

Federal Death Penalty Study Comments

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I. Summary

The draft I read reflected hard work, careful execution within the confines of the design and considerable statistical skills. Because of design limitations, the substantive conclusions merited by this data are quite modest and demand much more context and qualification than the current draft provides. I believe after my review of this report that Janet Reno probably did not exacerbate any race of victim effects that the huge discretions and odd selection patterns of U.S. attorneys might have produced in this sample. I can draw no conclusions about U.S. attorney criteria for case selection because their criteria for case inclusion or declination are excluded from the study. The study design covers the mid-points in the federal death selection process, leaving the last stages to another study and the critical first stages to nobody.

Even within its narrow confines, I find the report much too cheerful about how race of victim effects might reflect other variables. But the big problems are with the limited segment of the highly discretionary process that the study could explore. My earlier critique of the research design warned about the peculiar nature of federal jurisdiction and prosecution. I suggested separate analysis by statutory category (e.g., only one or two in 100 drug killings makes the federal courts but a much larger fraction of killings of federal officials and employees. Are race of victim effects spread evenly or clustered where the drop-offs are large?).

For now, the major impact of the federal jurisdiction and selection problems I mention is that they must be clearly acknowledged and that they must qualify any conclusions about (1) the role of U.S. attorney offices in generating the peculiar geographic and ethnic patterns in federal

death cases, (2) the comparability of these results with state studies (state prosecutors don't only indict two out of every 100 killers), and (3) the overall performance of the federal death selection process. This study lifts the curtain on the exercise of discretion in federal death penalty selection, but only in the middle of act three of the play. Earlier processes will not be measured or evaluated.

The following sections of this memo discuss the case selection process (Section II) and the current gap between description and findings of the study (Section III). I would appreciate receiving copies of the reactions of the other panel members, and also having this document distributed to them.

II. Case Selection in the Context of Broad Jurisdiction and Invisible Choice Processes.

This study examines a very narrow slice of the discretions exercised to generate federal criminal charges that might produce death penalties. The study starts after U.S. attorneys have taken jurisdiction and identified the case as potentially capital and ends after the Attorney General decides whether death will be sought. In 5.5 calendar years, this amounted to an unknown number of what the FBI calls "incidents" involving 312 total victims, or a mean of 57 victims per year in a nation with about 18,000 homicides per year in 1995-1999, or less than one-third of one percent of the total.

Of course, not all murder and non-negligent homicide cases generate federal capital

criminal jurisdiction, but how many do? If we focus on the largest generator of USAO death-possible cases §924, that generates 334 defendants in 5.5 years in the study data. The median number of defendants per case in Table 3.1 is two and the median number of victims per case is one. So 334 defendants in 5.5 years is less than 334 killings or less than 60 victims per year, probably closer to 40. Using the victim offender ratio reported in Laura's paper for the total 652/498, the 60.7 defendants per year USAO cases would come from cases involving 45 victims and 40 or fewer incidents (see p. 26 of the report). That's the numerator of cases chosen, but what's the denominator of potential federal death cases?

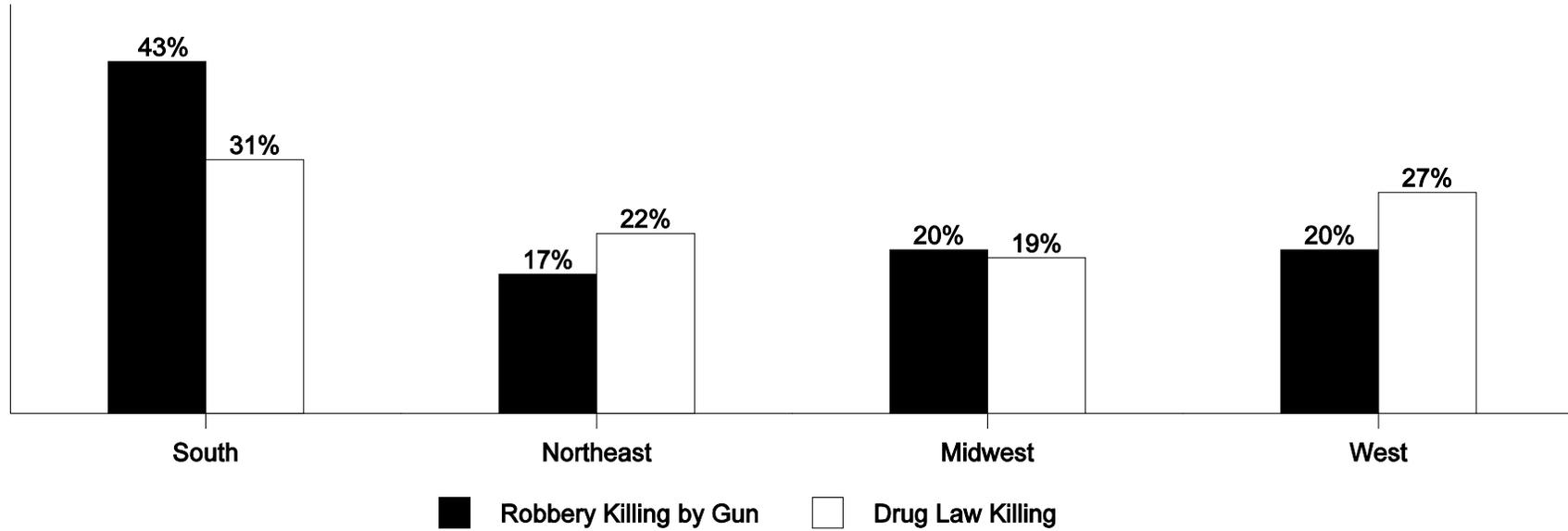
I used Uniform Crime Reports for victims from the SHR covering 1998 and 1999 to assure numbers sufficient for race and regional details. One SHR category, gun robbery homicide, creates a perfect fit with 18 U.S.C. 924, while a second category, what the SHR calls "drug law" killings, may also include non-trafficking cases, so I'll keep the two as separate categories. The annual average for gun robbery killings was 1,150 in 1998 and 1999. The annual average for "drug law homicides" was 631. Excluding every other firearm felony that also fits in §924, this produces between 30 and 50 times as many cases that could be charged federally as the annual averages of 57 victim cases.

