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Race and the Decision to
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Federal Cases

Executive Summary

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Summary

Introduction

In federal capital cases, the U.S. Attorney's Office (USAO) in the district where the case is prosecuted makes an initial recommendation to seek or not to seek the death penalty for defendants who are charged with crimes that carry this penalty. The USAO sends its recommendation to the Attorney General's Review Committee on Capital Cases (AGRC). The AGRC reviews the USAO's recommendation and the case file, occasionally gathers additional information about the case, and makes a recommendation to the U.S. Attorney General (AG) about whether to seek the death penalty. The AG then makes the final decision.

Questions have been asked about this process. Are the USAO's recommendations and the AG's decisions racially neutral, or are they affected by the race of the victim, the race of defendant, or both? Are the USAO and AG decisions predictable? Are they capricious (e.g., are they rationally related to the facts of the case and the law or are they affected by the whims of key decisionmakers)? Is the federal death penalty more likely to be sought in some areas of the country than in others?

The research described in this report examines these questions about race, predictability, capriciousness, and geographic effects by investigating whether USAO recommendations and AG decisions are related to case characteristics, including the geographic location of the USAO prosecuting the case, the defendant's race, and whether any of the defendant's victims were white.

Approach

Creating the Database

We began this study by reviewing previous research findings on state- and federal-level capital cases and by examining a sample of Department of Justice Capital Case Unit (CCU) case files. Each of these files contained documents submitted by the USAO, a copy of the indictment, a copy of the AGRC's draft and final memorandum to the AG, and a copy of the AG's decision letter.

Next, we created a list of the types of data that would be feasible and desirable to collect. We constructed a case abstraction form and coding rules for recording data on victims, defendants, and case characteristics from the CCU's hard-copy case files. Five specially trained

coders (who worked under the direction of a field data collection supervisor) used the case abstraction forms to record salient information that was in the CCU hard-copy files. We obtained victim- and defendant-race data from the CCU's electronic files. The end product of this effort was the creation of an extensive database that could be used by different research teams.

Characteristics of the Database

The study's database contained 312 cases for which defendant- and victim-race data were available. These cases were received by the CCU between January 1, 1995, and July 31, 2000, and the AG at the time (Janet Reno) made a decision about whether to seek the death penalty for these cases prior to December 31, 2000. The 312 cases contained a total of 652 defendants. These cases were often quite complex. For example, they frequently involved multiple defendants, multiple victims, and ongoing criminal enterprise activities. The AG made a seek/not-seek decision for 600 defendants. The difference between the two counts (i.e., between 652 and 600) stems mainly from defendants pleading guilty prior to the AG making a charging decision.

The 94 USAOs recommended seeking the death penalty for 23 percent of the 652 defendants charged with capital offenses. The AG decided to seek the death penalty for 25 percent of the 600 defendants she considered. USAOs in the southern region of the country forwarded more cases to the AG for review than any other region, and this region accounted for about one-half of all the recommendations to seek the death penalty.

Most homicides were within racial groups (e.g., white defendants were usually charged with killing white victims and nonwhite defendants were usually charged with killing non-white victims). White defendants had a higher percentage of seek decisions than did black or Hispanic defendants. Regardless of their race, defendants who murdered whites were more likely to have a seek decision than were defendants who murdered nonwhites. Consequently, before there was any adjustment for aggravating and mitigating factors and other case characteristics, white defendants who killed white victims were much more likely to have a seek decision than were nonwhite defendants who killed nonwhite victims.

Research Strategy

Three independent teams investigated whether these racial differences could be explained by differences in the heinousness of the crimes. The three teams were (1) Dr. Stephen Klein from RAND; Professor David Freedman from the University of California, Berkeley; and Dr. Roger Bolus from the Research Solutions Group; (2) Professor Richard A. Berk and Dr. Yan He at the University of California, Los Angeles; and (3) Dr. Matthias Schonlau at RAND.

All three teams received a copy of the study's database. Each team then independently constructed its own analysis variables and files. For example, each team created its own rules for determining whether a defendant killed a "vulnerable" victim. Each team next designed and conducted its own analyses, drew its own conclusions, and wrote its own chapter for this report. Only then did the teams come together to discuss their procedures and findings.

What the Three Teams Found

The three teams arrived at essentially the same conclusions, despite substantial differences in their analytic methods. What follows is a synopsis of their findings about race effects, predictability, capriciousness, and district effects. We quote relevant passages from each team's conclusions. The complete analyses for Klein, Freedman, and Bolus (KF&B); Berk and He (B&H); and Schonlau can be found in Chapters Four, Five, and Six, respectively.

