DIFFERENTIATING HIGHER LEVEL HOMICIDES: AN EMPIRICAL ANALYSIS OF THE IMPACTS OF LEGAL DEFINITIONS IN THE REAL WORLD, PLUS AN ILLUMINATION OF THE UNDERSTUDIED CRIME OF SECOND-DEGREE MURDER

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ABSTRACT

First-degree murder, second-degree murder, and voluntary manslaughter constitute the traditional hierarchy of higher level homicide offenses in 27 U.S. jurisdictions. The typical differences in potential sentences among the three crimes are dramatic, ranging from death or life without parole for first-degree murder down to a relatively short prison term for voluntary manslaughter. Accordingly, the level of crime of which a killer is convicted is crucially important to the prosecution, defense, and society.

The legal definitions of these three crimes are relatively clear-cut, but the definitions must operate in a messy, real world that is rife with variables. One purpose of this Article is to empirically examine the extent that real-world convictions are described by these legal definitions and to identify possible patterns when departures are observable.

This Article focuses on six states and covers 371 homicide case resolutions during the first six months of 2017, assembled using newspaper reports. A coding sheet with numerous variables was developed. One set of variables focused on the facts of each case, and the second set of variables reflected the resulting conviction in each case. After each case was coded, it was entered into a spreadsheet to facilitate data analysis. Finally, the results were analyzed qualitatively and quantitatively, using both descriptive statistics and ordered multinomial logistic regression, to ascertain the extent that the legal definitions of the three crimes—first-degree murder, second-degree murder, and voluntary manslaughter—described the case convictions in light of the case facts.

A second purpose of this Article is to provide insights into the crime of second-degree murder, which is the understudied workhorse of U.S. homicide law; indeed, the data demonstrates second-degree murder is the most likely conviction by a significant margin. Remarkably, until now, not a single scholarly piece has ever focused on second-degree murder. This Article will provide indicia of the kinds of fact patterns that tend to result in second-degree murder convictions.

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I. INTRODUCTION

First-degree murder, second-degree murder, and voluntary manslaughter constitute the traditional hierarchy of higher level homicide offenses.[1] These crimes rank highly in importance in the criminal justice system and in popular culture, in terms of both real and fictional portrayals of homicide. Typically, first-degree murder is defined as a killing that is

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1. For an in-depth presentation of this traditional hierarchy, see David Crump, *"Murder, Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257 (2007); Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007 (2001).

either (a) intentional and with premeditation or (b) during the commission of one of five predicate felonies: arson, burglary, kidnapping, rape, or robbery.[2] Second-degree murder is defined as either (a) an intentional killing (no premeditation required)[3] or (b) a killing with intent to cause serious bodily injury[4] that instead results in death.[5] Murder can be downgraded to voluntary manslaughter if the killer acted in the "heat of passion" due to a legally recognized provocation.[6] This traditional trichotomy of crimes is still embodied in the laws of 27 U.S. states.[7]

The typical differences in potential sentences among the three crimes are dramatic.[8] In most jurisdictions, first-degree murder is punishable by a life sentence without parole or death if the jurisdiction authorizes capital punishment, second-degree murder is punishable by decades in prison with

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2. *See* WAYNE R. LaFAVE, CRIMINAL LAW 1014 (6th ed. 2017).

3. *See id.* at 970.

4. "'Serious bodily injury' (or 'great' or 'grievous bodily harm,' as it is often called) is something more than plain 'bodily injury'; it means something close to, though of course less than, death." *Id.* at 976.

5. Of course, many jurisdictions have more variants of second-degree murder, specifically "depraved-heart" or extreme recklessness murder and second-degree felony murder. *See id.* at 970. For our purposes, we were not concerned with these types of unintentional second-degree murder.

6. *See id.* at 1026.

7. Citations for these states' statutes, as well as federal law and the District of Columbia, are found in the Online Statutory Appendix [https://lawreviewdrake.files.wordpress.com/2019/07/mccord-online-statutory-appendix.docx]: Arizona, California, Colorado, Florida, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. For statutory citations, see Stacy, *supra* note 1, at n.20. In five states—Arizona, Florida, Minnesota, Nebraska, and Washington—second-degree murder is explicitly defined as "without premeditation." Online Statutory Appendix. In 13 states—California, Idaho, Iowa, Maryland, Massachusetts, Michigan, Nevada, North Carolina, Rhode Island, South Dakota, Vermont, Virginia, and West Virginia—second-degree murder is defined as "all other kinds" of murder other than first-degree, and Pennsylvania defines third-degree murder as "all other kinds," while reserving second-degree murder for some kinds of felony murder. *See* Online Statutory Appendix. In eight states—Colorado, Kansas, Missouri, New Hampshire, New Mexico, Ohio, Tennessee, and Wyoming—second-degree murder is defined as intentionally or knowingly killing without mention of premeditation, whereas the first-degree murder statute requires premeditation. *See* Online Statutory Appendix.

8. For examples of punishment provisions from six states, see Online Statutory Appendix.

the possibility of eventual release, and voluntary manslaughter is punishable by a substantial prison sentence but not decades long. Accordingly, which crime a killer is convicted of is crucially important to the prosecution, defense, and society.

The legal definitions of these three crimes are relatively clear-cut, but these definitions must operate in a messy world rife with variables including: evidence of guilt that may be less than ironclad, defendants may assert more or less plausible affirmative defenses, both sides may have more or less effective lawyers, victims' survivors' wishes may diverge widely, prosecutorial resources may be strained, limited prison capacity may be available, etc. Accordingly, one would expect the pristine legal definitions of these three crimes to often yield to pragmatic uses. The purpose of this Article is to empirically examine the extent to which real-world convictions are described by these legal definitions and—when departures are observable—to identify possible patterns.

An important additional aspect of this Article is that it provides insights into two types of second-degree murder: intent to kill and intent to cause serious bodily injury (hereinafter simply second-degree murder). This crime is the understudied workhorse of U.S. homicide law.[9] Remarkably, not a single scholarly piece has ever focused on second-degree murder. By contrast, there is scholarly writing about the doctrinally interesting topics of premeditation for first-degree murder,[10] first-degree felony murder,[11] "depraved heart" or extreme recklessness second-degree murder,[12] and heat-of-passion manslaughter.[13] The lack of scholarly interest in second-degree murder is understandable from a doctrinal standpoint. Second-degree murder has a simple definition consisting only of the combined *actus reus*, causation, and result of causing the death of a human being and the *mens rea* element of with intent to kill or intent to cause serious bodily injury.

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9. *See* LAFAVE, *supra* note 2, at 970 ("The commonest type of murder, of course, is the intent-to-kill type, where *A*, with an intent to kill *B*, by his conduct succeeds in killing *B*.").

