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## THE UNDERMINING INFLUENCE OF THE FEDERAL DEATH PENALTY ON CAPITAL POLICYMAKING AND CRIMINAL JUSTICE ADMINISTRATION IN THE STATES

EILEEN M. CONNOR<sup>\*</sup>

*This Article investigates the dynamic relationship between the federal death penalty and the administration of criminal justice and capital sentencing in the states. As currently administered, the federal death penalty is used to attain death sentences against defendants in states where the death penalty is not available, where the state prosecution has resulted in a sentence less than death, or where a state death sentence has been overturned on appeal. The author argues that this practice obstructs the ability of, and obscures the incentives for, individual states to set criminal justice policy within their respective territorial jurisdictions, and furthermore that this tendency is manifestly out of step with constitutional norms surrounding the death penalty. Examining the constitutional doctrines of the Commerce Clause, double jeopardy, equal protection, and the Sixth Amendment, the author finds that none offers a meaningful limitation on the operation of the federal death penalty where dual jurisdiction exists. The differing experiences of the federal government and several states with determinate sentencing systems are used to expose the institutional features that act as limitations on the ability of Congress to set criminal justice policy. States are currently reexamining the use of capital punishment in the face of rising costs, increasing budget deficits, and concerns about the fair administration of the death penalty. In contrast, the federal government, which does not possess a general police power and is not the primary enforcer of criminal law, is insensitive to cost and unlikely to engage in meaningful debate regarding the rationale for capital punishment. Furthermore, the current use of the federal death penalty as a*

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*backstop to state sentencing regimes is out of step with constitutional principles governing capital sentencing. In addition to creating the potential for unfairness to individual defendants, the presence of the federal death penalty undermines state actors from legislators to district attorneys and jurors. The author concludes that a due regard for the primary role of the states in criminal justice administration suggests that federal restraint, in the form of a statutory adoption of a rule akin to the Department of Justice's current "Petite Policy," is in order.*

## I. INTRODUCTION

When Ronell Wilson was sentenced to death by a federal judge in the Eastern District of New York in March of 2007,<sup>1</sup> it was the first federal death sentence obtained in New York City in over fifty years.<sup>2</sup> Wilson was originally charged with capital murder in state court,<sup>3</sup> but after New York's high court invalidated the state's death penalty in 2004,<sup>4</sup> the Staten Island District Attorney requested that federal prosecutors take over the case.<sup>5</sup> The federal interest in the case was not obvious—Wilson was accused of murdering two undercover New York City Police Department officers investigating an illegal weapons ring in Staten Island. The investigation was not part of a joint federal-state task force, and the murder case was investigated by local law enforcement, and cooperating witnesses were given deals in state, not federal court.<sup>6</sup> The clear motivation for the transfer was that the death penalty was not available in state court.

Unsurprisingly, the decision of the Staten Island district attorney to seek the death penalty against Wilson was widely supported by the local law enforcement community,<sup>7</sup> who were a visible presence at the federal

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<sup>1</sup> Wilson was tried before and sentenced by Judge Nicholas G. Garaufis. *United States v. Wilson*, 493 F. Supp. 2d 537 (E.D.N.Y. 2007).

<sup>2</sup> Michael Brick, *Jury Agrees on Death Sentence for the Killer of Two Detectives*, N.Y. TIMES, Jan. 31, 2007, at A1. At least fourteen defendants had faced the federal death penalty in the city since its reintroduction. *Id.*

<sup>3</sup> Shaila K. Dewan, *Death Penalty to Be Sought in the Killing of Two Detectives*, N.Y. TIMES, July 30, 2003, at B2.

<sup>4</sup> *People v. LaValle*, 817 N.E.2d 341, 367-69 (N.Y. 2004) (holding that unconstitutional jury instruction rendered statutory scheme invalid absent legislative amendment).

<sup>5</sup> Michele Morgan Bolton, *Killer's Sentence Sparks a Debate*, TIMES UNION (Albany, N.Y.), Feb. 1, 2007, at A1.

<sup>6</sup> Jeff Harrell, *For 2 Who Helped Nail Cop Killer, Minimum Sentences*, STATEN ISLAND ADVANCE, May 9, 2007, at A4 (reporting state sentences of Jessie Jacobus and Mitchell Diaz).

