that advance cases to a capital sentencing hearing, reported in Table 8, documents a 37-percentage-point white-victim disparity, significant at the .18 level.

[212] In the core convening authority regression model, reported in Table 6, there is an 8-percentage-point minority-accused disparity, significant at the .35 level.

[213] In the guilt trial regression model, reported in Table 8, there is a 10-percentage-point minority-accused disparity, significant at the .47 level.

disparity in members' death-sentencing rates (71% for minority accused versus 31% for white accused) that is statistically significant at the .10 level.[214] Upon adjustment with a variety of culpability measures, the minority-accused disparities decline from 17 to 21 percentage points (depending on the measure of accused culpability used in the analysis) and were not significant because of the small sample sizes.[215] These independent race-of-accused disparities are substantially larger than the race-of-defendant effects documented in any comparable study of jury death sentencing of which we are aware.

The data reveal no white-victim effects in the members' capital sentencing decisions because only one black-victim case advanced this far in the system. However, the substantial white-victim effects documented in the members' unanimous guilt trial decisions[216] provide a basis for an expectation of white-victim effects if a substantial number of black-victim cases had advanced this far in the process.

What might explain the different records of the convening authorities and members in the differential treatment of minority and white accused?[217] As documented above, the record of the convening authorities is exemplary, while the record of the members leaves much to be desired. First, the convening authorities are experienced field grade officers (generals and admirals) with training in the exercise of discretion in general and in the military justice system in particular, in a profession that prides itself on diversity and race-neutral decisionmaking. In contrast, members more closely resemble civilian jurors in terms of their decisionmaking experience in and out of the military justice system. Second, convening authorities are heavily influenced by their chief legal advisors[218] who are likely to have had experience as a military prosecutor and as defense counsel representing both minority and white accused. In contrast, members are on their own in their decisionmaking and normally have had no reason to consider issues of equal justice.

The sixteen multiple-victim cases are a major source of racial disparities in the system, particularly minority-accused/white-victim disparities. Among these sixteen cases, after adjustment for offender culpability, the minority-accused/white-victim disparity is between 75 and 88 percentage points with a relative risk ranging from 4.9 to 10.8; two of

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[214] *Supra* Table 11, Column C.

[215] *Supra* Table 11, Columns D–F.

[216] *See supra* text accompanying note 158.

[217] Among the 105 cases processed by convening authorities, 43% (45/105) involved minority accused and 35% (37/105) involved African-American accused.

[218] *Supra* note 48 and accompanying text.

three disparities are significant beyond the .10 level.[219] These findings are consistent with theory and research suggesting that the risk of racial prejudice in the imposition of death sentences is substantially enhanced in highly aggravated cases with minority or black defendants and white victims. The racial disparities documented among these sixteen cases are the largest disparities that we have seen documented in any factually defined subgroup of cases in an American death-penalty system over the last twenty-five years.

Among the ten cases with a minority accused sentenced to death between 1984 and 2005 (reported in Table 13), there is a distinct relationship between the military implications of the murders and the risk of racial prejudice. The results of a qualitative and quantitative analysis of those cases documents a zero-to-low risk of racial prejudice in the three cases with very strong military implications because they involved commissioned officer victims or assaults on American troops. The other seven cases, which had only weak or no military implications, involved a risk of racial prejudice that is consistent with the statistical evidence of racial disparities documented in Part III of this Article.

We also estimated racial disparities in sentencing decisions among the sixty-seven death-eligible cases in our sample that did not advance to a capital sentencing hearing. These sentencing decisions are also the responsibility of convening authorities and court-martial members. This analysis revealed no racial disparities beyond what one would expect to see in a race-neutral system. Accordingly, these sentencing decisions confirm the widespread perception that the risk of racial prejudice is substantially higher in the administration of the death penalty than it is in decisionmaking that does not implicate capital punishment.

The policy implications of our findings are comparable to those in the Georgia findings presented to the United States Supreme Court in *McCleskey v. Kemp*.[220] That research teaches that the risk of systemic discrimination can be eliminated or drastically curtailed by limiting death eligibility to the most aggravated cases, in which there are few if any race disparities.

In the military system, this objective could be accomplished by limiting death eligibility to the most culpable murders committed by members of the U.S. Armed Forces. After more than twenty years of capital charging and sentencing experience, convening authorities and courts-martial members alike perceive those to be: (a) the premeditated murder of a commissioned officer under any circumstances, and (b) a

[219] *Supra* Table 12 and accompanying text.

[220] 481 U.S. 279 (1987).

premeditated attack on U.S. troops resulting in the loss of life. Between 1984 and 2005, such cases account for 11% (11/97) of the death-eligible cases and 33% (5/15) of all death sentences imposed. Between 1990 and 2005, they account for 57% (4/7) of the death sentences imposed. Moreover, since that date, among the forty-six death-eligible civilian murders with no military implications at all, only one death sentence has been imposed.[221] Our findings indicate that a narrowing of death eligibility under military law to the most aggravated cases would greatly reduce or entirely eliminate the risk of racial discrimination in the system.[222]

Such a limitation of death eligibility under military law would also simplify the costs and complexity of the current system without impairing the charging and sentencing authorities' ability to protect vital military interests through the use of the death penalty. For civilian murders with no military implications, the option of life imprisonment with or without parole would serve the interests of military justice. In fact, since 1990, a life sentence or less has been the outcome of 98% (45/46) of the civilian-style death-eligible murders with no military implications.

A formal narrowing of the military death penalty to the most aggravated cases could come by way of an executive order or an act of Congress. A de facto narrowing may now exist, given the charging practices of sentencing authorities since 1990, which have substantially limited capital prosecutions to death-eligible cases with significant military implications. We urge the leadership of the United States Armed Forces, Congress, and the President to consider revising the Uniform Code of Military Justice to formalize this de facto practice or making other revisions to address the racial disparity documented in this Article.

[221] *Witt* (a highly aggravated two-victim, white-accused murder with five statutory aggravating factors).

[222] Our findings indicate that a further limitation of death eligibility to the premeditated murder of commissioned officers and lethal attacks on troops would reduce even further the risk of racial prejudice in the system.

APPENDICES

A. FREQUENCY DISTRIBUTION OF CASE CHARACTERISTICS USED IN THE MILITARY DEATH-PENALTY STUDY: 1984–2005

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
I. Victims	
A. General Characteristics	
1. Child Victim (CHILDVIC)	5 (5)
2. Commissioned Officer Victim (COM_OFF_VIC)	6 (6)
3. Prior to 11/1/99 Victim Was Less Than 15 Years of Age (VIC_LT15)	5 (5)
4. Defendant Killed 2 or More Victims (TWOVIC)	15 (16)
5. Victim a Commissioned Officer or Police Officer (OFF_VIC)	7 (7)
6. Pregnant Victim (PREGVIC)	0 (0)
7. Age of Victim #1 (in Years) (VIC1AGE) (Median = 25)	5 (5)
B. Relationship to Accused	
1. Spouse, Ex, or Paramour Victim (SPOUSEVIC)	29 (30)
2. Spouse, Ex, Paramour, or Child Victim (SPOUSE_CHILDVIC)	33 (35)
3. Personal Relationship Between Accused and Victim (D_V_REL_M)	29 (31)
4. Victim Was Accused's Spouse, Child, or Parent (PV265A)	30 (32)
II. The Crime	
A. Place, Date, Type	
1. Crime Committed Overseas (C_OVERSEAS)	47 (49)
2. Offense Date Later Than 1990 (AFTER_1990)	56 (59)
3. Military Implicated Murder (MIL_IMPLICATED)	18 (19)
4. Five-Year Intervals (FIVE_YEARS)	
1984–1989 (1)	35 (34)
1990–1994 (2)	29 (28)

[223] The reported values differ between the binary (0/1) variables and the multi-level (e.g. 1–5 levels) variables. For the binary variables, the "Percent" and "Number" are the percent coded "1," while for the multi-level variables, the "Percent" and "Number" refer to the cases at the median level of the scale, which is indicated in parentheses.