10. *See, e.g.*, Kimberly Kessler Ferzan, *Plotting Premeditation's Demise*, 75 L. & CONTEMP. PROBS. 83 (2012).

11. *See, e.g.*, Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403 (2011).

12. *See, e.g.*, Dora W. Klein, *Is Felony Murder the New Depraved Heart Murder? Considering the Appropriate Punishment for Drunken Drivers Who Kill*, 67 S.C. L. REV. 1 (2015).

13. *See, e.g.*, Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, 55 AM. CRIM. L. REV. 409 (2018).

Thus, the primary issues on appeal[14] are sufficiency of the evidence of intent[15] and whether the facts instead support only a heat-of-passion manslaughter conviction.[16] These issues are fact-intensive and do not result in far-reaching doctrinal pronouncements. Thus, they have not proven provocative to criminal law scholars. Yet, there is much to be learned about second-degree murder by shifting perspective from the appellate level to the trial level—as this Article does.

II. METHODOLOGY

Twenty-seven U.S. states employ the traditional trichotomy of homicides; however, this Article will focus on six states: five of the most populous—California, Florida, Pennsylvania,[17] North Carolina, and

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14. Of course, sometimes cases raise issues of whether the victim is dead (missing-body cases) or whether the defendant was a sufficient cause of the victim's death. However, these cases, while intriguing, are rare.

15. *See* State v. Sellers, No. 12-0869, 2013 WL 105281, at *1, *4–5 (Iowa Ct. App. Jan. 9, 2013) (holding evidence was sufficient to support a finding of an intent to kill and not just an intent to inflict a routine beating); *see also* People v. Beamon, No. 332509, 2017 WL 2562555, at *1, *2 (Mich. Ct. App. June 13, 2017) (holding evidence was sufficient to support a finding of an intent to kill when the defendant expressed a motive to kill the victim, chased the victim while firing in his direction, and fled the scene after the killing).

16. *See* Soto v. State, 813 S.E.2d 343, 346 (Ga. 2018) (holding the evidence supported a finding of a malice murder with an intent to kill rather than a heat-of-passion manslaughter).

17. Pennsylvania parcels felony murder into two crimes: first-degree and death-eligible,if committed with premeditation during the commission of a felony and second-degree if committed with a lower *mens rea* during the commission of a felony. For coding purposes we treated Pennsylvania second-degree murders as first-degree murders. Pennsylvania has the crime of third-degree murder that equates to second-degree murder in the other jurisdictions. For coding purposes we considered these third-degree murders as second-degree murders. This is further explained in the Online Statutory Appendix.

Michigan[18]—plus the Authors' home state of Iowa.[19] Together these states provide a representative geographic coverage of the nation. The database is derived from newspaper reports of cases at the trial level of the six jurisdictions from January 1, 2017, to June 30, 2017. Newspaper databases provide two great benefits as sources of cases. First, they generate a large number of cases within a narrowly defined period. Second, examining trial-level resolutions is more reflective of practice in the trenches because many cases, particularly those that are plea-bargained, never appear in appellate reports.[20]

A pool of potentially useful articles was located by searching the terms *murder* and *manslaughter* in relatively comprehensive newspaper databases for each state.[21] This large pool of results was winnowed to find cases that resulted in convictions or sentences, by either a plea bargain or verdict, during that six-month period. This resulted in 371 cases: 112 from California, 61 from Florida, 25 from Iowa, 32 from Michigan, 55 from North Carolina, and 86 from Pennsylvania.[22] A coding sheet with numerous variables was

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18. These states rank in population, respectively, first, third, sixth, ninth, and tenth. *US States—Ranked by Population 2019*, WORLD POPULATION REV. (last visited Apr. 3, 2019), worldpopulationreview.com/states/ [https://perma.cc/R8L8-EJGE]. Four of the other five states in the top ten—Texas, New York, Illinois, and Georgia with population ranks of second, fourth, fifth, and eighth—are among the 23 states that do not distinguish between degrees of murder based on premeditation. *Id.*; *see* Online Statutory Appendix. We could have selected Ohio, ranked seventh in population, to represent the mid-East region, but we chose Michigan instead. *US States—Ranked by Population 2019*, *supra* note 18.

19. Iowa ranks 30th in population. *US States—Ranked by Population 2019*, *supra* note 18.

20. We acknowledge our search method missed cases from locales whose newspapers were not included in the database or cases that were relevant but not captured by the search terms. However, it was not necessary to achieve the impossible goal of generating a complete set of all homicide cases that were resolved in the six jurisdictions in those six months in order to compile a sufficient number of cases to be able to identify patterns; a robust sample is sufficient for the task.

21. The WestLawNext database allows for searching newspapers of every state individually. While the number of newspapers varies slightly over time, our searches encompassed approximately the following number of newspapers in each state: California 148, Florida 78, Iowa 29, Michigan 55, North Carolina 71, and Pennsylvania 82. These results were entered into a spreadsheet to facilitate data analysis [hereinafter Author Dataset]. This information is available from the Authors upon request.

22. *See* Author Dataset, *supra* note 21.

developed.[23] One set of variables focused on the facts of each case,[24] and the second set of variables reflected the resulting convictions in each case. After each case was coded, it was entered into a spreadsheet that facilitated data analysis. Finally, the results were analyzed qualitatively, using both descriptive statistics[25] and ordered multinomial logistic regression,[26] to ascertain the extent to which the legal definitions of the three crimes—first-degree murder, second-degree murder, and voluntary manslaughter—describe the cases' convictions in light of the cases' facts. These results are presented in the remainder of the Article.

III. An Overview of the Results and Four Useful Perspectives

The convictions[27] rendered in the 371 cases in the dataset, including the distinction between those resolved by plea and those resolved by verdict, broke down as seen below.[28]

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23. *See infra* Appendix One.

24. In some cases the news reports may not have reported some of the variables for which we were coding, but we chose variables that were obviously factually significant. Accordingly, we believe news reporters would usually have viewed them as worthy of reporting.

25. Descriptive statistics is a formal name for simple arithmetic analyses based on things such as counting and percentages. *See Descriptive and Inferential Statistics*, Laerd Stat. (last visited May 9, 2018), https://statistics.laerd.com/statistical-guides/descriptive-inferential-statistics.php [https://perma.cc/7SLQ-4WPE].

> Descriptive statistics is the term given to the analysis of data that helps describe, show or summarize data in a meaningful way such that, for example, patterns might emerge from the data.
>
> . . . .
>
> When we use descriptive statistics it is useful to summarize our group of data using a combination of tabulated description (i.e., tables), graphical description (i.e., graphs and charts) and statistical commentary (i.e., a discussion of the results).

Id.

26. Essentially, this type of analysis is used to predict the probabilities of higher ordered results for an ordinal dependent when there is a specified set of independent variables. For further explanation, see *infra* note 108.