<sup>7</sup> See Daryl Khan, *Cops Hail DA's Death Decision*, NEWSDAY (Queens), July 31, 2003, at A7, available at 2003 WLNR 930263 ("When the hearing was over and Ronell Wilson

trial.<sup>8</sup> Critics characterized the federal prosecution as an “end run” around the New York law,<sup>9</sup> whereas others saw the federal capital trial as expressing the conscience of the community where the laws of the state failed to adequately provide for such expression.<sup>10</sup> When the federal jury, which was drawn from a geographical area including but not limited to Staten Island,<sup>11</sup> returned a death verdict, Staten Island Borough President James Molinaro commended the decision and opined that “[t]he vast majority of New Yorkers support capital punishment for the most heinous acts of murder.”<sup>12</sup>

As *Wilson* and other cases demonstrate, capital punishment gives rise to tensions between federal and state values. Increases in the quantity and scope of federal criminal legislation enacted pursuant to the Commerce Clause have made federal law nearly coextensive with state law such that virtually every murder may be charged by both authorities. The death penalty is available very broadly under federal law, whereas in some states it is not available, not imposed, or more difficult to obtain when sought. In practice, the number of federal capital prosecutions remains low, and the vast majority of homicide prosecutions are undertaken by state criminal justice systems.<sup>13</sup> However, the impact of the federal death penalty is

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knew for certain he was potentially facing the death penalty, . . . applause erupted from the roughly 40 police officers, detectives and family members who had gathered to pay witness.”).

<sup>8</sup> See John Marzuli, *Judge Nixes NYPD Blue at Trial of Accused Cop Killer*, N.Y. DAILY NEWS, Oct. 5, 2006, at 8 (reporting ruling of Judge Garaufis banning uniformed police officers from courtroom).

<sup>9</sup> Michelle M. Bolton, *Killer's Sentence Sparks a Debate: Death Penalty Foes Say Prosecutors in Police Murders Ducked Law*, TIMES UNION (Albany, NY), Feb. 1, 2007, at A1.

<sup>10</sup> See Editorial, *Justice for Slain Heroes*, N.Y. DAILY NEWS, Mar. 30, 2007, at 34 (characterizing Wilson's crime as “precisely the type of crime that the death penalty is meant to address” and noting that because of “the failure of the New York Legislature to repair New York's capital punishment statute—which it could easily do—the only place such crimes can be properly addressed is in federal court”).

<sup>11</sup> The U.S. Attorney characterized the federal jury as “from this community.” Brick, *supra* note 2.

<sup>12</sup> Office of the Borough President, Staten Island, B.P. Molinaro Commends Brooklyn Federal Jury on Capital Punishment for Ronell Wilson (Feb. 1, 2007), *available at* <http://statenilandusa.com/2007/wilson.html>.

<sup>13</sup> The most recent statistics made available by the federal government indicate that federal prosecutors investigated 661 murder suspects in 2005. See MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2005—STATISTICAL TABLES tbl.2.1 (2008), *available at* <http://www.ojp.usdoj.gov/bjs/pub/html/fjsst/2005/tables/fjs05st201.htm>. The Federal Bureau of Investigation estimates the number of homicides committed in the United States at large for that year at 16,692. See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2005 tbl.1 (2006), [http://www.fbi.gov/ucr/05cius/data/table\\_01.html](http://www.fbi.gov/ucr/05cius/data/table_01.html). Thus, the federal government

greater than these numbers suggest, as the potential for federal prosecution alters the behavior of state-level criminal justice actors in a number of ways.

An abundance of scholarship addresses the consequences of increased federal criminal jurisdiction on local actors and individual criminal defendants. Likewise, an enormous body of literature examines the constitutional underpinnings and attributes of the modern death penalty regime. However, little attention has been paid to the dynamic relationship between federal criminal law in general, the federal death penalty, and the administration of criminal justice and capital sentencing in the states.

This Article addresses this dynamic relationship and argues that the federal death penalty obstructs the ability of and obscures the incentives for individual states to set criminal justice policy within their respective territorial jurisdictions, and furthermore that this tendency is manifestly out of step with constitutional norms surrounding the death penalty. Part II.A provides an overview of the current federal death penalty and the policy of the Department of Justice, which guides the use of prosecutorial discretion in relation to concurrent federal-state jurisdiction in homicide cases. Part II.B details a selection of recent federal cases, which suggest that federal prosecutions are being undertaken not to vindicate uniquely federal interests, but rather to achieve death sentences where the state prosecution would yield, at a maximum, a sentence of life imprisonment without the possibility of parole. At times, federal prosecutions are undertaken at the behest of state and local authorities, and at other times, they are in conflict with local norms. Part III examines several constitutional doctrines and finds that they are insufficient to resolve the individual rights and sovereign interests implicated by certain federal death penalty prosecutions. In particular, jurisprudence under the Double Jeopardy Clause recognizes the dual sovereignty doctrine, by which successive federal-state prosecutions are permissible. In the capital context, this means that a defendant may be acquitted or sentenced to life in state court and then prosecuted capitally by federal authorities. Although dual criminal jurisdiction is an enduring component of our federal system, the present calibration of federal criminal power vis-à-vis the states is predicated on an outdated norm that assigns to