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
1995–1999 (3)	21 (20)
2000–2005 (4)	14 (15)
B. Statutory Aggravating Factors for Premeditated Murder	
1. Serious Contemporaneous Felony: 7B (PM_AGG2)	32 (34)
2. Motive to Receive Money or Thing of Value: 7C (PM_AGG3)	11 (12)
3. Accused Murder by Another by Means of Coercion, Promise, or Thing of Value: 7D (PM_AGG4)	3 (3)
4. Motive to Avoid or Prevent Apprehension or Effect an Escape: 7E (PM_AGG5)	2 (2)
5. Victim Was an Officer in Execution of Office: 7G (PM_AGG6)	10 (11)
6. Intent to Obstruct Justice: 7H (PM_AGG7	11 (11)
7. Intentional Infliction of Physical Harm: 7I (PM_AGG8)	56 (59)
8. Multiple Victims: 7J (PM_AGG9)	14 (15)
9. Victim Under 15 Years of Age After 11/1/99 (PM_AGG10)	3 (3)
10. Great Risk to Others: R.C.M. 1004C (4) (PM_AGG11)	9 (10)
11. Rape or Sodomy Involved (RAPE_SODOMY)	10 (11)
12. Robbery or Burglary Involved (ROB_BURG)	26 (27)
C. Statutory Aggravating Factors for Felony Murder	
1. Accused Was the Actual Perpetrator (FM_AGG1)	8 (8)
2. Accused Was a Major Participant in Felony Murder with Reckless Indifference (FM_AGG2)	4 (4)
3. Endangered Others Beyond Victim (FM_Agg3)	2 (2)
D. Non-Statutory Aggravating Features of the Offense – In General	
1. Brutal Clubbing or Other Unnecessarily Painful Method of Attack (NS_AGG_TYPE2)	17 (18)
2. Brutal Stomping or Beating With Hands or Feet (NS_AGG_TYPE3)	18 (19)
3. Multiple Gunshot Wounds (NS_AGG_TYPE5)	12 (13)
4. Single Shot to Head (NS_AGG_TYPE6)	9 (9)
5. Slashed Throat (NS_AGG_TYPE8)	10 (11)
6. Multiple Stabbing (NS_AGG_TYPE9)	23 (24)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
7. Extremely Bloody (NS_AGG_TYPE11)	20 (21)
8. Victim or a Nondecedent Bound or Gagged (NS_AGG_TYPE13)	5 (5)
9. Victim or a Nondecedent Forced to Disrobe or Disrobed by Perpetrator (In Whole or in Part) (NS_AGG_TYPE14)	8 (8)
10. Attempt to Dispose of or Conceal Body After Death (NS_AGG_TYPE15)	19 (20)
11. Multiple Victims (NS_AGG_TYPE16)	10 (11)
12. Bodily Harm to One Other Than a Decedent (NS_AGG_TYPE17)	7 (7)
13. Luring, Ambushing, or Lying in Wait (NS_AGG_TYPE19)	13 (14)
14. Victim Killed in Presence of Family Members or Close Friends (NS_AGG_TYPE20)	11 (11)
15. Deceased Victim With 10 or More Stab Wounds or Shots, Except When Murder Weapon Was a Penknife or Other Small Cutting Instrument (NS_AGG_TYPE21)	13 (14)
16. Accused Searched For and Selected Victim Based on Identifiable Characteristics (NS_AGG_TYPE23)	7 (7)
17. Victim Strangled (NS_AGG_TYPE24)	23 (24)
18. Other (NS_AGG_TYPE25)	4 (4)
19. Source of Severe Physical Pain Was From Unusual Method or Weapon, Place of Wounds, Number of Wounds or Blows, or Duration of Attack (PTV319A)	55 (58)
20. Mode of Mistreatment That Caused Severe Physical Suffering Immediately Prior to Death, Not Including Stabbing (PTV311A)	52 (55)
21. All Sources of Severe Physical Pain (DV319A)	56 (59)
22. Great Danger Aggravating Factors Recode for PM and FM (HI_DANGER)	11 (12)
23. No Special Aggravating Circumstance (NOSPAGG)	4 (4)
24. Accused Used Force to Enter Place of Homicide (DV268A)	4 (4)
25. Accused Entered Place of Homicide Uninvited and Unforced (PV268A)	6 (6)
26. File States or Indicated Accused Had History of Previous Assaultive Conduct Toward Victim (DV366A)	11 (12)

A	B
Variable Label and Name	**Percent (Number of Cases)[223]**
27. Accused Killed 2 to 7 Victims While Physically Participating in the Killing or as the Triggerman (DV373A)	15 (16)
28. File Stated or Implied Accused Showed No Remorse For Homicide (PTV356A)	17 (18)
29. File Stated or Implied Accused Abandoned Dying Victim Under Circumstances in Which It Was Apparent the Victim Might Survive If Medical Help Was Sought (PTV369A)	13 (14)
30. Homicide Planned For More Than 5 Minutes (PV304A)	37 (39)
31. Record States or Implies Execution-Style Homicide Against Subdued or Passive Victim (PV306A)	13 (14)
32. Case Involved Contemporaneous Felony and Homicide Was Unnecessary to Complete the Crime (P3V307A)	4 (4)
33. Sexual Perversion Other Than Rape (P3V310A)	4 (4)
34. Mistreatment Lasted Longer Than Uninterrupted Time Period It Took to Cause Death or Unconsciousness (P3V317A)	7 (7)
35. Accused Continued or Resumed a Painful Attack on a Decedent Victim After It Was Apparent the Victim Was Dying (P3V371A)	15 (16)
36. Evidence in Record That Accused Used Alcohol Within the 24 Hours Prior to Offense (P4V176A)	43 (45)
37. One or More Injured Non-Decedent Victims (P4V374A)	11 (12)
38. Torture Involved (TORTURE)	3 (3)
39. Defenseless Victim (VDEFSLES)	0 (0)
40. Kidnapped Victim (VKIDNAP)	0 (0)
41. Threat of Interracial Conflict (CONFLICT_RACE)	6 (6)
42. Additional Crime After Murder (ADDCRIME)	21 (22)
43. BODY_PART_TYPEX (median = 1)	35 (37)
44. Accused Hid Dying Victim, Making Rescue Unlikely (DHIDVIC)	4 (4)
45. No Special Aggravating Circumstances (NOSPAGG)	4 (4)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
E. Aggravating Factors - Before the Crime	
1. Accused Previously Attempted To Kill the Victim (VAR365)	5 (5)
2. History of Assaultive Conduct (VAR366)	11 (12)
3. Previous Attempt to Kill and History of Assaultive Conduct Combined (DVIOL_HIST)	14 (15)
4. Count of Previous Attempt to Kill and History of Assaultive Conduct (DVIOL_HISTX) (Median = 0)	86 (90)
5. Prior Announced Intent to Kill Victim to Third Party (VAR368)	23 (24)
F. Accused's Motive for the Murder	
1. Motive to Facilitate Contemporary Offense (FACILCOF)	19 (20)
2. Motive to Avoid Apprehension (AVAPREH)	3 (3)
3. Separation or Threat of Separation Motivated Murder (DD_SEP)	11 (12)
4. Hatred or Revenge Motive (HATE_REV)	24 (25)
5. Insurance Motive: 4D (INSURANC)	9 (9)
6. Pecuniary Motive: Broad (PECUNMOT)	12 (13)
7. Immediate Rage or Frustration Motive (RAGE)	24 (25)
8. Sexual Motive (SEXMOT)	12 (12)
9. Retaliation for Sexual Refusal, Sexual Rivalry, or History of Previous Assaultive Conduct (SEX_ASSL)	16 (17)
10. Motive to Silence Witness to Contemporary Offense (SILENCEW)	4 (4)
11. Motive to Silence Witness to an Earlier Crime (SILPASTW)	4 (4)
12. Thrill Kill Motive (THRILKIL)	5 (5)
13. File Strongly Suggests that Racial Animosity Was a Motive (PV385A)	8 (8)
G. Accused's Role in the Crime	
1. Accused Harmed No Victim (A_NOHARM)	7 (7)
2. Accused Did Not Participate in the Violence (A_NOT_VIOL)	6 (6)
3. Accused Is Not the Trigger Person (PT373M)	7 (7)
H. Type of Attack	
1. Victim Bound or Gagged (BOUNDGAG)	5 (5)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
2. Luring or Ambush (AMBUSH)	13 (14)
3. Accused Ambushed Victim (DAMBUSH)	19 (20)
4. Brutal Clubbing (CLUB)	17 (18)
5. Slashed Throat (SLASH)	10 (11)
6. Brutal Stomping or Beating (STOMP)	18 (19)
7. Victim Was Strangled with Hands, Rope, Etc. (STRANGLE)	21 (22)
8. Multiple Gunshot Wounds (Other Than to Head) (MULSHBOD)	5 (5)
9. Multiple Gunshot Wounds (MULSHOT)	12 (13)
10. Multiple Stabbing (MULSTAB)	23 (24)
11. Single Shot to Head (V1HEADSH)	9 (9)
12. Execution-Style Homicide (EXECUTION)	13 (14)
13. Victim Mutilated or Dismembered (MUT_DISM)	5 (5)
14. Victim Otherwise Mutilated (OTHMUT)	5 (5)
15. Painful Method of Attack (PAINATK)	49 (51)
18. Sexual Abuse Beyond Rape (SEXPERV)	4 (4)
19. Multiple Stab Wounds (WOUND_1)	28 (28)
I. Parts of the Body That Were Wounded in the Attack	
1. Head (BODY_PART_TYPE1)	48 (50)
2. Neck (BODY_PART_TYPE2)	49 (51)
3. Torso (BODY_PART_TYPE3)	44 (46)
4. Genitals (BODY_PART_TYPE4)	7 (7)
5. Limbs (BODY_PART_TYPE5)	12 (13)
6. Injuries to Genitals or Limbs (PV345A)	19 (20)
7. Sum of Injuries to the Victim (BODY_PART_TYPEX) (Median = 2)	24 (25)
8. Head Wound (P4V345A)	40 (42)
J. Attacks that Caused Severe Physical Suffering Immediately Prior to Death	
1. Punching or Kicking (ATTACK_TYPE1)	20 (21)
2. Stabbing (ATTACK_TYPE2)	23 (24)
3. Beating with Baseball Bat (ATTACK_TYPE3)	4 (4)
4. Beating with Other Blunt Object (ATTACK_TYPE4)	10 (11)
5. Shooting (ATTACK_TYPE5)	8 (8)
6. Sexual Attack (ATTACK_TYPE7)	8 (8)
7. Imprisonment (ATTACK_TYPE9)	16 (17)