27. We did not find many cases in which there were complete acquittals, but in any event, acquittals were not relevant to our inquiry.

28. *See infra* Table 1.

TABLE 1

	Total (371)	By plea (180)	By verdict (191)
First degree with death sentence	11	0	11
First degree without death sentence	124	27	97
Second degree	165	99	66
Voluntary manslaughter	53	41	12
Involuntary manslaughter	8	5	3
Nonhomicide	10	8	2

Worthy of note from this general overview are the following:

- Second-degree murder was the most frequently occurring conviction by a significant margin (165 for second-degree convictions compared with 135 convictions for first-degree (11 with death sentences and 124 without));[29]

- But in cases that went to trial, first-degree murder was the most frequent conviction by a significant margin (31 more than second-degree convictions);[30]

- First-degree pleas were relatively infrequent (27),[31] likely because only defendants in the four death-penalty states had something to gain (California, Florida, North Carolina, and Pennsylvania) by avoiding the possibility of a death sentence. Even in those states, only one had a sentence for life with possibility of parole available in a first-degree case—the other five jurisdictions had a mandatory sentence of life without parole;[32]

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29. *See supra* Table 1.
30. *See supra* Table 1.
31. *See supra* Table 1.
32. Nonetheless, two defendants in Iowa and one in Michigan pleaded guilty to

- Voluntary manslaughter convictions were much more frequent through pleas (41) than through verdicts (12);[33]

- In a handful of cases, intention to kill dropped out of the case resolution in favor of a conviction for a crime with a less culpable mental state (18 cases, of which 8 were for involuntary manslaughter and 10 for nonhomicide crimes);[34] and

- In general, the breakdown suggests exactly what one would intuitively suppose: prosecutors tended to bargain to second-degree murder, voluntary manslaughter, or a lesser conviction in weaker cases and saved the stronger cases for trial, where jurors usually agreed with the prosecutors' assessments of the strength of the evidence through a predominance of first-degree verdicts.[35]

Beyond these overall observations, there are many possible ways to more closely analyze the 371 cases in the dataset. Ultimately, we found the most helpful insights came from analyzing the dataset from four perspectives:

- The relationship between the defendant and the victim, plus the defendant's motive (Relationship + Motive), apart from the felony-murder rule;

- Felony Murders;

- Cases with clear evidence of premeditation (Clear Premeditation); and

- Other factors (Complicating Factors) that spanned Relationship + Motive, Felony Murders, and Clear Premeditation.

We will examine each of these four perspectives below.

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first-degree murder seemingly just to get on with spending their lives in prison. Kim Norvell, *Waukee Man Pleads Guilty to Premeditated Murder*, DES MOINES REG., Jan. 24, 2017, at 1, 2017 WLNR 2360210; Grant Rodgers, *Green Pleads Guilty to Two Police Killings Shooter Offers Little Insight into the Slayings of D.M., Urbandale Officers*, DES MOINES REG., May 23, 2017, at 1, 2017 WLNR 15950660; Tony Wittkowski, *Beshires Sentenced to Life in Prison*, HERALD-PALLADIUM, Jan. 31, 2017, at 1, 2017 WLNR 3131069.

33. *See supra* Table 1.

34. *See* Author Dataset, *supra* note 21.

35. *See supra* Table 1.

A. *Relationship + Motive, Apart from the Felony-Murder Rule*[36]

We identified eight categories of Relationship + Motive represented by 10 or more cases. [37] In describing these categories, we will use *D* to represent the defendant and *V* to represent the victim.

1. The first category consists of cases where the *D* killed a child *V*[38] of whom *D* was the caretaker. These killings did not appear to have been with intent to kill but by child abuse inflicted without regard for the consequences. These cases were most likely to result in second-degree convictions. [39]

TABLE 2

Number of cases	**22**
First degree with death sentence	1
First degree without death sentence	4
Second degree	14
Voluntary manslaughter	3
Involuntary manslaughter	0
Nonhomicide	0

2. The second category involves a male *D* killing someone while angry with a female significant other due to jealously or feeling spurned by her.[40]

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36. Indeed, these cases usually did not involve the defendant's commission of any of the big five predicate felonies, although occasionally Relationship + Motive overlapped with Felony Murders. *See* LaFave, *supra* note 2, at 1019–20.

37. *See* Author Dataset, *supra* note 21.

38. We defined *child victim* as 12 years old or younger.

39. *See infra* Table 2.

40. There were also three cases with jealousy or spurning as motives but with different genders in the roles: in one case, a female *D* killed a male *V* significant other; in another case both *D* and *V* were males; and in a third case, both *D* and *V* were females. Chris Berendt, *Woman Gets 16 Years in Murder of Girlfriend, Who Was Shot, Burned*, The Sampson Independent, May 9, 2017, at 1, 2017 WLNR 14541106; Thomas Franz,

Macomb Twp. Man Sentenced in Murder Case, Macomb Township Chron., Mar.

Most often, the *V* was the female significant other, followed by a perceived romantic rival, and then occasionally some third party.[41] Convictions were about evenly split between first degree and lesser convictions.[42]

TABLE 3

Number of cases	**34**
First degree with death sentence	0
First degree without death sentence	15
Second degree	15
Voluntary manslaughter	3
Involuntary manslaughter	0
Nonhomicide	1

However, when the figures were separated into significant-other victims and compared to romantic-rival victims, defendants were much more likely to incur first-degree convictions for killing a significant other versus a romantic rival.[43]

15, 2017, at 1, 2017 WLNR 8149766; Diane Turbyfill, *Triple Killer Gets 29 Years in Group Sex Killings*, GASTON GAZETTE, Mar. 7, 2017, at 1, 2017 WLNR 7191005.

41. In one case, *D* killed his four children to get back at his wife. Oralandar Brand-Williams, *Mom Tells Killer Husband: 'You're a Devil in Disguise' Man Who Killed Four Kids, Assaulted Wife to Serve 47-102 Years in Prison*, DETROIT NEWS, Mar. 2, 2017, at 1, 2017 WLNR 8335611. In another case, *D* shot a female, who survived, and shot her aunt and uncle, who died. James Herrera, *Crime: Man Pleads Guilty in Salinas Murders*, MONTEREY COUNTY HERALD, Mar. 1, 2017, at 1, 2017 WLNR 6421850. In a third case, *D* shot a female who survived, but *D* also shot a neighbor who died. Diane Turbyfill, *Zinna Guilty of First-Degree Murder in New Year's Day Slaying*, GASTON GAZETTE, Jan. 20, 2017, at 1, 2017 WLNR 2016331.

42. *See infra* Table 3.

43. *See infra* Table 4.