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was involved in the investigation (although not necessarily the prosecution) of less than 4% of all murders in the United States for that year. The United States Department of Justice concurs that “the vast majority of homicides in the Untied [sic] States, like most violent crimes, are investigated exclusively by local police officers working hand-in-hand with local prosecutors, who file charges against defendants in state courts.” U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 1988-2000* 4 (2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html> [hereinafter DOJ STATISTICAL SURVEY].

states obstructionist intentions with respect to federal law enforcement priorities. However, the modern landscape is one of collaboration. Part IV examines the institutional features of Congress that impact its capacity to enact rational criminal justice legislation and argues that the respective states are better able to set a rational criminal justice policy that is truly reflective of community norms. Part V argues that the overlapping jurisdiction of federal and state death penalty law is inconsistent with constitutional principles governing capital sentencing. The potential for federal capital prosecution nationwide threatens to undermine seriously the ability of states to make reasoned policy choices for the benefit of their citizenry, the ability of local prosecutors to remain accountable for their charging decisions, and the capacity of local juries to breathe normative and moral values into the substance of capital law. Finally, Part VI suggests that federal enactment of an abstention rule similar to the non-binding policy currently operative within the Department of Justice is the best means to address the concerns raised in Part V.

## II. THE SUBSTANTIAL FEDERAL INTEREST IN THE DEATH PENALTY

The federal government has in recent years broadened the reach of its capital punishment regime.<sup>14</sup> This expansion, as discussed *infra*, is attributable to an increase in federal statutes authorizing the death penalty for particular crimes and, in part, an increased willingness on the part of recent Attorneys General to pursue federal capital prosecutions.

The policy considerations facing Congress and federal law enforcement officials are quite distinct from those that impact the states. In addition to the need to consider how to best vindicate federal interests and effectuate national law enforcement policy, the federal government must consider that its criminal jurisdiction often overlaps with that of the states. Part II.A provides a brief overview of federal statutory law regarding the death penalty and outlines the Department of Justice's internal procedures regarding which cases will be selected for capital prosecution. Part II.B provides examples of recent capital prosecutions in which federal prosecution overlapped and, at times, conflicted with state criminal jurisdiction, and argues that the Department's procedures do not provide a clear principle for resolving these conflicts.

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<sup>14</sup> Between 1988, the year in which the federal death penalty was reintroduced, and 1994, the federal government initiated forty-seven capital prosecutions. DOJ STATISTICAL SURVEY, *supra* note 13, at 8. Between 1995 and 2000, that number grew to 159. *Id.*

A. AN OVERVIEW OF THE FEDERAL STATUTES AND POLICY  
GOVERNING THE DEATH PENALTY

The increasing frequency of federal capital prosecutions and expansion of death-eligible offenses under federal law is in line with the well-documented, expansive trend in general federal criminal law.<sup>15</sup> Commentators have explored the implications of this expansion for the calibration of power in our federalist system.<sup>16</sup> Prior to the last third of the twentieth century, the bulk of federal criminal law was directed at conduct that was particularly or inherently federal in nature—crimes against the sovereignty of the federal government, such as treason, and crimes involving national currency, borders, land, or territories.<sup>17</sup> Almost by definition, the conduct proscribed in a truly national crime was beyond the reach of state criminal statutes or enforcement capabilities. This arrangement was in harmony with fundamental precepts regarding the balance of power between the constituent parts of our federal system. Traditionally, states are the protectors of the public health and welfare of their citizens, whereas the Constitution did not grant to the federal government a general police power.<sup>18</sup> Yet given the current expanded

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<sup>15</sup> See generally AM. BAR ASS'N, TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 5 (1998) [hereinafter ABA TASK FORCE REPORT]; Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995).