A	B
Variable Label and Name	**Percent (Number of Cases)[223]**
8. Sum of Methods of Attacks (ATTACK_TYPEX) (Median = 1)	43 (45)
K. Source of Severe Physical Pain	
1. Unusual Method or Weapon (PAIN_SOURCE_TYPE1)	6 (6)
2. Place of Wounds (PAIN_SOURCE_TYPE2)	30 (31)
3. Number of Wounds or Blows (PAIN_SOURCE_TYPE3)	45 (47)
4. Number of Persons Taking Part in the Attack (PAIN_SOURCE_TYPE4)	7 (7)
5. Duration of the Attack (PAIN_SOURCE_TYPE5)	6 (6)
6. Other (PAIN_SOURCE_TYPE6)	5 (5)
7. Not Applicable (PAIN_SOURCE_TYPE8)	27 (28)
8. Unknown (PAIN_SOURCE_TYPE9)	11 (11)
9. Sum of Pain Sources (PAIN_SOURCE_TYPEX) (Median = 1)	58 (61)
L. Murder Weapon	
1. Handgun (HANDGUN)	20 (21)
2. Shotgun (PTV277A)	6 (6)
3. Knife Stabbing (KNIFE)	28 (29)
4. Bizarre Weapon, e.g. Sword or Razor Blade (BIZWEAP)	5 (5)
5. Beating By a Blunt Object or Other Item, Not Including a Baseball Bat, Fists, or Feet (PTV277A2)	11 (12)
M. Circumstances Surrounding the Victim's Death	
1. Extremely Bloody Crime (BLOODY)	20 (21)
2. Additional Crime or Dismemberment (DADCRIMX)	24 (25)
3. Defendant Arrived Armed (DARMED)	44 (46)
4. Defendant Attacked Dying Victim (DATKDIEV)	19 (20)
5. Victim or Nondecedent Forced to Disrobe or Disrobed by Perpetrator (In Whole or in Part (DISROBE)	8 (8)
6. Defendant Showed No Remorse (DNOREMOR)	17 (18)
7. Defendant Expressed Pleasure (DPLEASUR)	12 (13)
8. Possible Indicators of Domestic Violence Combined (DVIOL)	60 (62)
9. Count of Possible Indicators of Domestic Violence (DVIOLX) (Median = 1)	47 (49)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
10. Entry Without Consent (ENTRYNO)	10 (11)
11. Defendant Created Grave Risk to Nondecedent Victim(s) (GRAVERSK)	14 (15)
12. Severe Pain from Duration of Attack (LONGATAK)	6 (6)
13. Severe Pain from Multiple Wounds (MULWOUND)	50 (47)
14. Attack on Victim More Than 15 Minutes (PV317A)	4 (4)
15. Unnecessary Killing (UNECESAR)	15 (16)
16. Victim Pled for Life (VICPLEAD)	16 (17)
17. Victim Not Clothed at Death (VNUDE)	13 (14)
18. Victim a Stranger (VSTRANGR)	11 (12)
19. Accused Came to Crime Scene With Murder Weapon (P4V269A)	44 (46)
20. Killing Planed More Than 5 Min. (PREMED)	51 (53)
21. Accused Planned Homicide For More Than 5 Minutes (VAR304)	51 (53)
N. Defendant's Actions After the Crime	
1. Additional Crime After Murder (ADDCRIME)	21 (22)
2. Defendant Hid Victim, Reducing Chance of Help (DHIDVIC)	4 (4)
3. Attempt to Dispose of or Conceal Body (HIDEBODY)	19 (20)
4. Defendant Abandoned Dying Victim (DABANVIC)	13 (14)
5. Victim's Body Burned or Placed in Trash or Dump (PV351A2)	6 (6)
6. Defendant Actively Resisted Arrest (DRESIST)	12 (13)
7. Defendant Interfered with Judicial Process (DTHRWIT)	5 (5)
8. Defendant Resisted Arrest (RESARRST)	12 (13)
O. Abuse of the Victim's Body	
1. Dismembered (Abuse_Type1)	6 (6)
2. Otherwise Mutilated (Abuse_Type2)	16 (17)
3. Sexually Attacked (Abuse_Type3)	4 (4)
4. Burned (Abuse_Type4)	5 (5)
5. Placed in Trash or Dump (Abuse_Type6)	4 (4)
6. Thrown in Body of Water (Abuse_Type7)	9 (9)

A	B
Variable Label and Name	**Percent (Number of Cases)[223]**
7. No Indication of Abuse (Abuse_Type8)	69 (72)
8. Sum of the Types of Abuse (Abuse_TypeX) (Median = 1)	70 (74)
9. Accused Dismembered or Otherwise Mutilated Corpse After Death (DV351A)	18 (19)
10. Accused Was a Drug Addict or Substance Abuser (DV185A)	65 (68)
11. Accuser Was Addicted to More Than One Substance (DV185A2)	9 (10)
12. Victim Was Child, Parent, or Other Relative of the Accused (DV265A)	5 (5)
13. Accused Used Force to Enter Place of Homicide (DV268A)	4 (4)
14. Accused Strangled with Rope or Other Cord and/or Burned or Suffocated in Arson (DV277A)	9 (10)
15. Victim Suffered Severe Physical Suffering from a Variety of Sources (DV311A)	43 (45)
16. One or More Sources of Severe Physical Pain (DV319A)	56 (59)
17. File States or Indicates that the Accused Had History of Previous Assaultive Conduct Toward Victim (DV366A)	11 (12)
18. Accused Killed 2 or 3 Victims as Trigger Person or While Physically Participating in the Killing (DV373A)	15 (16)
19. Accused Killed to Silence a Witness to a Recently Committed or Attempted Crime by Either the Accused or a Co-Perpetrator (DV401A)	4 (4)
20. Accused Killed to Silence a Witness Sought Out Subsequent to the Commission of an Earlier Crime (DV402A)	4 (4)
21. Victim Was Accused's Spouse or a Sexual Paramour (PTV265A)	29 (30)
22. Source of Severe Physical Pain Was From Unusual Method or Weapon, Place of Wounds, Number of Wounds or Blows, or Duration of Attack (PTV319A)	55 (58)
23. File Stated or Implied Accused Showed No Remorse For Homicide (PTV356A)	17 (18)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
24. File Stated or Implied that the Accused Abandoned Dying Victim Under Circumstances in Which It Was Apparent the Victim Might Have Survived If Medical Help Was Sought (PTV369A)	13 (14)
25. Accused Entered Place of Homicide Uninvited and Unforced (PV268A)	6 (6)
26. Accused or Co-Perpetrator Came to the Crime Scene Not Armed With the Weapon Used to Kill the Victim (PV269M)	29 (30)
27. Homicide Planned For More Than 5 Minutes (PV304A)	37 (39)
28. Record States or Implies Execution-Style Homicide Against Subdued or Passive Victim (PV306A)	13 (14)
29. Victim's Body Dismembered or Mutilated (PV351A)	7 (7)
30. Victim's Body Burned or Placed in Trash or Dump (PV351A2)	6 (6)
31. File Strongly Infers or Provides a Rational Basis For Belief That Accused Had Long-Term Hatred of Victim (PV380M)	10 (11)
32. File Strongly Infers Motive Was Racial Animosity (PV385A)	8 (8)
33. Execution-Style Homicide (i.e. Homicide Against Subdued or Passive Victim) (P3V306A)	12 (13)
34. Case Involved Contemporaneous Felony and Homicide Was Unnecessary to Complete the Crime (P3V307A)	11 (12)
35. Victim Was Not Clothed (In Whole or in Part) at the Time of the Homicide (P3V309A)	10 (11)
36. Sexual Perversion Other Than Rape (P3V310A)	4 (4)
37. Mistreatment Lasted Longer Than Uninterrupted Time Period It Took to Cause Death or Unconsciousness (P3V317A)	7 (7)
38. Accused Continued or Resumed a Painful Attack on a Decedent Victim After It Was Apparent the Victim Was Dying (P3V371A)	15 (16)
39. File States Strongly Suggesting That Motive Was to Facilitate the Commission of Another Crime (P3V397A)	19 (20)
40. Evidence in Record That Accused Used Alcohol Within the 24 Hours Prior to Offense (P4V176A)	43 (45)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
41. Accused Came to Crime Scene with Murder Weapon (P4V269A)	44 (46)
42. Strong or Some Evidence to Show Victim Pleaded for Life (P4V308A)	16 (17)
43. Victim Dismembered After Death (P4V351A)	6 (6)
44. One or More Injured Nondecedent Victims (P4V374A)	11 (12)
III. Mitigating Factors	
A. Mitigating Factors based on the Model Penal Code Mitigating Circumstances:	
1. No Significant History of Prior Civilian Criminal Activity (MPC1)	51 (53)
2. Accused Under Extreme Emotional Disturbance (MPC2)	29 (30)
3. Victim a Participant (MPC3)	2 (2)
4. Accused Was a Minor Accomplice (MPC5)	2 (2)
5. Accused Was Under Domination of Another (MPC6)	5 (5)
6. Accused's Capacity to Appreciate Criminality Was Impaired (MPC7)	35 (37)
7. Youth of the Accused (MPC8)	18 (19)
8. A Catchall Mitigating Factor (MPC9)	81 (85)
B. Other Mitigating Factors	
1. No Previous Arrests or Convictions (ST_MIT_TYPE10)	48 (50)
2. Passionate Reasons for the Murder (Not Cold Calculation) (ST_MIT_TYPE30)	13 (14)
3. Murder Committed During a Heated Argument (ST_MIT_TYPE31)	6 (6)
4. Murder Committed During a Domestic Quarrel (ST_MIT_TYPE32)	11 (11)
5. Accused's Intent to Kill Was Formed During an Argument with the Victim (ST_MIT_TYPE33)	5 (5)
6. Accused Acted in Emotional Rage (ST_MIT_TYPE34)	16 (17)
7. Accused Was Defending Himself (ST_MIT_TYPE36)	4 (4)
8. Accused Was Depressed (ST_MIT_TYPE39)	8 (8)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
9. Accused Had Difficulty Dealing With Stressful Situations (ST_MIT_TYPE40)	5 (5)
10. Accused Had Substantial Psychological Stress Not Created by the Accused's Wrongful Act (ST_MIT_TYPE41)	6 (6)
11. Accused Had Emotional Stress and Considered Suicide After Murder (ST_MIT_TYPE42)	6 (6)
12. Accused is 18, 19, or 20 Years Old (ST_MIT_TYPE51)	11 (12)
13. Accused Was Not the Trigger Person (ST_MIT_TYPE64)	6 (6)
14. Accused Suffers from Psychotic Depression (ST_MIT_TYPE82)	6 (6)
15. Accused Had a Substantially Impaired Capacity to Appreciate the Criminality of His Conduct or Conform His Conduct to the Requirements of the Law (ST_MIT_TYPE89)	4 (4)
16. Accused Claimed He/She Was Intoxicated During the Crime (ST_MIT_TYPE99)	18 (19)
17. Accused Was Drinking the Night/Day the Homicide Was Committed (ST_MIT_TYPE101)	18 (19)
18. Accused Had a Mental and Emotional Handicap (ST_MIT_TYPE103)	7 (7)
19. Other Accused Had Personality Disorder (ST_MIT_TYPE114)	6 (6)
20. Accused Had Significantly Impaired Social Judgment (ST_MIT_TYPE118)	5 (5)
21. Accused Had Antisocial Personality Disorder (ST_MIT_TYPE120)	9 (9)
22. Accused Showed No Long Term Planning of the Murder (CATCHALL_MIT_TYPE300)	24 (25)
23. Accused Showed Remorse for the Crime (CATCHALL_MIT_TYPE301)	42 (44)
24. Accused Took Responsibility for the Offense (e.g., Pled Guilty to a Non-Capital Murder) (CATCHALL_MIT_TYPE302)	21 (22)
25. Accused Surrendered Within 24 Hours (CATCHALL_MIT_TYPE303)	4 (4)
26. Accused Surrendered More Than 24 Hours After the Homicides (CATCHALL_MIT_TYPE304)	5 (5)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
27. Accused Cooperated with Authorities (e.g. Testified for Prosecutors) (CATCHALL_MIT_TYPE305)	16 (17)
28. Dispute Between Spouses or Ex-Spouses (CATCHALL_MIT_TYPE339)	19 (20)
29. Lover's Triangle (CATCHALL_MIT_TYPE341)	6 (6)
30. Accused Did Not Flee Crime Scene (CATCHALL_MIT_TYPE347)	5 (5)
31. Accused Waived Miranda Rights (CATCHALL_MIT_TYPE348)	6 (6)
32. Accused Confessed to the Crime (CATCHALL_MIT_TYPE350)	34 (36)
33. Credibility Problems of Co-Accused (CATCHALL_MIT_TYPE352)	5 (5)
34. Accused Had Good Behavior at the Trial (CATCHALL_MIT_TYPE353)	7 (7)
35. Accomplice with Comparable Culpability Received Less Severe Treatment (CATCHALL_MIT_TYPE354)	8 (8)
36. Accused Is a Parent (CATCHALL_MIT_TYPE400)	39 (41)
37. Accused Is a Good Parent (CATCHALL_MIT_TYPE401)	12 (13)
38. Accused Is a Provider For His or Her Family (CATCHALL_MIT_TYPE402)	21 (22)
39. Accused Is a Good Spouse (CATCHALL_MIT_TYPE403)	6 (6)
40. Accused Is a Good Child (CATCHALL_MIT_TYPE404)	30 (31)
41. Accused Loves His or Her Family (CATCHALL_MIT_TYPE405)	42 (44)
42. Accused Has Family Who Loves Him or Her (CATCHALL_MIT_TYPE406)	60 (63)
43. Accused Did Service to Community (CATCHALL_MIT_TYPE502)	5 (5)
44. Accused Did Volunteer Work (CATCHALL_MIT_TYPE507)	4 (4)
45. Accused Exhibited Kindness to Others (CATCHALL_MIT_TYPE510)	20 (21)
46. Accused Leads a Stable Life (CATCHALL_MIT_TYPE600)	19 (20)