TABLE 4

Number of cases	Significant other (19)	Romantic rival (12)	Third party (3)
First degree with death sentence	0	0	0
First degree without death sentence	11	2	2
Second degree	8	6	1
Voluntary manslaughter	0	3	0
Involuntary manslaughter	0	0	0
Nonhomicide	0	1	0

3. The third category of cases involves a male *D* killing a female *V* who was *D*'s present or prior significant other, with the motive appearing to be something other than jealously or spurning. The motives in these cases were sometimes reported as a generic fight or argument (six cases) or not reported at all (five cases). The remaining 11 cases exhibited a range of motives. But whatever *D*'s motive, these cases were highly likely to result in a first-degree conviction. [44]

TABLE 5

Number of cases	22
First degree with death sentence	1
First degree without death sentence	16
Second degree	3
Voluntary manslaughter	0
Involuntary manslaughter	1
Nonhomicide	1

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44.   *See infra* Table 5.

4. The fourth category involves a female *D* who killed a male *V* who was *D*'s present or prior significant other. Of these cases, four involved a claim by *D* that she had been abused by *V* at some point, one was due to jealousy or spurning, and motives in the other six cases were whatever malicious reasons that arise from close association over time.[45] These cases all resulted in convictions for second-degree murder or voluntary manslaughter. [46]

TABLE 6

Number of cases	**11**
First degree with death sentence	0
First degree without death sentence	0
Second degree	7
Voluntary manslaughter	4
Involuntary manslaughter	0
Nonhomicide	0

5. In the fifth category, a *D* killed a *V* who was a close blood relative—such as a natural parent, grandparent, sibling, or child.[47] Motives here likewise consisted of whatever malicious reasons that arise from close association over time. Convictions were about evenly split between first-degree murder and lesser convictions.[48]

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45.   *See* Author Dataset, *supra* note 21.

46.   *See infra* Table 6.

47.   This does not include children who are less than 13 years old. The cases in which *D* was the parent and caretaker of his or her child less than 13 years old (and killed *V* through child abuse) are counted in the first category.

48.   *See infra* Table 7.

TABLE 7

Number of cases	**17**
First degree with death sentence	1
First degree without death sentence	6
Second degree	7
Voluntary manslaughter	3
Involuntary manslaughter	0
Nonhomicide	0

6. The sixth category involves a *D* who was a criminal street gang member whose motive was to achieve gang purposes. Convictions were about evenly split between first-degree and lesser convictions in these cases.[49]

TABLE 8

Number of cases	**17**
First degree with death sentence	2
First degree without death sentence	5
Second degree	7
Voluntary manslaughter	3
Involuntary manslaughter	0
Nonhomicide	0

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49. *See infra* Table 8.

7. The seventh category consists of a *D* and *V* who were acquainted through the illegal drug trade, and the motive was a dispute over a drug deal.[50] These cases were quite likely to result in second-degree convictions or lower.[51]

TABLE 9

Number of cases	**23**
First degree with death sentence	0
First degree without death sentence	4
Second degree	16
Voluntary manslaughter	1
Involuntary manslaughter	2
Nonhomicide	0

8. The final category involves a *D* and *V* who were acquaintances that were not described by the categories above or were strangers, and the motive for the killing was a dispute between them.[52] Motives ranged from an argument (43 cases),[53] a physical altercation giving rise to a claim within shouting distance of self-defense (34 cases),[54] or a belief by *D* that *D* or some third party needed protection from *V*, even though the situation did not come close to meeting the criteria for self-defense or defense of a third party

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50. There is a closely related genre of killing during a robbery for drugs or drug proceeds that will be counted later under the felony-murder pattern.

51. *See infra* Table 9.

52. In four of the cases, the victim was not a party to the dispute but was killed by a stray bullet. Daphne Duret & Jane Musgrave, *Man Convicted of Killing Woman*, PALM BEACH POST, May 24, 2017, at 1, 2017 WLNR 16086115; Christal Hayes, *Man Found Guilty in Deadly Bar Shooting*, ORLANDO SENTINEL, Apr. 7, 2017, at 1, 2017 WLNR 10773417; *Shooter Sentenced for Killing Toddler*, FLINT J., Apr. 4, 2017, at 1, 2017 WLNR 10382968; Paula Reed Ward, *Man Gets 15 to 40 Years in Shooting Death of 6-Year-Old*, PITTSBURGH POST-GAZETTE, Feb. 15, 2017, at 1, 2017 WLNR 4863562.

53. *See* Author Dataset, *supra* note 21.

54. *See id.*

(11 cases).[55] This is by far the largest category (87 cases).[56] In a sense, it is a catchall[57] for cases that do not have any of the distinguishing factors set forth elsewhere in this Article. This category is composed overwhelmingly of male *D*s and male *V*s,[58] which lends credence to the insight of journalist Jill Leovy who, while examining homicides in Los Angeles, said that many of them can be concisely explained by the phrase, "Men fighting."[59] These were not the "red ball" cases with especially sympathetic victims that catch the police and public's attention, as described by journalist David Simon in his classic work on homicides in Baltimore;[60] rather, they were routine[61] homicides that mostly passed under the public's radar—except for brief mention in the newspaper.[62] The motives in these cases varied widely from the plausible, such as arguable self-defense, to the ludicrous, such as a *D* killing a *V* because *V* said that *D* looked like Spongebob Squarepants[63] or over a dispute about the proper seasoning for gumbo.[64]

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55. *See id.*

56. *See id.*

57. Actually, it does not catch all of the other cases in the database. There were a few cases that were idiosyncratic enough that they could not be categorized.

58. Five of the *D*s in this category were women (4.6 percent), which is far less than the proportion of women *D*s in the database overall (11.6 percent, or 43 of 371). *See id.* Eight of the eighty-seven Vs were female, but four of them were killed by a stray bullet resulting from *D*'s dispute with another man. *See id.*.

59. *See* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 39–40 (2015) ("The killings typically arise from arguments. A large share of them can be described in two words: *Men fighting*. The fights might be spontaneous, part of some long-running feud, or the culmination of 'some drama' . . . .").

60. *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 20 (1991).

    Underneath this towering pyramid of authority squats the homicide detective, laboring in anonymity over some bludgeoned prostitute or shot-to-shit narcotics trafficker until one day the phone bleats twice and the body on the ground is that of an eleven-year-old girl, an all-city athlete, a retired priest, or some out-of-state tourist who wandered into the projects with a Nikon around his neck.

    Red balls. Murders that matter.

Id. at 19.

61. Of course, no homicide is actually routine in the sense of the extreme harm it causes in the world.

62. *See, e.g.*, LEOVY, *supra* note 59, at 37.

63. *See* Francis Scarcella, *Jury Finds Lee Guilty of Third-Degree Murder*, DAILY ITEM, June 22, 2017, at 1, 2017 WLNR 19317741.