<sup>16</sup> See, e.g., ABA TASK FORCE REPORT, *supra* note 15, at 5 (“The fundamental view that local crime is, with rare exception, a matter for the states to attack has been strained in practice in recent years. Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably in areas in which existing state law already criminalizes the same conduct.”); Ashdown, *supra* note 15, at 813 (“Wholesale federal criminalization and enforcement of local crime heads the country in the direction that the framers of the Constitution wanted to avoid—the creation of a strong and pervasive national police and criminal justice system.”); Beale, *supra* note 15, at 993 (“The current increase in federal criminal jurisdiction is in fundamental tension with the values of decentralization promoted by federalism.”).

<sup>17</sup> See ABA TASK FORCE REPORT, *supra* note 15, at 46 (detailing typical federal criminal legislation that addresses “crimes interfering with the core functions of the federal government: treason, controlling national borders, and protecting government currency” and legislation “based on a federal relationship to the site of the crime”).

<sup>18</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“[T]he Constitution . . . withhold[s] from Congress a plenary police power.”); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (explaining that in our federal system, “[t]he States possess primary authority for defining and enforcing the criminal law”) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)); *Patterson v. New York*, 432 U.S. 197, 201 (1977) (“It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government.”); *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (“Our national government is one of delegated powers alone. . . . [T]he administration of criminal justice rests with the States except as Congress, acting within the scope of [its]

scope of federal criminal law, this precept is observed more often in the breach, as courts have upheld federal criminal statute upon federal criminal statute as valid exercises of Congress's power under the Commerce Clause.<sup>19</sup> A consequence of this expanded and expansive federal criminal jurisdiction is that virtually every homicide is potentially punishable by the federal government, even those that are purely local and thus seemingly at the core of the quintessential local police power.<sup>20</sup>

Three federal legislative enactments compose the modern federal death penalty. Following the Supreme Court's invalidation of all death penalty statutes in *Furman v. Georgia* in 1972,<sup>21</sup> the United States did not reinstate the death penalty for federal offenses until 1988 with the passage of the Anti-Drug Abuse Act.<sup>22</sup> The availability of the federal death penalty expanded further with the Violent Crime Control and Law Enforcement Act of 1994, which contained the Federal Death Penalty Act (FDPA).<sup>23</sup> The FDPA prescribes procedures for implementing the death penalty in relation to over sixty substantive crimes.<sup>24</sup> The Antiterrorism and Effective Death

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delegated powers, has created offenses against the United States."); *cf.* *United States v. Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (arguing that reading the Commerce Clause to allow Congress to regulate intrastate, noncommercial activity would confer upon Congress a general police power).

<sup>19</sup> *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 41 (2005) (Scalia, J., concurring) (voting to uphold a portion of the Controlled Substances Act that criminalizes the growing of marijuana for personal consumption against a Commerce Clause challenge while affirming the principle that Congress may not regulate purely local activity); *United States v. Patton*, 451 F.3d 615 (10th Cir. 2006) (upholding federal law prohibiting felons from possessing body armor); *United States v. Grimm*, 439 F.3d 1263 (10th Cir. 2006) (upholding federal prohibition on intrastate possession of child pornography).

<sup>20</sup> *See, e.g.*, *United States v. Claiborne*, 92 F. Supp. 2d 503, 509 (E.D. Va. 2000) ("[T]he Commerce Clause has been broadly expanded and the line between federal and state crimes has been blurred to allow virtually every crime to be prosecuted in federal court under the auspice of 'affecting interstate commerce.'"); *accord* Bob Egelko, *S.F. Grapples with 1st Death Trials in Years*, S.F. CHRON. Mar. 1, 2009, at B1 (quoting former federal prosecutor Rory Little as saying: "[t]here's no case where there's a homicide that you couldn't charge as a federal death penalty if you worked hard enough.").

<sup>21</sup> 408 U.S. 238 (1972).

<sup>22</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at scattered sections of 21 U.S.C.) (2006)). The Act made the crime of "continuing criminal enterprise" death-eligible. *See* 21 U.S.C. § 848(e) (2006).

<sup>23</sup> 18 U.S.C. §§ 3591-3599 (2006).