A	B
Variable Label and Name	**Percent (Number of Cases)[223]**
47. Accused Possesses Good Character Traits (CATCHALL_MIT_TYPE601)	31 (33)
48. Accused was a Non-Violent Person (CATCHALL_MIT_TYPE602)	27 (28)
49. Accused Cooperated with Police (CATCHALL_MIT_TYPE603)	5 (5)
50. Accused Cooperated with Prosecutors (CATCHALL_MIT_TYPE604)	9 (9)
51. Accused Had Good Behavior While in Prison (CATCHALL_MIT_TYPE605)	20 (21)
52. Accused Improved in Prison (CATCHALL_MIT_TYPE606)	5 (5)
53. Accused Was Raised in Good Home (CATCHALL_MIT_TYPE610)	19 (20)
54. Accused Had a Religious Background (CATCHALL_MIT_TYPE611)	9 (9)
55. Accused Displayed Good Qualities as a Child (CATCHALL_MIT_TYPE612)	9 (9)
56. Accused Was Intelligent (CATCHALL_MIT_TYPE614)	9 (10)
57. Accused Had Strong Spiritual and Religious Beliefs (CATCHALL_MIT_TYPE615)	9 (10)
58. Accused Was Devout in His or Her Faith (CATCHALL_MIT_TYPE616)	6 (6)
59. Accused Had a Spiritual Conversion (CATCHALL_MIT_TYPE618)	10 (11)
60. Accused Had a Potential to Contribute to Society (CATCHALL_MIT_TYPE623)	20 (21)
61. Accused Had a Potential to Contribute to Prison Life (CATCHALL_MIT_TYPE624)	8 (8)
62. Accused or Co-Perpetrator Came to the Crime Scene Not Armed with the Weapon Used to Kill the Victim (PV269M)	29 (30)
63. Accused Cooperated with Police or Prosecutors (D_HELP_PROS_M)	10 (11)
64. Accused Is a Parent (D_PARENT_M)	39 (41)
65. Accused Is a Provider (D_PROVID_M)	21 (22)
66. Accused Has Rehabilitation Potential or Engaged in Self-Help Activities (D_SELF_HELP_M)	27 (28)
67. Accused Showed Remorse for Crime (REMORSE_M)	42 (44)

A	B
Variable Label and Name	**Percent (Number of Cases)[223]**
68. Personal Relationship Between Accused and Victim (D_V_REL_M)	29 (31)
69. Accused Has Family Who Love Him/Her (FAM_LOVE_D_M)	60 (63)
70. Accused Took Responsibility for Offense (TOOK_RESP_M)	36 (38)
71. No Evidence of Long-Range Planning for the Murder (NO_LONG_PLAN_M)	23 (24)
IV. Evidentiary Measures	
A. Strong Evidence	
1. Full Confession with Corroboration (STRONG_EVID1)	20 (20)
2. Confession or Declaration Against Penal Interest with Corroboration (STRONG_EVID2)	65 (68)
3. Confession or Other Overwhelming Evidence (STRONG_EVID3)	83 (87)
B. Miscellaneous Evidentiary Variables	
1. Full Confession to Law Enforcement Authorities (EVID_STREN_L_1)	19 (20)
2. Qualified Confession (i.e. Accused Admitting Only Some Elements of Capital Murder) (EVID_STREN_L_2)	29 (30)
3. Declaration Against Penal Interest of Accused with Eyewitness Testimony, Substantial Forensic Evidence, or Circumstantial Evidence (EVID_STREN_L_3)	17 (18)
4. Eyewitness(es) Without Creditability Problems (EVID_STREN_L_4)	6 (6)
5. Eyewitness(es) with Credibility Problems But with Either Overwhelming Forensic or Physical Evidence or Substantial Circumstantial Evidence (EVID_STREN_L_5)	5 (5)
6. Overwhelming Forensic or Physical Evidence (EVID_STREN_L_6)	8 (8)
7. Full Confession to Law Enforcement Authorities (EVID_STREN_SA_1)	26 (27)
8. Qualified Confession (i.e. Accused Admitting Only Some Elements of Capital Murder) (EVID_STREN_SA_2)	15 (16)

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
9. Declaration Against Penal Interest of Accused with Eyewitness Testimony, Substantial Forensic Evidence, or Circumstantial Evidence (EVID_STREN_SA_3)	15 (16)
10. Eyewitness(es) Without Creditability Problems (EVID_STREN_SA_4)	6 (6)
11. Overwhelming Forensic or Physical Evidence (EVID_STREN_SA_6)	9 (9)
12. Pretrial Identification of Accused Occurred (EVID_TYPE_1)	26 (27)
13. Accused Identified By Someone Who Knew Him or Her (EVID_TYPE_2)	23 (24)
14. Accused Identified By 2 or More Witnesses (EVID_TYPE_4)	23 (24)
15. Accused Confessed to Murder (EVID_TYPE_5)	49 (51)
16. Accused Made Incriminating Statements, Less Than a Full Confession (EVID_TYPE_6)	27 (28)
17. Co-Perpetrator Implicated or Testified Against Accused (EVID_TYPE_7)	26 (27)
18. Weapon Found Linking Accused to Murder (EVID_TYPE_8)	33 (34)
19. Scientific Evidence Linking Accused to Murder (e.g. DNA or Fingerprint Evidence) (EVID_TYPE_9)	28 (29)
20. Physical Evidence Linking Accused to Murder (EVID_TYPE_10)	48 (50)
21. Testimony of Primary Witness Was Corroborated (EVID_TYPE_11)	11 (12)
22. Accused Had a Motive to Commit Murder (EVID_TYPE_12)	43 (45)
23. Accused Took out Insurance Policy on Deceased Victim (EVID_TYPE_14)	6 (6)
C. Other Crimes Evidence	
1. Death-Eligible Contemporaneous Offense Conviction (DECO_CONVICT)	34 (36)
2. Death-Eligible Contemporaneous Offense Present (DECO_PRESENT)	43 (45)
D. Accused Defenses	
1. Insufficient Evidence to Prove § 118(1) Culpability (DEFENSE_TYPE1)	48 (50)