Race Effects

When we look at the raw data and make no adjustment for case characteristics, we find the large race effects noted previously—namely, a decision to seek the death penalty is more likely to occur when the defendants are white and when the victims are white. However, these disparities disappear when the data coded from the AG's case files are used to adjust for the heinousness of the crime. For instance, B&H concluded, "On balance, there seems to be no evidence in these data of systematic racial effects that apply on the average to the full set of cases we studied" (see Chapter Five, p. 58). The other two teams reached the same conclusion. KF&B found that, with their models, ". . . after controlling for the tally of aggravating and mitigating factors, and district, there was no evidence of a race effect. This was true whether we examined race of victim alone . . . or race of defendant and the interaction between victim and defendant race" (see Chapter Four, p. 48). Schonlau reported that his "analysis found no evidence of racial bias in either USAO recommendations or the AG decisions to seek the death penalty" (see Chapter Six, p. 113).

KF&B noted that "previous research at the state level suggests that if a race-of-victim effect is present, it is most likely to appear among defendants with a middling probability of a seek decision (e.g., in the 0.40 to 0.60 range)" (see Chapter Four, p. 48). For such defendants, they found that the number of white-victim and nonwhite-victim cases with an AG seek decision was almost identical to the number that would be expected to have this decision based on nonracial factors. This finding, and results from the full set of cases, led them to conclude that after controlling for the heinousness of the crimes, "there was no sign of a race-of-victim effect overall, or in the cases with middling probabilities" (see Chapter Four, p. 48). B&H reached the same conclusion about the various subsets of defendants they studied.

All the teams would agree that race may be a factor in a particular case. However, because there does not appear to be any overall effect of race, the teams would also agree that a bias in one direction in one case must usually be offset by a bias in the opposite direction in another case. It is unlikely that offsetting biases occur frequently because, as discussed below, seek decisions can be predicted with good accuracy without considering victim or defendant race. The three teams did not examine why their findings about victim race differ from those in many past state-level studies (see Chapter One and GAO, 1990). There is some evidence that the state-level studies suffered from methodological deficiencies. (See the discussion in Chapters Four and Five and Berk, Li, and Hickman, 2005, about concerns with the statistical methods often used in the past.) However, differences could also result from the nature of the cases

prosecuted at the state versus federal levels (see Chapters One and Two), prosecutor and defendant decisionmaking practices in state versus federal cases, or some combination of these or other factors.

Predictability

KF&B noted that "[f]ew systems as complex as the criminal justice system lend themselves to high-accuracy statistical modeling" (see Chapter Four, p. 40). Nevertheless, all three teams found that their statistical models predicted seek decisions with surprisingly good accuracy, in the range of 85 to 90 percent. These accuracy rates were obtained without considering defendant or victim race.

KF&B found that adding defendant and victim race to their models did not improve predictive accuracy. Moreover, their models fit the data quite well. For example, without considering defendant or victim race, the actual number of defendants with a seek decision corresponded very closely with the expected number at all 10 levels of predicted probability, including the middling levels.

Capriciousness

B&H appeared to equate capriciousness with unpredictability. KF&B disagreed on the grounds that, although prediction errors may result from capricious behavior, such errors "may also result from imperfections in the data and the models" (see Chapter Four, p. 40). Prediction errors also may stem from special circumstances; for example, the AG may have agreed to not seek the death penalty for an offender with a high probability of a seek decision because she wanted to extradite that person from another country or arrange for that offender's capture. (The Unabomber is an example.) The high level of predictability led Schonlau to conclude that "the decision to seek the death penalty is not capricious" (see Chapter Six, p. 109). Similarly, B&H concluded that "whether or not a capital charge will occur can, for the system as a whole, be forecasted with considerable skill. In that sense, there is little evidence of capriciousness" (see Chapter Five, p. 58). Nevertheless, B&H contend that there would still be capriciousness if a large percentage of cases had middling probabilities of a seek decision (e.g., probabilities between 0.40 and 0.60), because "probabilities in the middle ranges imply that the capital-charge decision is little more than a coin flip" (see Chapter Five, p. 77). B&H reported that according to their models, 10 to 25 percent of the defendants had probabilities in this range.