<sup>24</sup> A non-exhaustive list of the federal crimes that carry the death penalty include murder related to the smuggling of aliens, 8 U.S.C. § 1342 (2006); destruction of an aircraft, motor vehicle, or related facilities resulting in death, 18 U.S.C. §§ 32-34 (2006); murder committed during a drug-related drive-by shooting, 18 U.S.C. § 36 (2006); retaliatory murder of a member of the immediate family of law enforcement officials, 18 U.S.C. § 115(b)(3) (2006) (cross referencing 18 U.S.C. §§ 1111, 1113, 1117 (2006)); civil rights offenses resulting in death, 18 U.S.C. §§ 241, 242, 245, 247 (2006); death resulting from offenses involving transportation of explosives, destruction of government property related to foreign or

Penalty Act of 1996 (AEDPA) added four more crimes to the list of death-eligible federal offenses.<sup>25</sup> It cannot be said that the majority of these crimes reach criminal conduct directed against the United States as an entity, nor can it be said that the substantive crimes describe behavior that is not proscribed by the criminal codes of each of the fifty states. For example, among the most frequently charged federal capital crimes are the use of a gun to commit homicide during and in relation to a crime of violence or drug trafficking in violation of 18 U.S.C. § 924(j), murder in aid of racketeering activity in violation of 18 U.S.C. § 1959(a), and murder in furtherance of a continuing criminal narcotics enterprise in violation of 21 U.S.C. § 848(e)(1)(A)—all targeting conduct proscribed by every state.<sup>26</sup>

That the federal government has the ability to prosecute virtually every homicide in the United States as a capital crime does not, of course, mean that it does or will, or that the states have been supplanted as the primary prosecutors of human-on-human violence.<sup>27</sup> Since 1988, the Attorney General of the United States has authorized capital prosecutions against 441 defendants.<sup>28</sup> This number represents a tiny fraction of cases in which the federal government could assert its criminal jurisdiction and charge an offense that carries the death penalty.

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interstate commerce, 18 U.S.C. § 844(d), (f), (i) (2006); murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime, 18 U.S.C. § 924(c)(5)(B)(i) (2006); first-degree murder, 18 U.S.C. § 1111 (2006); murder of a foreign official, official guest, or internationally protected person, 18 U.S.C. § 1116 (2006); murder by a federal prisoner, 18 U.S.C. § 1118 (2006); murder of a state or local law enforcement official or other person aiding in a federal investigation or murder of a state correctional officer, 18 U.S.C. § 1121 (2006); murder during a kidnapping, 18 U.S.C. § 1201 (2006); murder during a hostage taking, 18 U.S.C. § 1203 (2006); mailing of injurious articles with intent to kill or resulting in death, 18 U.S.C. § 1716 (2006); use of interstate commerce facilities in the commission of murder for hire, 18 U.S.C. § 1958 (2006); bank-robbery-related murder or kidnapping, 18 U.S.C. § 2113 (2006); murder in aid of racketeering activity, 18 U.S.C. § 1959 (2006); murder related to a carjacking, 18 U.S.C. § 2119 (2006); murder related to a rape or child molestation, 18 U.S.C. § 2245 (2006); murder committed during an offense against maritime navigation, 18 U.S.C. § 2280 (2006); murder by the use of a weapon of mass destruction, 18 U.S.C. § 2332a (2006); murder involving torture, 18 U.S.C. § 2340A (2006); and murder related to a continuing criminal enterprise or related murder of a federal, state, or local law enforcement official, 21 U.S.C. § 848(e) (2006). Non-homicide capital crimes include espionage, 18 U.S.C. § 794 (2006); treason, 18 U.S.C. § 2381 (2006); and trafficking in large quantities of drugs, 18 U.S.C. § 3591(b) (2006).

<sup>25</sup> See DOJ STATISTICAL SURVEY, *supra* note 13, at 1.

<sup>26</sup> See *id.* at 13.

<sup>27</sup> See *supra* note 13.

<sup>28</sup> Current information on the charging practices of the federal government may be found on the Death Penalty Information Center website. Death Penalty Information Center, *Federal Death Penalty*, <http://www.deathpenaltyinfo.org/federal-death-penalty> (last visited Nov. 11, 2009).

One factor acting as a restraint on the number of federal criminal prosecutions is the Department of Justice's centralized review process. Unlike state-level county prosecutors, the United States Attorneys of the ninety-three judicial districts spanning the fifty states, Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands are not autonomous actors when it comes to capital prosecutions. Should a United States Attorney wish to prosecute a defendant capitally, he or she must submit a memorandum to the Attorney General's Review Committee on Capital Cases (known as the Capital Review Committee). The Attorney General makes the final decision about whether to seek the death penalty,<sup>29</sup> and once the Capital Review Committee has authorized a capital prosecution, the United States Attorney must seek permission from the Attorney General to reduce the charges.<sup>30</sup> The ultimate decision rests with the Attorney General, who may override the local prosecutor's preference.<sup>31</sup>

An express goal of this centralized authorization policy is to achieve uniformity in charging decisions across jurisdictions:

National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice.<sup>32</sup>

Thus, department policy requires that each decision to seek or not to seek the death penalty "be set within a framework of consistent and even-handed national application of Federal capital sentencing laws."<sup>33</sup> The Capital Review Committee is populated with an eye toward national uniformity. According to departmental testimony presented to the United States Senate: "The Committee members were selected based on their abilities to

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<sup>29</sup> U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.040 (2007), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam) [hereinafter USAM].