A	B
Variable Label and Name	**Percent (Number of Cases)[223]**
2. Accident (DEFENSE_TYPE2)	8 (8)
3. Mistaken Identity (DEFENSE_TYPE4)	8 (8)
4. Defense of Self or Others (DEFENSE_TYPE8)	5 (5)
5. Lack of § 118(1) Mens Rea Because of Mental Illness or Intoxication (DEFENSE_TYPE15)	20 (21)
6. Witnesses Not Creditable (DEFENSE_TYPE19)	7 (7)
V. Accused Criminal Culpability Scales	
1. Number of Statutory Aggravating Factors in the Case (NUM_AGG) (Median = 1)	49 (52)
2. Number of Mitigating Factors in the Case (MITCIRX) (Median = 2)	36 (33)
3. Five-Level Race-Purged Scale Based on Logistic Regression Model of Death-Sentencing Outcomes Among All Death-Eligible Cases (DTH_W6_SCL) (Median = 3)	21 (20)
4. Five-Level Race-Purged Scale Based on Logistic Regression Model of Convening Authority Decisions Advancing Cases to a Court-Martial Seeking a Death Sentence (CAS_SCL_8) (Median = 3)	25 (26)
5. Six-Level Scale Based on 3 Salient Factors (FACTORS_SCL2X)[224] (Median = 2)	15 (16)
6. Highly Aggravated Case: 2 or More Statutory Aggravating Factors (HI_AGG)	50 (53)
VI. Accused and Victim Race, Gender, and Ethnicity Variables	
A. Race of the Accused	
1. Accused is a Racial Minority (ACCUSEDRM)	43 (45)
2. Accused is African-American (ACCUSEDB)	37 (39)
3. Accused is Hispanic (ACCUSEDH)	9 (9)
B. Race and Gender of Victim(s)	
1. White Victim (WV)	82 (86)
2. Female Victim (FEMVIC1)	54 (52)
3. Female White Victim (FEMWHITEVIC)	31 (31)
4. Minority Male Victim (MIN_MALEVIC)	8 (8)

[224] The component variables of this salient factors scale are: (a) the vileness factor (VILE_FAC); (b) the accused victim relationship factor (A_V_FAC); and (c) the two or more aggravating factors variable (HI_AGG).

A	B
Variable Label and Name	**Percent (Number of Cases)**[223]
5. One or More White Victims (WHITEVIC)	82 (86)
C. Defendant/Victim Racial/Gender Combinations	
1. Racial Minority Accused and One or More White Victims (MDWV)	27 (28)
2. Accused/Victim Racial Combination (AVICRACE_2):	
Minority Accused/White Victim (1)	27 (28)
White Accused/White Victim (2)	55 (58)
Minority Accused/Minority Victim (3)	16 (17)
White Accused/Minority Victim (4)	2 (2)
3. Minority Accused in One-Victim Cases (ACCUSEDRM_ONEVIC)	34 (36)
4. Minority Accused in Multiple-Victim Cases (ACCUSEDRM_TWOVIC)	9 (9)
VII. Outcomes	
1. Case Advances to a Capital Court-Martial with the Government Seeking a Death Sentence (CA_SEEK)	43 (45)
2. Capital Sentencing Hearing Held (CSH)	31 (30)
3. Capital Sentencing Hearing: Death Sentence Imposed (CSHDTH)	48 (15)
4. Death Sentence Imposed Among All Death-Eligible Cases (DEATH1)	15 (15)
5. DTH_LIFE_TERM	
Death (2)	14 (15)
Life (1)	58 (56)
Term of Years (0)	29 (25)
6. Life Without Possibility of Parole Imposed (LWOP)	4 (4)
7. Unanimous Vote of Guilt for Premeditated Murder (MEMBERS_GLT)	73 (30)
8. Life Versus Term of Years in a Non-Capital Sentencing Hearing (NCSH_LIFE_TERM)	69 (46)
9. Non-Unanimous Guilty Verdict (NON_UNANIMOUS)	27 (11)

B. CASE-SPECIFIC QUALITATIVE ANALYSES OF THE RISK OF RACIAL PREJUDICE IN TEN MINORITY-ACCUSED DEATH-SENTENCED CASES (1984–2005)

1. Commissioned Officer Murder and Lethal Assaults on U.S. Troops While on Duty

The following qualitative analysis supports an inference of little or no risk of racial prejudice in the commissioned officer victim cases.

i. Hassan Akbar

Akbar included two officer victims and a great risk of death to many other military personnel because the accused, Hassan Akbar, attacked his own unit. These facts highly aggravate his case by military standards and explain why the predicted probability of a death sentence without regard to race is 98% (reported in Column E of Table 13).[225] The quantitative assessment of the risk of prejudice in Column G is 1 percentage point. There are no other cases with multiple victims who are officers with either a white or minority accused for purposes of comparison. *Kreutzer*, a white-accused/white-victim case with a single, white officer victim, is the only other case involving an attack on a military unit and a great risk of death to many other military personnel.[226] William Kruetzer also received a death sentence. Given the high value placed on the lives of commissioned officers in the military and the safety of troops, and the death sentence in *Kreutzer*, it is difficult to perceive a significant risk that racial prejudice infected *Akbar*'s charging and sentencing decisions. This qualitative assessment of risk is consistent with the 1-point estimated risk of racial prejudice reported in Table 13, Column G.

ii. Jessie Quintanilla

Jessie Quintanilla killed one commissioned officer and nearly killed another officer in retaliation for perceived discriminatory treatment by his

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[225] At night in Kuwait four days before the 2003 United States-led invasion of Iraq, Hassan Akbar, a thirty-one-year-old Army E5 with four years of military service, feigned an attack on his unit by rolling live hand grenades into three tents with sleeping officers and opened fire on the occupants as they fled their tents. He killed one officer with a shot in the back. A second officer died of eighty-seven shrapnel wounds. Akbar injured fourteen other non-decedent military victims, many seriously.

[226] William J. Kreutzer, a white, twenty-six-year-old infantry weapons squad leader Army E5, frustrated with his military unit, arrived in the middle of a drill formation of multiple units in a stadium located on his post and opened fire on 1,300 fellow soldiers, killing one, a major, and wounding several others, including at least one officer.

victims.[227] *Quintanilla* is distinguishable from *Akbar* because Quintanilla's motive was a personal grievance toward his victims and he did not threaten the lives of many other military personnel the way Akbar and Kreutzer did. Nevertheless, Quintanilla's decedent and non-decedent victims were commissioned officers, which explains the 83% estimated probability of his receiving a death sentence without regard to race, reported in Column E.

Colon and *Garraway* are life-sentenced cases with single-officer victims in which the accused attacked an individual officer for personal reasons. Ruben Colon, an extremely violent offender in a white-accused/white-victim case, was capitally referred but he avoided the risk of a death sentence when the court-martial members failed to unanimously find premeditation despite overwhelming evidence to the contrary, an outcome that enhances the perceived risk of racial prejudice in *Quintanilla*.[228] Garraway, a minority accused with a single, white-officer victim, was charged capitally for a highly aggravated murder, but received a life sentence in a capital sentencing hearing.[229] Evidence that Garraway suffered from a personality disorder and paranoia mitigates and thereby may distinguish his case from *Quintanilla*.

Overall the perceived risk of racial prejudice in *Quintanilla* is higher than the risk in *Akbar*, but it is low and consistent with the 13-point estimated risk of racial prejudice reported in Column G of Table 13.

iii. Ronnie Curtis

Ronnie Curtis killed two white victims: an officer and his wife.[230] The presence of two white victims, one of whom is an officer, places this case at a slightly greater risk of discriminatory treatment than *Quintanilla*.

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[227] In retaliation for perceived discriminatory treatment, Jessie Quintanilla, a twenty-eight-year-old E4 with nine years of military service, killed his executive officer with a shot in the back. The accused also attempted to kill his commanding officer with a nearly fatal shot to his chest.

[228] Ruben Colon, a white enlisted man with fifteen years of service in the Navy, murdered and robbed the white disbursing officer on his ship. The victim was found gagged, bound, strangled, and shot once through the head in a locker on the ship. Colon also stole cash and U.S. Treasury checks from the victim's office.

[229] Mitchell Garraway, a minority, twenty-one-year-old Navy E4 with three years of military service, brutally stabbed a white, thirty-five-year-old engineering officer aboard their ship in retaliation for the victim's alleged part in suspending his watch stander's qualifications and withholding his promotion, as well as for perceived racial injustice. Garraway fled and another officer discovered the victim, who bled to death within an hour after the attack.