For the robbery killings with guns where the victim was identified as either black or white, 53% were black. For the drug law killings where the victim was identified as either black or white, 59% were black. So these are one measure of the pool of cases where USAO could select (when arrests are made) to prosecute and one set of racial descriptions to compare with

federal death cases.

The pattern by region of these two classes of victimization is produced in Figure 1.

Figure 1. Robbery Killings by Gun and Drug Law Killings by Region, U.S. 1998 and 1999.



Source: FBI Supplemental Homicide Reports for 1998 and 1999.

The South produces 43% of the gun robbery killings and 31% of the drug law killings. What percentage of these two categories in the USAO sample came from the South? One can use the SHRS to document the apparent differential extent of selection by region and race (but not with Hispanic detail) by doing the type of federal offense specific analysis I mentioned in my letter on the design. What one cannot do is observe this vastly important discretionary drop number.

For the largest group of cases in the federal death eligible category §924, the death cases are not the tip of the iceberg, but the tip of the tip of the iceberg. For every 100 killings that could result in some federal prosecution, as many as 97 don't. Cases aren't referred or the U.S. attorneys decline jurisdiction. Are the selection rates the same in the South and the North? We don't know. Are they the same for white victim cases? Unknown. Could these undocumented discretions produce the odd racial and geographic distributions in the federal death eligible prosecuted case category? Sure, they could. If case selection by U.S. attorneys for prosecution rather than their selection for death recommendations is the driving force in over-representation, would this be as problematic as over-selecting for death among the prosecuted cases? I think the answer is probably yes.

The narrow slice of case selection subject to scrutiny in this study makes a big difference at a number of different substantive and methodological junctures. Most broadly, this study can't evaluate USAO case selection because it has access to less than a fifth of USAO discretion. When comparing this study to state death penalty studies, the undocumented discretionary

selection in areas like §924 cases (and therefore in the total sample) means that the samples and findings are not comparable. State's attorneys indict the majority of persons arrested for intentional killings. U.S. attorneys prosecute a tiny fraction of death eligible cases. What would be a "middling probability of a seek decision"?...If the base expectancy of seeking a federal death sentence is .006 of potentially eligible cases, would .40 to .60 be a "middling probability"? There are no obviously valid methods of extrapolating from the study of the federal sub-sample to the state studies with no information on the large case declination processes before a sample is observed. The manuscript should make this clear and should also indicate that the state studies are a better basis for judging their justice systems because most of the prosecutorial discretions are observed and measured within the data sets analyzed.

III. Controls for Racial Differences

My understanding of the data and analysis in this report produces more qualified (and more differentiated) conclusions than the report reaches at pp. 142-143. There are two reasons this study is in a much better position to judge the Attorney General than the U.S. attorneys. First, the study has a 100% sample of the cases where she made discretionary decisions while it can only observe a tiny fraction of the discretionary decisions by the USAOs.

The second reason why the Attorney General's account in this report is more persuasive is that the statistical analysis shows that differences in case severity alone (at least as measured here) explains the Attorney General's different preferences in different cases. If the severity scales are wonderful, the Attorney General has no worries. The racial differences don't

“disappear” (p. 143), but the severity measures are a complete potential explanation of them.

The USAO do most of their deciding offstage, so only a small fraction of their decisions can ever be addressed. And even with this small fraction, there are troubles. The conclusion tells us “after controlling the tally of aggravating and mitigating factors, and district, there was no evidence of a race effect...” Why would district be an obviously benign explanation for race of victim differences in the federal system?

Because race effects are in the distribution of punishments, the issue is whether alternatives to problematic racial influences are the explanation. At minimum, the report should distinguish between legally relevant issues and interactive elements like federal district effects. And if the authors of this report want to persuade readers that real differences in death penalty selection by race that are driven by district differences are not a concern, they need more analysis to do so.