64. *See* Zack McDonald, *Bay Man Convicted of Slaying Co-Worker with Sword*,

The cases in this category were substantially more likely to be resolved by a second-degree murder conviction (or lower) than by first-degree.[65]

TABLE 10

Number of cases	87
First degree with death sentence	0
First degree without death sentence	16
Second degree	40
Voluntary manslaughter	25
Involuntary manslaughter	4
Nonhomicide	2

However, jurors were not averse to convicting for first-degree or second-degree murder in cases that reached them. Elaborating on the above table, about two-thirds of the second-degree convictions and all of the voluntary manslaughter convictions came from plea bargains.[66]

NEWS HERALD, Apr. 21, 2017, at 1, 2017 WLNR 12308670.

65.   *See infra* Table 10.

66.   There were also 24 cases in the database that did not fall into any of the other categories because the news reports did not mention a motive. *See* Author Dataset, *supra* note 21. The most likely motive was a dispute, either physical or verbal, and the convictions in these 24 cases paralleled the convictions in the 87 cases discussed in the text. *See id.* The 24 cases were resolved in the following ways: six first-degree verdicts, one first-degree plea, five second-degree verdicts, six second-degree pleas, five voluntary-manslaughter pleas, and one nonhomicide plea. *See id.*

TABLE 11

Number of cases	Verdict (32)	Plea bargain (55)
First degree with death sentence	0	0
First degree without death sentence	16	0
Second degree	14	26
Voluntary manslaughter	0	25
Involuntary manslaughter	1	3
Nonhomicide	1	1

B. *Felony Murders*

We categorized Felony Murders as those in which a death occurred[67] while *D* was committing one or more of the traditional big five predicate felonies: arson, burglary, kidnapping, rape, or robbery.[68] About 22.1 percent of the cases in the dataset—82 of 371—involved felony murders: 60 with robbery, 38 with burglary, 8 with rape, 5 with kidnapping, and 4 with arson (these total more than 82 because about one-third of the cases involved more than one felony, as noted below).[69] As the table shows, 54.9 percent of Felony Murders resulted in first-degree murder convictions (45 of 82, comprised of 5 death sentences and 40 first-degree convictions).[70]

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67. While almost all *V*s were the targets of the felonies, in two cases the decedent was one of the perpetrators who was killed by a crime victim resisting the felony. Gal Tziperman Lotan, *Man Gets 20 Years for Role in '15 Death*, ORLANDO SENTINEL, Feb. 1, 2017, at 1, 2017 WLNR 3247865; Suzie Schottelkotte, *Winter Haven Teen Gets 15 Years for His Role in Friend's Death*, THE LEDGER (LAKELAND, FL), May 11, 2017, at 1, 2017 WLNR 14610722. Not all jurisdictions would permit a felony-murder conviction when the killer was a person lawfully resisting the felony, but Florida, where both of these cases occurred, permits such a conviction. Lotan, *supra* note 67; Schottelkotte, *supra* note 67.

68. *See* LAFAVE, *supra* note 2, at 1019–20.

69. *See* Author Dataset, *supra* note 21.

70. *See infra* Table 12.

TABLE 12

Number of cases	**82**
First degree with death sentence	5
First degree without death sentence	40
Second degree	33
Voluntary manslaughter	1
Involuntary manslaughter	1
Nonhomicide	2

There was a dramatic divergence among the outcomes of cases that were plea-bargained and those that went to trial. Of the plea-bargained cases, 34 of 44 resulted in convictions for second-degree murder or a lesser crime,[71] while 35 of the 38 cases that went to verdict resulted in first-degree convictions[72] (including five death sentences) and none were less than second-degree murder. A fair inference is that prosecutors used plea bargains to weed out cases with some sort of troublesome issue[73] or, in multiple-perpetrator cases, to give a deal to one perpetrator to testify against the others.[74] In cases that prosecutors decided were strong enough to take to trial, jurors had little mercy for felony murderers.[75]

71.	All 10 of the pleas to first-degree murder occurred in death-penalty jurisdictions (five in California, two in Florida, and three in North Carolina). *See* Author Dataset, *supra* note 21. The bargains in those cases almost certainly were for *D* to avoid the death penalty or, in California, in hopes of a life-with-possibility-of-parole sentence, since California is the only one of the six states whose statutes provide for the possibility of that sentence for first-degree murder. *See id.* In the non-death-penalty jurisdictions of Iowa and Michigan, there was nothing to gain from a legal standpoint in *D* pleading guilty to first-degree murder since the worst-case scenario at trial—a first-degree conviction and mandatory life-without-parole sentence—could not have been worse than the result of a guilty plea to first-degree murder with a mandatory life-without-parole sentence. *See id.*

72.	*See id.*

73.	One issue reported in seven multiple-perpetrator cases was that another felon had committed the murder, not the defendant. *See id.*

74.	This was reported in only three cases, but one suspects it was more prevalent than that in multiple-perpetrator cases. *See id.*

75.	*See infra* Table 13.

TABLE 13

Number of cases	Verdict (38)	Plea bargain (44)
First degree with death sentence	5	0
First degree without death sentence	30	10
Second degree	3	30
Voluntary manslaughter	0	1
Involuntary manslaughter	0	1
Nonhomicide	0	2

In 26 cases, the *D* committed two predicate felonies (23 with robbery and burglary and 3 with rape and burglary), and in one case, the *D* committed three predicate felonies (robbery, burglary, and rape).[76] Curiously, the percentage of first-degree convictions was slightly lower (51.9 percent) in these multiple-felony cases than in single-felony cases (56.4 percent).[77]

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76. *See* Author Dataset, *supra* note 21.

77. Of 55 single-felony cases, 4 resulted in death sentences and 27 in first-degree convictions. *See id.*

TABLE 14

Number of cases	27
First degree with death sentence	1
First degree without death sentence	13
Second degree	13
Voluntary manslaughter	0
Involuntary manslaughter	0
Nonhomicide	0

C. Clear Premeditation

There was clear evidence of premeditation in 63 cases, or 17 percent of the 371 cases.[78] Since first-degree murder (excluding felony murder) is defined in terms of premeditation, one would expect most of these cases to have resulted in first-degree convictions. This was the result in close to two-thirds (63.5 percent) of the cases, either with or without a death sentence.[79]

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78. *See id.*; LAFAVE, *supra* note 2, at 1017 (stating the three traditional indicators of premeditation are (1) preexisting motive; (2) significant planning activity; and (3) calculated method of committing the murder). We classified premeditation as clear when there was evidence of each of these indicators. The most noteworthy (some would say notorious) case to crystalize these three indicators is *People v. Anderson*. People v. Anderson, 447 P.2d 942, 949 (Cal. 1968). For a total dissection of the *Anderson* holding, although not necessarily of the three indicators, see Crump, *supra* note 1, at 267–74.