[230] Ronnie Curtis, a twenty-one-year-old Marine Corps E3 with three years of military service, murdered his commanding officer in charge and the officer's wife by stabbing them multiple times in retaliation for perceived racial slights by the officer. He also burglarized the victims' homes and robbed them.

Although Curtis, like Garraway, killed for personal reasons, *Curtis* is more aggravated because he killed two victims. Our qualitative assessment of the risk of racial prejudice in *Curtis*, therefore, is consistent with the 19-point estimated risk reported in Column G of Table 13.

2. Other Multiple-Victim Cases

The following qualitative analysis supports an inference of substantial risk of racial prejudice in the other multiple-victim cases.

The *Gray* and *Loving* cases are civilian-style, multiple-victim cases with conflicting evidence on the risk of racial prejudice.

i. Ronald Gray

Ronald Gray's crime involved two rape–murders with sodomy and a third rape, each on separate occasions. He had also been convicted of an additional premeditated murder in a North Carolina court.[231] Gray's crime was racially charged and at risk of racial prejudice not only because he killed two white victims but also because he raped three white women.[232]

There are no other multiple-victim cases with rape as a statutory aggravating factor. However, *Gray* may be usefully compared to the case of Rocky Reliford[233] and Alan Clark,[234] two white co-perpetrators in a

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[231] Ronald Gray, a twenty-one-year-old Army E4 with four years of military service, abducted, raped, and sodomized his first victim and stabbed her multiple times. Several weeks later, Gray bound, gagged, raped, and sodomized his second victim, a civilian cab driver, and stabbed her seven times. He also attempted to kill a non-decedent rape victim with multiple stab wounds to the neck and side after tying her hands behind her back. A North Carolina court had earlier convicted Gray of a third unrelated premeditated murder.

[232] *See* R.W. Hymes et al., *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 J. SOC. PSYCHOL. 627, 632 (1993) (finding mock juries in 1990 more likely to convict a black defendant of rape when his victim was white rather than black); Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 119, 129–30 (1973) (finding that between 1945 and 1965 in six southern states where rape was a death-eligible offense, the death-sentencing rate in black-defendant cases was 13% (110/823) compared to 2% (9/442) in white-defendant cases. However, in black-defendant cases with white victims, the rate was 36% (113/317) compared to 2% (19/921) in cases with all other defendant/victim racial combinations).

[233] Rocky Reliford, a white twenty-one-year-old Marine Corps E4 with four years of military service, and two accomplices, including Alan Clark, robbed and murdered a fellow white marine, a lance corporal, and his Asian wife, both of whom he knew. The perpetrators cut the male victim's throat with a utility knife they brought with them and then strangled the wife before cutting her throat. They then stole items including a wallet, from which they obtained identification that enabled them to access the victims' banking and American Express accounts.

[234] Alan Clark was a white twenty-one-year-old Marine Corps E3 with two years of military service. See *supra* note 233 and accompanying text for a discussion of the crime

single-murder case involving a contemporaneous felony (robbery) and two victims, one white and the other Asian. *Reliford*'s court-martial members failed to unanimously convict him of premeditated murder, while Clark was sentenced to life imprisonment in a capital sentencing hearing. Another relevant case is *Meeks*, in which a white accused killed two white victims and was sentenced to life imprisonment in a capital sentencing hearing.[235]

The *Gray* case is arguably more aggravated than *Reliford* and *Clark* by the presence of a third premeditated murder (for which Gray was convicted in a state court) and a third rape that did not result in a murder. In terms of assessing the importance of the third rape as an aggravating circumstance, it is worth noting that out of twelve other rape–murder cases (six with sodomy) prosecuted in the military courts since 1984, none has resulted in a death sentence.[236]

Gray's case also involved substantial violence—the first victim was stabbed and shot multiple times, and the second victim was stabbed seven times. However, the cruelty in *Gray* does not exceed that of *Reliford* and *Clark*.[237] Nor does the cruelty in *Gray* exceed the cruelty in *Meeks*.[238]

As noted above, *Reliford*'s court-martial failed to reach a unanimous vote on his premeditated murder charge, which took death off the table. On its face, that decision would appear to mitigate *Reliford* and distinguish it from *Gray*. However, that decision in *Reliford* appears to be against the weight of the evidence, since he and his accomplice planned the crime as a murder–robbery and they armed themselves with knives beforehand to carry out their mission. There is a risk, therefore, that the dissenting votes on premeditation in *Reliford*, taken with knowledge of their implications for a death sentence, may have been influenced by the race of the accused (white) and the race of one of his victims (Asian).

Meeks's court-martial members may have empathized with him because of his race and his jealousy motive. In addition, they may have treated him less severely in deference to his eleven years of military service. This potential mitigation does not apply to Reliford or Clark who, like

committed.

[235] Jeffrey Meeks, a white twenty-eight-year-old Army E6 with eleven years of military service, killed two white female friends when the two victims began to exclude him. He entered the trailer-park residence of the second victim, bound and gagged both victims with tape, stabbed them many times and slit their throats with a knife. He shot one victim one time in the chest and inflicted post-mortem wounds on the second victim by beating her with a fire poker. He then emptied the contents of the second victim's purse, took her car keys, and stole her car, which he later abandoned.

[236] These were all single-victim cases: *Fell*, *Franklin*, *Gates*, *Grandy*, *Graves*, *Mabie*, *Miller*, *Mobley*, *Ronghi*, *Shiloh*, *P. Smith*, and *Whitehead*.

[237] *Supra* notes 233–234.

[238] *Supra* note 235.

Gray, had been in the military only four years. We believe that *Reliford*, *Clark*, and *Meeks* support a concern about the risk of racial prejudice in *Gray*. However, because of the extraordinary level of culpability in *Gray*, our qualitative assessment of the risk of racial prejudice in the case is lower than the 31-point estimate reported for his case in Column G of Table 13.

ii. Dwight Loving

Dwight Loving killed two white cab drivers in the course of two different robberies and attempted to murder a third white cab driver in a failed robbery attempt. The day before the murders he completed two armed robberies against white victims.[239]

Clark, *Reliford*, and *Meeks*, discussed above in the *Gray* analysis, are also relevant to *Loving*. Although *Loving* involved two separate robberies and one attempted robbery in a single evening, his two murders—carried out with shots to the victims' heads from a handgun—lack the ferocity and brutality of the *Clark*, *Reliford*, and *Meeks* murders.

It can be argued that Loving's third unsuccessful armed robbery and the two successful robberies he committed the day before the murders aggravated his case *vis a vis Clark*, *Reliford*, and *Meeks*. In assessing that claim, it is worth noting that in the twenty-one other cases of armed robbery and murder prosecuted between 1984 and 2005, a death sentence was imposed only four times—twice in single-victim cases (*Dock*[240] and *Simoy*[241]) and twice in multiple-victim cases (*Parker* and *Walker*).[242]

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[239] Dwight Loving, a twenty-year-old Army E1 with two years of military service, murdered two cab drivers during two robberies. He killed the first driver with two shots to the head, which yielded $30. On the same night, he killed the second driver with one shot to the head, which again yielded about $30. He later tried to rob and kill a third driver who escaped. The night before the two murders he successfully completed two additional robberies.

[240] Todd Dock, a white, nineteen-year-old armor crewman (Army E3) with three years of military service, stabbed a German taxi driver in the neck until he lost consciousness. After the cab came to a stop, Dock dragged the driver's body from the car. At that point, the driver regained consciousness and attempted to grab Dock's arm. Dock then repeatedly stabbed the victim in the abdomen and chest until he died. Dock stole the victim's wallet and fled the scene.

[241] Jose Simoy, a twenty-eight-year-old Air Force E4 with three years of service, and four co-perpetrators robbed individuals delivering proceeds to a bank on an airbase. In the process, another co-perpetrator killed a police officer with pipe blows to the head and nearly killed a witness trying to silence him. The accused was not the trigger person and did not intend to kill the victim. However, he masterminded the robbery and directed an accomplice to murder the witness.

[242] The single-victim cases of armed robbery where the defendant was sentenced to life imprisonment or less are: *Adams*, *Antle*, *Baer*, *F. Brown*, *Coleman*, *Colon*, *M. Curry*, *Hirsch*, *Humiston*, *Jordan*, *McDonald*, *Pereira*, *Schroeder*, and *Stinson*. The other two multiple-

Among these four cases, the death sentences in *Simoy*, *Parker*, and *Walker* are minority-accused/white-victim cases that themselves carry a risk of racial prejudice. Dock's conviction was reversed on appeal, and on remand he was sentenced to life imprisonment in a capital sentencing hearing.

We believe that *Reliford*, *Clark*, and *Meeks* support a significant concern about the risk of racial prejudice in *Loving*. This concern is consistent with the 36-point quantitative assessment of risk of racial prejudice reported for *Loving* in Column G of Table 13.

iii. Kenneth Parker

The *Parker* case had obvious racial aspects and was therefore racially charged.[243] It also had important military implications because it risked exacerbating racial animosity and conflict within the ranks, thereby threatening military order. It was also a classic case of intergroup conflict. On its own, Parker's second offense, committed on a separate occasion, was a civilian-style murder of the spouse of a fellow soldier's paramour. That alone would have been unlikely to result in a capital prosecution.

Concern about deterring racial conflict likely influenced the capital referral in Parker's case. Capital sentencing members may have been influenced by the belief that blacks are prone to violence or morally inferior, and their empathy with the victim (who was both white and a fellow marine) would be obvious. Those sentiments could have been exacerbated by Walker's senseless and totally unnecessary killing of the spouse of a fellow soldier's paramour.