<sup>30</sup> *Id.* § 9-10.150 ("Once the Attorney General has authorized the United States Attorney to seek the death penalty, the United States Attorney may not withdraw a notice of intention to seek the death penalty filed with the district court unless authorized by the Attorney General.").

<sup>31</sup> *Id.* § 9-10.150 ("The United States Attorney should base the withdrawal request on material changes in the facts and circumstances of the case from those that existed at the time of the initial determination . . . . In all cases, the Attorney General shall make the final decision on whether to authorize the withdrawal of a notice of intention to seek the death penalty.").

<sup>32</sup> *Id.* § 9-10.130.B.

<sup>33</sup> *Id.* § 9-10.030.

synthesize facts and to fairly and uniformly evaluate arguments regarding the application of the Federal death penalty statutes.”<sup>34</sup>

Uniformity and consistency in capital charging decisions are laudable goals, especially given that modern death penalty jurisprudence posits arbitrariness as the chief vice against which the Eighth Amendment guards.<sup>35</sup> The virtue of the Capital Review Committee is that by allowing the same group of individuals to review and issue recommendations on most potentially capital federal cases,<sup>36</sup> some consistency may be achieved. Yet, aside from this procedure, the substantive values by which the committee makes its determinations are under-articulated,<sup>37</sup> especially in light of the expanse of territory and citizenry over which the Department presides and the virtually unlimited scope of federal criminal jurisdiction. The Department concedes that “Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists.”<sup>38</sup>

A separate policy relating to dual state and federal jurisdiction provides some further principles. Departmental policy dictates that scarce federal resources are not to be expended where state law targets federally proscribed conduct and enforcement of state law is thorough and effective.<sup>39</sup> In such instances of overlapping jurisdiction, a federal prosecution should

<sup>34</sup> See *Oversight of the Federal Death Penalty: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 110th Cong. 38-62 (2007) [hereinafter *Federal Death Penalty Hearing*] (responses of Department of Justice to questions submitted by Senator Feingold).

<sup>35</sup> The concern over arbitrariness led the Supreme Court to find Georgia’s capital punishment statute unconstitutional in *Furman v. Georgia*. 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.”); *Id.* at 313 (White, J., concurring) (“[T]he death penalty is exacted with great infrequency even for the most atrocious of crimes . . . . There is no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not.”); *Id.* at 249 (Douglas, J., concurring) (“A penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”).

<sup>36</sup> Before issuing an indictment in a case potentially subject to the death penalty (even where the indictment will be for a lesser offense, or where the death penalty is not sought), “the United States Attorney is strongly advised, but not required, to consult with the Capital Case unit.” USAM, *supra* note 29, § 9-10.050.

<sup>37</sup> See John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer when U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1698-99 (2003) (gleaning general principles by which the Attorney General requires U.S. Attorneys to seek death in the absence of formal statement of standards).

<sup>38</sup> USAM, *supra* note 29, § 9-27.230.B.1.

<sup>39</sup> *Id.* § 9-27.220.A.2.

be undertaken “only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities.”<sup>40</sup> The interest of the state in prosecution of the offense is indicated in the nature of the offense, identity of the offender or victim, and the amount of investigative resources already devoted by the state.<sup>41</sup> The federal interest may be heightened where the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction<sup>42</sup> and where the “ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction” is lacking.<sup>43</sup>

The policy supports federal prosecution where a state is unlikely to obtain an “appropriate punishment.” What exactly is considered to be appropriate punishment is not defined, but by inference, this phrase must relate to the severity of the sentence. Because federal prosecution aimed at correcting a state sentence deemed inappropriate for its severity would be an absurd use of resources and ultimately inconsequential—since the more lenient federal punishment will not prevent the state from executing its sentence—the import of the policy is that federal prosecutions are utilized when the array of potential state sentences is deemed too lenient.