79. *See infra* Table 15.

TABLE 15

Number of cases	Verdict (37)	Plea bargain (26)	Total (63)
First degree with death sentence	4	0	4
First degree without death sentence	25	7	32
Second degree	7	14	21
Voluntary manslaughter	1	3	4
Involuntary manslaughter	0	0	0
Nonhomicide	0	2	2

D. *Summary of the Uses of the Various Crimes Derived from Descriptive Statistics*

1. *Cases in Which First-Degree Murder Predominated*

First-degree murder was the predominant conviction in two situations where that would be expected and in one situation where that might not be expected. Unsurprisingly, first-degree murder convictions predominated:

- For Felony Murders (45 first-degree convictions, compared with 37 for the other types of convictions combined), particularly for those that went to verdict (35 of 38 verdicts);[80] and

- For cases with Clear Premeditation (40 first-degree convictions, compared with 27 for the other types of convictions combined), again especially for those that went to verdict (25 of 37 verdicts).[81]

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80. *See* Author Dataset, *supra* note 21.

81. *See id.*

Surprisingly, first-degree murder convictions also predominated:

- For male defendants who killed female significant-other victims (28 first-degree convictions, compared with 13 for the other types of convictions combined).[82] This is an intriguing result because it may provide evidence against the findings of some social science studies that there is a "domestic discount," which leads to these defendants being treated more leniently with respect to convictions or sentences than other killers.[83] For further discussion of the effect of defendant–victim relationships, see the regression portion of the analysis.[84]

Finally, it is instructive to note cases in which first-degree convictions were absent (such as cases where a female defendant killed a male significant-other victim) or scarce (such as in drug-dispute killings where there were 4 first-degree convictions compared to 19 convictions for lesser crimes).[85]

2. *Cases Relatively Evenly Split Between First-Degree and Second-Degree*

First-degree convictions were almost equally likely with second-degree convictions for the following:

- Killings of close blood relatives (seven of each degree);[86]

- Gang-purpose killings (seven of each degree);[87]

- Verdicts regarding men fighting (16 first-degree and 14 second-degree);[88] and

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82. *See id.*

83. The social science literature is reviewed in-depth in Tara N. Richards et al., *When Domestic Goes Capital: Juror Decision Making in Capital Murder Trials Involving Domestic Homicide*, 39 L. & HUM. BEHAV. 402, 402–05 (2015) ("Prior studies have provided limited, but generally supportive, evidence regarding a domestic discount in the criminal prosecution and sentencing of domestic homicides generally, and capital sentencing specifically."). But before concluding that such a discount does not exist, one would have to factor in lesser convictions, as well as whether the convictions were arrived at by verdict or plea. *See id.* at 403 (discussing social science findings of some variations based on degree of conviction and whether the conviction was arrived at by plea).

84. *See infra* note 115 and accompanying text.

85. *See* Author Dataset, *supra* note 21.

86. *See id.*

87. *See id.*

88. *See id.*

- Male jealousy or spurning (15 of each degree).[89]

3. *Cases in Which Second-Degree Murder Predominated*

Second-degree murder was the most common conviction (165 cases compared with the runner-up of first-degree at 124).[90] It is also by far the most common plea bargain (99 cases compared with the runner-up of voluntary manslaughter at 41).[91] It is the predominant conviction in five situations:

- Child abuse (14 convictions compared with 8 for the other types of convictions combined);[92]

- Female killers of male significant-other victims (seven convictions compared with none for first-degree and four for voluntary manslaughter);[93]

- Drug disputes (16 convictions compared with 7 for the other types of convictions combined);[94]

- Men fighting plea-bargains (40 convictions compared with 25 for the runner-up crime of voluntary manslaughter);[95] and

- Felony murder plea-bargains (30 convictions compared with 14 for the other types of convictions combined).[96]

Combining the cases in which second-degree convictions were almost equally likely as first-degree with the cases in which second-degree predominated, this conviction deserves the title we accorded it earlier: the workhorse of U.S. homicide law.

4. *Cases in Which Voluntary Manslaughter Predominated in Plea Bargains*

Voluntary manslaughter predominated as a plea-bargain tool in men fighting cases.[97] Almost half of the total voluntary manslaughter

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89. *See id.*
90. *See supra* Table 1.
91. *See supra* Table 1.
92. *See* Author Dataset, *supra* note 21.
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
97. *See id.*

convictions—25 of 53—were the result of plea bargains in this type of case.[98] The remaining voluntary manslaughter convictions were spread out in numbers of four or fewer over the Relationship + Motive and Clear Premeditation cases, likely indicating a weakness in those cases. Further, voluntary manslaughter was a nonfactor in Felony Murders, with only one conviction compared with 78 convictions for first-degree or second-degree.[99]

E. *Factors that Span Relationship + Motive, Felony Murders, and Clear Premeditation*

We found three Complicating Factors[100] that spanned Relationship + Motive, Felony Murders, and Clear Premeditation. These Complicating Factors have the potential to be important in case outcomes:

- In 83 cases, *D*s claimed some sort of impairment: mental health (44 cases), alcohol or drug intoxication (44 cases), juvenile status[101] (14 cases), or a combination of the three.[102] These add up to more than 83 because of overlapping claims;[103]

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98.   *See id.*

99.   *See id.*

100.   An arguable fourth factor that we have instead consigned to this footnote could be called "problems in prosecuting the case," consisting of three subproblems: the case was "cold," which we defined as not having a suspect for more than five years; the prosecutor had tried the case before, but the jury deadlocked; and the case had arrived back in the prosecutor's office because the conviction had been overturned on appeal. Cold cases did not seem to adversely affect the prosecution as much as one might expect. In 13 cold cases, prosecutors achieved seven first-degree convictions, four second-degree convictions, and only settled for one plea to voluntary manslaughter and one plea to a nonhomicide crime. *See id.* Nor did a jury deadlock seem to deter prosecutors much from retrying cases. In four of five cases, prosecutors retried the case and achieved one death sentence, one first-degree conviction, and two second-degree convictions. *See id.* The prosecutor settled for a voluntary manslaughter plea in only one case. *See id.* Prosecutors also mainly plunged ahead with retrials after appellate reversals as well. They retried four of seven cases, achieving three first-degree convictions and one second-degree conviction; the remaining cases were plea-bargained to two second-degree convictions and one voluntary manslaughter conviction. *See id.* Finally, one hardy prosecutor retried cases that had an appellate reversal followed by a jury deadlock and achieved a second-degree conviction. *See id.*

101.   That is, *D* was less than 18 years old at the time of the homicide.

102.   *See id.*

103.   *See id.* In 13 cases, *D*s claimed both mental health and intoxication impairment, one juvenile claimed mental health impairment, four claimed intoxication impairment, and one claimed both mental health and intoxication impairments. *See id.*

- Multiple perpetrators were responsible for the homicide in 104 cases;[104]

- The case exhibited an additional aggravating factor,[105] to wit: multiple homicides (27 cases, including 8 cases where there were 3 or more murders); an attempted homicide in addition to a murder (37 cases); homicide of a pregnant woman (2 cases); a homicide to eliminate a witness (9 cases); a homicide for pecuniary gain other than robbery, for example, life insurance proceeds (4 cases); a hired or ordered homicide (4 cases); a homicide where *V* was a police or correctional officer (3 cases); or a homicide where *D* committed it as an inmate (3 cases).[106]

Mere counting, however, does not demonstrate how important these complicating factors might be and how they might interact with Relationship + Motive, Felony Murder, and Clear Premeditation. Thus, we next rely on ordered multinomial regression analysis to shed some light on these questions.