It is relevant that only one of Parker's five accomplices (Walker) involved in the murder of the white marine was sentenced to death,[244] suggesting that the second civilian-style murder in *Parker* may have made the difference. Overall, our qualitative estimate of the risk of racial prejudice in *Parker* is somewhat lower than the 36-point estimate reported in Column G of Table 13.

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victim cases with life sentences are *Clark* and *Reliford*. Case details for *Parker* and *Walker* are presented *infra* notes 243 and 257.

[243] Motivated by a perceived racial attack on a black marine by white marines, Kenneth Parker, a twenty-one-year-old Marine Corps E3 with three years of military service, and five co-perpetrators—including Wade Walker, *infra* note 257—kidnapped, robbed, and killed with a shot to the heart the first white person they encountered who happened to be a fellow marine. Parker was the shooter. Parker also killed the male spouse of Walker's paramour with a shotgun blast to the chest at Walker's request.

[244] For the four co-perpetrators not sentenced to death this was a single-victim case, but for Parker and Walker it was a multiple-victim case. Three were permitted to plead guilty in exchange for a life sentence. The only one who advanced to a capital sentencing hearing was sentenced to life imprisonment.

iv. James Murphy

Murphy is a three-victim case involving a physical altercation during a marital dispute in which the accused brutally murdered his white wife and two children—one white and one black.[245] At the time of Murphy's crime, the premeditated murder of a child under fifteen years of age was not an aggravating factor;[246] the statutory aggravating factors in *Murphy* were multiple victims and intentional infliction of pain and suffering.

There are three other cases involving multiple child victims that ended with a life sentence or less (*Morgan, K. Curry,* and *Fuhrman*). Lillie Morgan, a black woman, drowned her three-year-old son and two-month-old daughter in the bathtub.[247] There was strong evidence of a psychotic disorder in the case. Because Morgan was less cruel than Murphy and accepted responsibility for her crimes, her case can be distinguished from *Murphy* and does not suggest a white-victim effect in *Murphy*.

Kirklan Curry, a white accused, was charged with the premeditated murder of his ten-month-old child in 1976 and his three-month-old child in 1987.[248] The case was capitally prosecuted but the members failed to find him guilty of premeditated murder. The eleven-year delay in prosecution of the 1976 murder, the initial failure to identify the earlier case as a murder, and the lengthy period between the two murders mitigates this case and distinguishes it somewhat from *Murphy*.

James Fuhrman, a white accused who murdered his Asian wife and adopted Asian son, is a comparison case that suggests possible minority-

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[245] James Murphy, a twenty-three-year-old Army E5 with six years of military service, brutally murdered his wife with a hammer during a physical altercation and drowned her in a bathtub. When his five-year-old stepson sought to protect his mother, Murphy knocked him down, and after he killed the boy's mother, he drowned the boy in the bathtub. He thereupon drowned his own twenty-one-month-old child in the bathtub. He removed identification from the victims to hinder the authorities from identifying the bodies, locked the apartment, and proceeded to his new duty station.

[246] This aggravating factor became effective November 1, 1999.

[247] Lillie Morgan, a black twenty-two-year-old Army E4 with four years of military service, drowned her three-year-old son and two-month-old daughter, both black, in the bathtub, seeking revenge on her allegedly unfaithful husband. She then destroyed all of her husband's property, called him to tell him what she had done, and surrendered to the authorities.

[248] Kirklan Curry, a white thirty-three-year-old Marine Corps NCO (E7) violently shook his three-month-old son in 1987, causing massive brain trauma and resulting in the child's death two days later from cardiac arrest. During the autopsy it was discovered that the victim suffered three broken ribs at different stages of healing and a fractured tibia bone. The investigation into the child's death led investigators to re-open the file on the 1976 death of Curry's ten-month-old son; they concluded that that child had been intentionally suffocated.

accused and white-victim effects in *Murphy*.[249] The level of brutality in *Fuhrman* is unknown because he burned the bodies. Like Murphy, Fuhrman attempted to cover up the crime. Unlike Murphy, there is no evidence that Fuhrman was defending himself in a physical altercation with his wife. The convening authority accepted Fuhrman's offer to plead guilty and was sentenced to fifty years by members in a non-capital sentencing hearing.[250]

Murphy is arguably more aggravated than *Fuhrman* because of the additional child victim in his case. In assessing the importance of the additional child victim as an aggravating circumstance in *Murphy*, consider that out of eight murder prosecutions involving a child victims under fifteen years of age since 1984, Murphy is the only accused to have received a death sentence that was approved by the convening authority.[251] Because of the race of the accused (white) and the victims (Asian) in *Fuhrman*, empathy with the accused and a lack of empathy with the victims may have influenced both the convening authority's non-capital referral and the members' fifty-year sentence in lieu of a life sentence. However, Fuhrman's eighteen-year military career was three times longer than Murphy's, and that difference mitigated his case *vis a vis Murphy*.

Two other multiple-victim domestic homicides are relevant to *Murphy*. *Strom* suggests a possible race-of-accused effect in *Murphy*, and *Patterson* suggests a possible race-of-victim effect. Strom, a white accused, killed his white wife and an innocent white bystander and seriously injured two other bystanders.[252] Strom was sentenced to life imprisonment in a capital sentencing hearing. In the second case, Eddie Patterson, a black accused, intentionally killed both his black girlfriend after assaulting her and a black bystander who intervened.[253] There was no capital referral in the case.

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[249] James Fuhrman, a white thirty-six-year-old Navy E6 with eighteen years of military service, killed his intoxicated Asian wife during an argument. He also murdered his four-year-old Asian adopted son. He burned the bodies and attempted to hide them.

[250] The aggravating factor of murder of a child under fifteen years of age was not effective on the date of his crime.

[251] A death sentence imposed in a child-murder case in 1984 (*Turner*) was disapproved by the convening authority. Beyond *Murphy* and *Turner* there were three child-victim cases before the effective date (November 1, 1999) of this aggravating factor (*K. Curry*, *P. Smith*, and *Fuhrman*) and three such cases after that date (*Ronghi*, *Morgan*, and *J. Brown*).

[252] Mark Strom, a white twenty-nine-year-old Army E5 with four years of military service and three young sons, went to an apartment where his wife was with three friends, including a man with whom she was allegedly having an affair, and shot her in the head, killing her instantly. He continued to fire on the corpse and then fired on the three other people in the apartment, killing one who was white and seriously injuring the others.

[253] Eddie Patterson, a black twenty-two-year-old Army E3 with five years of military service, assaulted his girlfriend, who was black, and then obtained a gun and broke into the barracks, where he fatally shot her twice in the head. He also shot and killed a black

There are two relevant single-victim, white-accused/white-victim cases (*Gibbs* and *Thomas*) that involved considerably less culpability than *Murphy* and arguably diminish the inference of racial prejudice in *Murphy*, even though both Gibbs and Thomas were sentenced to death. In 1989, Gibbs, a white marine, nearly decapitated his very drunk white drinking companion in a brawl.[254] He was capitally charged and sentenced to death. However, the convening authority reduced the death sentence to life imprisonment on Gibbs's post court-martial clemency petition, a decision that speaks to Gibbs's perceived deathworthiness. Thomas, a white marine, brutally murdered his white wife with a tire iron to collect insurance proceeds on her life.[255] On appeal Thomas's death sentence was vacated, and on remand the convening authority waived the death penalty, which speaks to his perceived deathworthiness.

There is also a 2005 multiple-victim case (*Witt*) in which a white accused was sentenced to death, which arguably diminishes the inference of racial prejudice in *Murphy*. Witt, with substantial planning and premeditation, stabbed to death a fellow airman who had harassed Witt with phone calls alleging sexual misconduct on Witt's part. He also killed the wife of his target to eliminate her as a potential witness.[256] The court-martial members who sentenced Witt to death found five statutory aggravating circumstances. If one views *Witt* as comparable to *Murphy* in terms of criminal culpability, its outcome does diminish the perceived risk of racial prejudice in *Murphy*. However, if one views *Witt* as substantially

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bystander who tried to stop him.

[254] Curtis Gibbs, a white twenty-six-year-old Marine Corps E3 with seven years of military service, left a bar with a thirty-five-year-old white woman. He drove the victim into the woods, attempted to force her to leave his car, and then became enraged and pummeled her until she was no longer mobile. He then struck her with a Ninjato sword on her collarbone, almost decapitating her, threw all of her belongings out of his car, and fled the scene of the crime.

[255] In 1987, to collect life insurance payment, Joseph Thomas, a white twenty-eight-year-old field wireman (Marine Corps E5) with ten years of military service, along with an accomplice, killed his white wife with a tire iron. They moved the body into Thomas's car, drove the car off a cliff, and set it on fire.

[256] After receiving thirty-two threatening or harassing phone calls alleging sexual misconduct on his part, Andrew Witt, an Air Force avionics technician (E4) with two years of military service, armed himself with a combat knife and drove to the victims' home. He entered the home without permission and was confronted by the first victim, a senior airman, who told him to leave. The two began fighting, at which point the second victim (the senior airman's wife, who was in the bedroom talking on the phone) and another airman (also in the bedroom) came to intervene. Witt stabbed but did not kill the non-senior airman in the chest and then followed him out of the house and stabbed him an additional three times in the back. Witt then stabbed the first victim, the senior airman, twice in the back before kicking down the bedroom door to get to the second victim, whom he stabbed six more times, killing her. He then stabbed the senior airman (the first victim) again in the heart, killing him.

more aggravated than and therefore distinguishable from *Murphy*, it does not materially diminish the inference of a risk of racial prejudice in *Murphy*.