The concept of “appropriate punishment” is mirrored in the Department’s policy regarding successive federal-state prosecutions. Because the Double Jeopardy Clause allows a federal prosecution following a state prosecution,<sup>44</sup> the federal government may initiate a second prosecution in order to vindicate a substantial federal interest. Such prosecutions are governed by a second discretionary policy, the “*Petite* Policy.”<sup>45</sup> The purposes of this policy are (1) to “protect persons charged with criminal conduct from the burdens associated with multiple prosecutions or punishments for substantially the same act(s) or transaction(s)”; (2) to allow for the “vindicat[ion] of substantial federal interests through appropriate federal prosecutions”; (3) to promote efficient use of departmental resources; and (4) to facilitate federal-state cooperation in law enforcement.<sup>46</sup> The policy requires the prior approval of the Attorney General “whenever there has been a prior state or federal prosecution resulting in an acquittal, a conviction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the

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<sup>40</sup> *Id.* § 9-10.090.

<sup>41</sup> *See id.* § 9-10.090.A.

<sup>42</sup> *Id.* § 9-10.090.B.

<sup>43</sup> *Id.* § 9-10.090.C.

<sup>44</sup> *See infra* Part III.B.

<sup>45</sup> USAM, *supra* note 29, § 9-2.031.

<sup>46</sup> *See id.* § 9-2.031.A.

merits after jeopardy has attached.”<sup>47</sup> Approval is contingent upon the satisfaction of three prerequisites:

[F]irst, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant’s conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction.<sup>48</sup>

Although the charging policy speaks of uniformity, this is in tension with the admittedly limited resources of the federal government and indeed with the empirical reality of federal criminal prosecutions. Both the capital charging policy and the *Petite* Policy imply that a state is capable of delivering full vindication of federal interests, so long as punishment is sufficiently severe. Where state laws, policies, or norms favor the same or greater level of punishment for a certain crime, the local norm is observed, either by virtue of a federal prosecution whose sentencing outcome is similar to that which would be attained in a state prosecution, or, more likely, by federal abstention from prosecution. Where state laws, policies, or norms favor less punishment, the norm may be supplanted by a successive or overriding federal prosecution.

#### B. EXAMPLES OF FEDERAL PROSECUTIONS

The existence of dual jurisdiction over potentially capital crimes raises questions about the exact parameters of “appropriate punishment” and the existence of a “substantial federal interest” in obtaining a particular sentencing outcome. Some examples of the application of the Department’s policies in actual cases suggest that in certain instances, in the judgment of the Department, the only appropriate punishment is a death sentence, without which the substantial federal interest would be unvindicated.

##### *1. Prosecutions Initiated in Federal Court Where the Death Penalty Is Unavailable in the State*

The federal prosecution of Alan Quinones predated the Ronell Wilson trial, discussed *supra*, but was similar in several respects. Quinones was accused of murdering an undercover New York City Police Department (NYPD) officer in the Bronx.<sup>49</sup> Although Quinones’s criminal behavior fit within the federal charge of murder in furtherance of a continuing criminal enterprise, the crime was arguably local: he was a relatively small-time drug dealer; the victim was part of an NYPD investigative team; the murder was

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<sup>47</sup> *Id.* § 9-2.031.C.

<sup>48</sup> *Id.* § 9-2.031.A.

<sup>49</sup> *United States v. Quinones*, 511 F.3d 289, 292 (2d Cir. 2007).

in retaliation for an arrest by the NYPD; the murder took place in the Bronx and was investigated by the NYPD. Capital punishment was (at the time) available in New York, but the Bronx District Attorney, Robert Johnson, has a policy of not seeking the death penalty.<sup>50</sup> As Johnson is the longest serving district attorney in Bronx history,<sup>51</sup> this policy evidently meets with local approval, although at times it has been challenged by higher state authorities. The Governor of New York had successfully removed Johnson from the trial of another defendant accused of killing an officer of the NYPD.<sup>52</sup> By removing the matter from Johnson's control, the federal charges against Quinones obviated the need for a similar political scuffle. Although the United States Attorney recommended against seeking the death penalty in the case, the United States Attorney General overrode this recommendation.<sup>53</sup> The Justice Department pursued the capital charge, it said, in order to ensure consistency of capital punishment across the country.<sup>54</sup> The federal jury convicted Quinones, but he was given only a life sentence.<sup>55</sup>