IV. ORDERED MULTINOMIAL LOGISTIC REGRESSION ANALYSIS

We used the perspectives set forth in Part III.E—Felony Murder, Clear Premeditation, and Complicating Factors (mental impairment, intoxication, juvenile status, multiple perpetrators, self-defense, and other aggravation)— as variables for multinomial regression analysis. We hypothesized that felony murder, clear premeditation, self-defense, and other aggravation would have a predictive effect toward more severe convictions rather than less severe convictions and that mental impairment, intoxication, juvenile status, and multiple perpetrators[107] would have a predictive effect toward less severe convictions rather than more severe convictions. To summarize the results, the perspectives of clear premeditation, felony murder, and other aggravation did, indeed, prove statistically significant toward predicting more severe convictions. By contrast, mental impairment, intoxication, juvenile status, and multiple perpetrators turned out *not* to be statistically significant toward predicting less severe convictions. The details of these analyses will be set forth in the following paragraphs.

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104. *See id.*

105. Not including commission of a big five felony, which is already accounted for via our Felony Murders category.

106. *See id.*

107. Because blame may be harder to apportion, and co-perpetrators are often given plea deals in exchange for testimony.

The response variable—crime of conviction—was categorical in nature and also naturally ordered into five levels of severity: first degree with death sentence, first degree without death sentence, second degree, voluntary manslaughter, and lesser crimes (involuntary manslaughter, assault, etc.). Because of the categorical and ordered characteristics of the response variable, ordinal logistic regression was the best analytical tool to estimate the relationship between the predictive variables outlined above and the probability of receiving a more severe conviction versus a less severe conviction.[108] Ordinal logistic regression links the log odds of the probability of receiving a more severe conviction to each of the variables and provides an estimate of whether the variable increases or decreases a defendant's odds of receiving a more severe conviction.[109] This is in contrast to ordinary least squares regression, in which the mean of the response is linked with each of the variables. [110] As the data is categorical and ordered, it makes sense to link by membership probability rather than by means.

In order for the results to be valid and interpretable, the assumption of proportional odds had to be supported. We performed a score test of proportional odds and found this assumption held (Chi-square = 36.77, DF = 36, p-value = 0.4329).[111] Thus, we could proceed to interpret coefficients and significance levels.

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108. *See Ordinal Regression Using SPSS Statistics*, LAIRD STAT. (last visited June 19, 2018),   https://statistics.laerd.com/spss-tutorials/ordinal-regression-using-spss-statistics.php [https://perma.cc/MUW2-YN93].

> Ordinal logistic regression (often just called 'ordinal regression') is used to predict an ordinal dependent variable given one or more independent variables. It can be considered as either a generalisation [sic] of multiple linear regression or as a generalisation [sic] of binomial logistic regression . . . . As with other types of regression, ordinal regression can also use interactions between independent variables to predict the dependent variable.

Id.

For a denser, mathematically detailed explanation of ordered multinomial regression analysis, see LUDWIG FAHRMEIR ET AL., REGRESSION 334–37 (2007).

109. *See* FAHRMEIR ET AL., *supra* note 108, at 70.

110. *See id.* at 177.

111. The null hypothesis of a proportional-odds test is that the slopes are equal across each order level's linear predictor. ALAN AGRESTI, FOUNDATIONS OF LINEAR AND GENERALIZED LINEAR MODELS 214 (2015). A p-value of greater than 0.05 leads us to fail to reject this null hypothesis.

Table 16 displays the results of the ordinal logistic regression model in the form of estimated odds ratios, confidence intervals for the odds ratios, and p-values.[112]

Table 16: Odds ratios, 95 percent odds ratio confidence intervals, and corresponding p-values. A * indicates significance at the 0.10 level, while ** indicates significance at the 0.05 level.

Table 16

Variable		Odds ratio	Confidence interval	P-value
Juvenile	Yes	1.071	(0.362, 2.861)	0.9739
Mental impairment	Yes	1.163	(0.613, 2.206)	0.6441
Intoxication	Yes	1.806	(0.956, 3.412)	0.0687*
Premeditation	Yes	1.735	(1.995, 3.024)	0.0519*
Multiple perpetrators	Yes	0.878	(0.545, 1.414)	0.5924
Felony murder	Yes	4.583	(1.547, 13.573)	0.0060**
Self-defense	Yes	0.345	(0.190, 0.628)	0.0005**
Other aggravation	Yes	2.594	(1.555, 4.327)	0.0003**
Relationship (vs stranger)	**Acquaintance**	0.700	(0.429, 1.143)	0.8570
	Close relative	0.642	(0.301, 1.366)	0.6790
	Significant other	1.101	(0.563, 2.151)	0.1103
	Unknown	0.405	(0.116, 1.409)	0.2391

As hypothesized, variables that tended to make a case worse (clear premeditation, felony murder, and other aggravation) all resulted in higher

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112. We used the SAS 9.4 software and the PROC LOGISTIC procedure to estimate this model.