We believe that these comparison cases, when viewed as a group, suggest a risk of racial prejudice in *Murphy* that is consistent with the 32-point quantitative assessment of risk of racial prejudice reported for his case in Column G of Table 13.

v. Wade Walker

Wade Walker was one of Parker's accomplices in the racially motivated and charged murder of a white fellow marine.[257] Walker was not the actual killer in that crime. Nor was he the actual killer in Parker's murder of the husband of Walker's paramour, but he was the sole instigator of that offense. The analysis of Walker's cases parallels the analysis of Parker's case except that Walker was not the triggerman in either murder. There is nothing in this or any other case that appears to undercut the validity of the 32-percentage-point estimate for the risk of racial prejudice in the case reported in Column G of Table 13.

3. Single-Victim Murder

The following qualitative analysis supports an inference of a substantial risk of racial prejudice in the final two single-victim cases in Table 13.

i. Jose Simoy

Simoy's victim was a military police officer with the rank of sergeant. His crime occurred during an armed robbery of individuals delivering proceeds to a bank on a Guam airbase.

Even though Simoy's case implicated the policy underlying the 7G "officer victim" statutory aggravating factor,[258] his victim was not a commissioned officer. Our database contains no other cases with a police officer as the victim. However, it does contain four other cases like Simoy's with non-commissioned officer victims that resulted in a life sentence or less. One such case that involved a minority accused and a

[257] Wade Walker, a twenty-four-year-old Marine Corps E3 with two years of military service, was a co-perpetrator of Kenneth Parker in both of his murders. *See supra* note 243. While the accused recruited Parker to carry out the paramour murder, he was not a trigger person in either of these murders.

[258] MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 1004(c)(7)(G) (2008). The 7G factor is implicated in a premeditated murder when the accused knowingly kills a commissioned officer, a non-commissioned officer, or a law enforcement officer in the execution of office. However, the aggravator was not charged because Simoy was convicted of felony murder.

white victim (*Ameen*) was highly aggravated, involving three additional attempted murders.[259] It advanced to a capital sentencing hearing and resulted in a life sentence. Because it is a minority-accused/white-victim case, *Ameen*'s outcome weakens the perceived risk of racial prejudice in *Simoy*. The one case of a minority accused and a minority non-commissioned officer victim (*Levell*) advanced to a capital court-martial, but capital punishment came off the table when the members failed to convict unanimously on the premeditated murder charge.[260] This outcome suggests a possible race-of-victim effect in *Simoy*. In the two cases where the accused were white and the non-commissioned officer victims were white (*Bowley* and *Jiminez*), the convening authority waived the death penalty before trial.[261] The outcomes of these two white-accused cases therefore suggest a possible minority-accused effect in *Simoy*. The outcomes of these four cases also enhance the perceived risk of a minority-accused effect in *Simoy*, because the two similarly situated minority accused in *Ameen* and *Levell* were treated more punitively than the two white accused in *Bowley* and *Jiminez*. Specifically, the two minority-accused cases advanced to a capital court-martial while the two white accused were not capitally charged.

In assessing the importance of an armed robbery in a single-victim case, we observe that a death sentence has been imposed in only one other case (*Dock*). On remand, Dock was sentenced to life imprisonment.[262]

Simoy was not the actual killer and there was no evidence that he intended to kill the victim, who died three days later from head wounds inflicted by an accomplice. This was an ordinary armed robbery and felony murder case except for its high visibility as an assault on an air base, which likely highlighted its racial aspects and therefore enhanced the risk that Simoy's race may have played a role in his charging and sentencing decisions. This assessment of the risk of racial prejudice in *Simoy* is consistent with the 28-point risk reported in Table 13.

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[259] Arif Ameen, a minority thirty-year-old seaman (Navy E3) with one year of military service, killed a senior chief petty officer in an academic counseling session. He also attempted to murder three other military personnel, whom he seriously injured in the process. His defense was a psychotic episode and a total lack of recall of the incident.

[260] Victor Levell, a minority twenty-year-old Marine Corps enlistee (E1), shot and killed a non-commissioned officer who sought to break up an altercation outside a bar.

[261] Jacob Bowley, a white twenty-year-old military policeman (Army E3), shot and killed his white female platoon sergeant in an altercation over his and his friend's drunken behavior off post. Mark Jiminez, a white Hispanic twenty-two-year-old Marine Corps lance corporal and two accomplices (also marines), while drunk, drowned a sergeant (after repeatedly stabbing him over his entire body) in order to prevent him from testifying against Jiminez and one of his accomplices for a prior assault on a fellow marine.

[262] *See supra* note 240 and accompanying text.

ii. Melvin Turner

In January 1984, Turner brutally murdered his eleven-month-old daughter with a razor blade in retaliation for his wife's infidelity.[263] The estimated probability of a death sentence without regard to race reported in Column F of Table 13 is 26%, and the quantitative risk of racial prejudice reported in Column G is 1 percentage point.[264] This is the only death-sentenced case with only black victims, which partly explains why the case-specific quantitative measure of the risk of racial prejudice is so low.

There are four comparison cases involving a single victim less than fifteen years of age, a circumstance which became a statutory aggravating factor on November 1, 1999.[265] Two of the cases occurred before that date: *Smith* (a white accused and a two-year-old white victim)[266] and *Thomas* (a white accused and a seven-year-old white victim).[267] Despite the high level of aggravation in both of these cases, the convening authority waived the death penalty, suggesting a possible minority-accused effect in *Turner*.

There are two additional comparison cases prosecuted after the less than fifteen years of age victim aggravating factor became effective (*Ronghi* and *Brown*). *Ronghi* was a brutal white-accused/white-victim rape–murder of an eleven-year-old Albanian girl.[268] The convening authority waived the

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[263] Melvin Turner, a thirty-eight-year-old Marine Corps E7 with many years of military service, brutally murdered his eleven-month-old daughter with a razor blade, slashing her face, shoulders, and neck while she slept. He had been drinking heavily before the attack and his motive was retaliation for his wife's infidelity.

[264] There is an issue in the case of the applicability of the 1984 executive order, which became effective August 1, 1984, seven months after Turner's offense. However, on its face the executive order applies to cases tried and sentenced after its effective date, which brought *Turner* within its terms. Exec. Order No. 12,473, 49 Fed. Reg. 17152 (Apr. 13, 1984) ("This Manual shall take effect on August 1, 1984, with respect to all court-martial processes taken on and after that date."). There is evidence that some military courts have refused to apply the new rule to a crime that occurred before the effective date of the executive order.

[265] MANUAL FOR COURTS-MARTIAL, RCM 1004(c)(7)(K).

[266] Patrick Smith was a white twenty-two-year-old multiple launch rocket system crewmember (Army E4) stationed in Germany. After a night of drinking, he entered the house of the victim, a white two-year-old girl, through an unlocked door. He took the girl without authority and carried her to a nearby wooded area. He repeatedly hit her in the head with his fists, rendering her unconscious. He then removed her clothes, raped her, and threw her body into a thorny underbrush. It is unclear when she died, but the autopsy lists the cause of death as blows to the head.

[267] Fredrick Thomas, a white thirty-five-year-old aviation systems warfare operator (Navy E6), had an argument with his wife. During the argument, he attempted to suffocate their seven-year-old son with his bare hands and also choked his wife. He eventually drove away with his son after his wife prevented the attempted murders. The next day, Thomas suffocated his son with his bare hands.

[268] Frank Ronghi, a white thirty-five-year-old weapons squad leader with ten years of

death penalty, which enhances the perceived risk of a minority-accused effect in *Turner*.

Brown was a minority-accused/minority-victim murder of a three-week-old girl. The convening authority waived the death penalty and accepted a plea to non-premeditated murder in exchange for a sentence of not more than fifteen years.[269] *Brown* is mitigated *vis a vis Ronghi* because his liability for premeditated murder was questionable. For this reason we believe *Brown* does not substantially implicate the perceived risk of a minority-accused effect in *Turner*.

Turner involved the killing of one child, motivated by the wife's infidelity, a category of murder typically with very low priority in the eyes of convening authorities and in which no other cases have been capitally prosecuted since.[270] Nevertheless, if *Turner*'s convening authority and court-martial members perceived blacks as prone to violence, the brutality of Turner's crime could have provided an opportunity for racial prejudice to operate. We perceive a substantial risk of racial prejudice in *Turner*'s charging and sentencing decisions in the range of 30 points, which greatly exceeds the 1-point estimate in Column G of Table 13.

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military service (Army E6), while on patrol in Kosovo as part of a NATO Kosovo peacekeeping force, entered an apartment complex with the purpose of finding a young female to sexually assault. He found the victim, an eleven-year-old Albanian girl, and took her to the basement. There he forcibly removed her clothes, digitally penetrated her vagina, sodomized her (causing serious injury to her rectum), and pounded her face into the concrete floor (causing bruising). He then strangled the girl with his bare hands before stepping on her neck, killing her.

[269] Jerry Brown, a minority twenty-two-year-old Army enlistee (E3), killed his three-week-old daughter by striking her and slamming her against the kitchen countertop repeatedly because she did not stop crying. His wife demanded that he take the girl to the hospital, but he refused. After twenty minutes of argument his wife called 911, and the girl died three hours later at the hospital.

[270] This fact, in addition to his rank as an E7 and his many years of good service, likely explains why the convening authority disapproved Turner's death sentence on his post court-martial clemency motion.