However, when KF&B used their own models to investigate B&H's alternative definition of capriciousness, they found that only about 6 percent of the defendants had probabilities in the 0.40 to 0.60 range ("probabilities" were defined by a logistic regression model based on case characteristics other than race of victim or defendant). KF&B found no relationship between seek decisions and race for the cases in this range. These findings are consistent with B&H's conclusion that "there is no evidence that race plays an important role in which cases are faced with significant capriciousness. The fraction of cases with index values between 0.40 and 0.60 is about the same regardless of the race of the victim or race of the defendant" (see Chapter Five, p. 77).

Area Effects

The 94 federal districts differ substantially in the number of capital cases filed. For example, the eight districts with the most defendants account for about half of all the defendants that had an AG seek/not-seek decision. Most of the other 86 districts had fewer than 10 defendants apiece.

Schonlau reported that after aggregating the districts to census region and controlling for various other case characteristics, there was a slightly greater tendency for USAO districts in the South to seek the death penalty and slightly less tendency for districts in the Northeast to seek it, but within a region, the odds of a defendant having a seek decision were not related to defendant or victim race. B&H found "substantial variation across districts in the likelihood of a seek decision and a modest tendency overall for districts with a larger proportion of white-victim cases to be more inclined to recommend seeking the death penalty" (see Chapter Five, p. 75). They note that, at least in part, this is "because the number and mix of cases handled by a given district can vary enormously" (see Chapter Five, p. 75).

KF&B did not find a significant race-of-victim or race-of-defendant effect in any of the several models they constructed for the AG seek decision. They did find a significant race-of-victim effect in predicting USAO seek recommendations with a model that only adjusted for aggravating and mitigating factors (i.e., the model did not include district or defendant race). KF&B then controlled for district by including a dummy variable for each of the eight districts that had the most defendants (which implicitly compared each of these districts to all the other districts combined). The addition of this control for districts eliminated the race-of-victim effect.[1]

Like the other teams, KF&B found disparities among districts. However, including districts in their models had only a very small effect on the estimated probability of a seek decision. For example, there was a 0.95 correlation between (1) estimated probabilities from a model that considered only aggravating and mitigating factors and (2) estimated probabilities from a model that considered those factors plus district. In short, including districts in the model did not seem to matter much in terms of estimated probabilities. B&H also found that controlling for district made race effects disappear.

Conclusions

The main question addressed by this research is whether the USAO's recommendations and the AG's final charging decisions were related to defendant or victim race after taking into account case characteristics, such as aggravating and mitigating factors. The research also examined whether recommendations and decisions were predictable, capricious, or related to geographic area. There are large race effects in the raw data that are of concern. However, all three teams found that controlling for case characteristics eliminated race effects. This finding supports the view that seek decisions were driven by heinousness of crimes rather than race.

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[1] Controlling for race-of-defendant also eliminated the race-of-victim effect. The latter control is especially important to implement because of the correlation between defendant and victim race.

Nevertheless, the three teams agreed that their analytic methods cannot provide definitive answers about race effects in death-penalty cases. Analyses of observational data can support a thesis and may be useful for that purpose, but such analyses can seldom prove or disprove causation.

Determining whether bias is present in federal charging decisions is an especially difficult and complex problem. There is simply no way to identify and measure all the factors that may influence these decisions. Factors that have a substantial influence in just a few cases cannot be detected by statistical methods. For example, arranging for the murder of a federal judge does not occur often enough to show up by itself as a statistically significant factor, even though it may carry great weight in the decisionmaking process in a particular case. Moreover, a factor may behave one way in one type of case and another way in a different type of case. For example, being a prominent member of a gang may increase the likelihood of a decision to seek the death penalty when the defendant refuses to accept a plea bargain, but decrease the likelihood when the defendant is willing to plea bargain and provide information about other gang members. For these reasons among others, statistical models are at best crude approximations of a complex reality.

Moreover, potentially important information about defendants, victims, and case characteristics are often not present in the case files (prosecutor assessments of witness credibility are an example). These problems are particularly acute with typically complex federal capital cases.

In summary, given the inherent problems in using statistical models under these circumstances, our results need to be interpreted cautiously. There are many reasonable ways to adjust for case characteristics, but no definitive way to choose one approach over another. Bias could occur at points in the process other than the ones studied, such as the decision by federal prosecutors to take a case. Results could be different with other variables, methods, and cases. Extrapolating beyond the data we analyzed here to other years, other defendants, other points in the decisionmaking process, or other jurisdictions would be even more problematic.