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odds of receiving a more severe conviction. However, the results show something very interesting: felony murder and other aggravation are significantly better predictors of more severe convictions than clear premeditation.[113] The odds of a more severe conviction in a case involving felony murder increased by 4.58 times relative to cases that did not involve felony murder.[114] The odds of receiving a more severe conviction increased by 2.59 times in cases involving other aggravation relative to cases that did not involve other aggravation, while the odds of a more severe conviction when there was clear evidence of clear premeditation were 1.76 times greater than the odds relative to cases in which there was no clear evidence of premeditation.[115] And beyond the odds, felony murder and other aggravation were statistically significant with p-values less than 0.05 while clear premeditation was not.[116]

Thus, while the traditional categories of first-degree murder—premeditation and felony murder—work in the real world by predicting more severe convictions, felony murder works much better.[117] Further, other aggravators—the kinds that typically end up making murders death-eligible in death-penalty jurisdictions—also work better than premeditation in predicting more severe convictions.[118] Professor Tom Stacy was certainly prescient almost two decades ago when he noted that the "new paradigm" of homicide law derived from the aggravating-circumstances model for eligibility for the death penalty, noting, "[T]he new paradigm is not merely a way of implementing the death penalty. With or without a death penalty, it furnishes a coherent alternative model for the classification of homicides generally."[119]

Moving to the variables that we hypothesized might be predictive of less severe convictions—juvenile status, mental impairment, intoxication, multiple perpetrators, and self-defense—our hypotheses were mostly not

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113. *See supra* Table 16.
114. *See supra* Table 16.
115. *See supra* Table 16. Premeditation and felony murder being predictive of more severe convictions necessarily includes the finding that they have a predictive effect as to first-degree convictions, although they also a predictive effect further down the homicide hierarchy, e.g., toward second-degree rather than voluntary manslaughter convictions.
116. *See supra* Table 16.
117. *See supra* Table 16.
118. *See supra* Table 16.
119. Stacy, *supra* note 1, at 1010.

supported. Three of these—juvenile status, mental impairment, and multiple perpetrators—did not have a statistically significant effect (0.05 level) in making the crime of conviction less severe.[120] And neither did intoxication; in fact, it had weak evidence of significance (p-value = 0.07) in the *opposite* direction of what we hypothesized.[121] Rather than increasing the odds of a less severe conviction, this variable had predictive power for a more severe conviction, increasing the odds by 1.81 times.[122] Only self-defense claims had some predictive power toward a less severe conviction: the odds of a more severe conviction in cases with a claim of self-defense were estimated to be 0.35 times those of cases without such a claim.[123] Thus, a self-defense claim was significantly associated (p-value = 0.0005) with a less severe conviction.[124] In sum, given the lack of predictive power for four of these five supposed mitigating variables for less severe convictions, it seems that mitigation has a hard time gaining traction with respect to a crime as serious as killing another person, except when based on a claim of self-defense.[125]

In the last four rows of Table 16, we analyzed whether the relationship between the perpetrator and the victim could provide any statistical insights about conviction level. We coded for five relationships where the perpetrator and the victim were one of the following: (1) acquaintances (179 cases); (2) close relatives (the victim was the perpetrator's grandparent, parent, sibling, or natural child) (36 cases); (3) significant others (the victim was the perpetrator's spouse, ex-spouse, boyfriend or girlfriend, ex-boyfriend or ex-girlfriend, or hopeful boyfriend or girlfriend) (56 cases); (4) strangers to each other (90 cases); or the relationship was unknown (10 cases).[126] Relationship turned out not to be statistically significant, with an overall p-value of 0.27 (chi-square = 5.21, DF = 4).[127] There was not enough evidence to conclude that the probability of receiving a more severe conviction depended on the relationship between the victim and the defendant.

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120. *See supra* Table 16.
121. *See supra* Table 16.
122. *See supra* Table 16.
123. *See supra* Table 16.
124. *See supra* Table 16.
125. *See supra* Table 16.
126. *See supra* Table 16.
127. *See supra* Table 16.

V. Conclusion

Our analysis led us to three findings that comport with what common sense would suggest even absent any data. First, prosecutors tended to plea-bargain to lesser crimes than first-degree murder in weaker cases, while being more willing to go to trial for first-degree in stronger cases—where they were met with very receptive juries.[128] Second, first-degree convictions predominated for felony murders and in cases involving clear premeditation, in accordance with the two definitions of the crime.[129] Finally, claims of self-defense predictably had a mitigating effect.[130]

We also arrived at many descriptively interesting findings via our data that could not be intuited through common sense. Among the more important of these findings were the following: second-degree murder was the most common conviction by a significant margin;[131] in cases that went to trial, first-degree murder was the most common conviction by a significant margin;[132] and voluntary manslaughter convictions were predominantly the result of plea bargains rather than jury verdicts, and these convictions were most common in men fighting cases.[133]

Finally, our analysis demonstrated three effects that were contrary to what might be expected. First, male defendants who killed female significant-other victims were very likely to be convicted of first-degree murder rather than a lesser crime.[134] Second, the seemingly mitigating factors of mental impairment, intoxication, juvenile status, and multiple perpetrators did not have a predictably mitigating effect.[135] Finally, clear premeditation had significantly less predictive effect for more severe convictions than did felony murder and other kinds of aggravation.[136]

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128. *See supra* Table 1.
129. *See supra* Part III.D.1.
130. *See supra* Part IV.
131. *See supra* Table 1.
132. *See supra* Table 1.
133. *See supra* Table 1.
134. *See supra* Table 4.
135. *See supra* Table 1.
136. *See supra* Table 15.

APPENDIX ONE—CODING SHEET

_D_ Number:

State Number:
1 (CA) 2 (FL) 3 (IA) 4 (MI) 5 (NC) 6 (PA)

_D_'s Gender: 0 (M) 1 (F)

Victim relationship to _D_
_D_ caretaker for child
Female significant other or ex
Male significant other or ex
Close blood relative
Other relative or well-known acquaintance
Casual acquaintance
"Romantic" rival
Gang antagonist
Co-perpetrator
Stranger
Other or unknown

Motive
Retaliate for spurning or jealousy
Debt or property dispute
Drug transaction gone awry
Drug business robbery
Gang purpose
Robbery—not drug-related
Sexual assault
Self-defense—physical altercation
Self-defense—speculative
Defense of third party—physical altercation
Defense of third party—speculative
Defense of property
Argument without physical altercation
Child abuse—no evidence death intended

Eliminate witness
Pecuniary gain (not robbery)
Killed for hire or hired a killer or ordered a hit
Unreported or other

Claimed mitigator for _D_
Juvenile
Mentally impaired
Drug or alcohol-impaired

Aggravator—Other
Two murders
More than two murders
Pregnant victim
Attempted murder
Burglary of home
Kidnapping
Victim police or correctional officer
_D_ was a prisoner
Clear evidence of planning or premeditation
Arson

Case history
Cold case (more than five years without suspect)
Prior jury deadlock
Prior verdict overturned on appeal

Juvenile victim
Infant (less than one)
Toddler (one to three)
Child (four to twelve)

Other participants
Multiple perpetrators
_D_ not actual killer

<u>Plea-bargained</u>

Death possible to non-death first   **<u>Verdict</u>**
Death possible to second   Death sentence
First—death sentence not at issue   First but death sentence rejected
Second   First—death sentence not at issue
Voluntary manslaughter   Second (third for PA)
Involuntary manslaughter   Voluntary manslaughter
Nonhomicide crime   Involuntary manslaughter
Turned state's evidence   Nonhomicide