A federal forum afforded the option of a death sentence for Alfonso Rodriguez, Jr., who was convicted and sentenced to death by a federal jury in the District of North Dakota.<sup>56</sup> The crime had been sensationalized in the national media; Rodriguez, a convicted sex offender recently released from prison, was convicted of killing a vivacious white college student whom he

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<sup>50</sup> Johnson issued a statement in 1995, upon legislative authorization of the death penalty in New York, declaring his intention not to utilize the death penalty. His reasons included the fact that, while the "probability of conviction and certainty of punishment" are the best deterrents of crime, the death penalty is never certain in a given case and therefore resources are better spent in other criminal justice endeavors. Robert Johnson, Bronx District Attorney, Statement Regarding New Death Penalty/Life Without Parole Law in New York State (Mar. 7, 1995), <http://bronxda.nyc.gov/fcrime/death.htm>.

<sup>51</sup> See Bronx District Attorney's Office, District Attorney's Biography, <http://bronxda.nyc.gov> (last visited Oct. 27, 2009).

<sup>52</sup> See *In re Johnson v. Pataki*, 691 N.E. 2d 1002, 1003 (N.Y. 1997). Johnson called Governor Pataki's action "tantamount to the disenfranchisement of the voters of the Bronx." Letter from Robert Johnson, Bronx District Attorney, to George Pataki, Governor of New York (Mar. 20, 1996), available at <http://bronxda.nyc.gov/fcrime/death.htm#1g>.

<sup>53</sup> Julia Preston, *Killers Get Life Sentences in Setback to Justice Department*, N.Y. TIMES, Aug. 6, 2004, at B2.

<sup>54</sup> *Id.* ("Justice officials have said they are bringing more capital charges in the New York region to ensure consistency of capital punishment across the country. No jury has delivered a federal death penalty sentence in New York State since the penalty was reinstated in 1988.")

<sup>55</sup> See *United States v. Quinones*, 511 F.3d 289, 291 (2d Cir. 2007).

<sup>56</sup> *United States v. Rodriguez*, No. 2:04-cr-55, 2007 WL 466752, at \*52 (D. N.D. Feb. 12, 2007).

had kidnapped from a mall parking lot.<sup>57</sup> It was the first death sentence handed down within the territorial jurisdiction of that state in nearly one hundred years.<sup>58</sup> Similarly, in 2005 Donald Fell received a federal death sentence for a crime that partially took place in Vermont,<sup>59</sup> a state without the death penalty.<sup>60</sup> Notably, Fell was tried only after the Attorney General rejected his plea agreement with the United States Attorney's Office for the District of Vermont.<sup>61</sup> His death sentence was the first one delivered by a jury in Vermont in nearly fifty years.<sup>62</sup>

## 2. *Simultaneous State and Federal Prosecutions*

In Tennessee, two brothers, Robert and Antonio Carpenter, faced dual murder prosecutions in state and federal court, stemming from the abduction and murder of a local woman from a fast-food restaurant drive-in in 1999.<sup>63</sup> Federal authorities charged the brothers under the federal carjacking statute.<sup>64</sup> In what was, at the time, a rare occurrence, the United States Attorney General authorized federal prosecutors to seek the death penalty against the Carpenter brothers, despite the fact that they were presently facing the death penalty in state court.<sup>65</sup> However, the state prosecution was on uncertain grounds. Defense attorneys for the Carpenter brothers, who are African-American, filed a motion to dismiss the capital charges, predicated on the assertion that District Attorney Elizabeth Rice engaged in a pattern and practice of racial discrimination in seeking the

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<sup>57</sup> See Dave Kolpack, *Experts: Fiber, DNA Evidence Link Rodriguez and Sjodin*, BISMARCK TRIB., Aug. 23, 2006, at A1.

<sup>58</sup> See Chuck Haga & Pam Louwagie, *A Wrenching Verdict*, STAR TRIB. (Minn.-St. Paul, MN), Sept. 23, 2006, at A1. North Dakota law does not allow for the death penalty. *Id.*

<sup>59</sup> *United States v. Fell*, 531 F.3d 197, 205 (2d Cir. 2008).

<sup>60</sup> *United States v. Fell*, 571 F.3d 264, 265-66 (2d Cir. 2009) (Raggi, J., concurring in denial of reh'g en banc).

<sup>61</sup> *Id.* at 206-07.

<sup>62</sup> Strat Douthat & Jenna Russell, *Jury Votes Death for Vermont Killer, Sentence Is First in 50 Years in Vt.*, BOST. GLOBE, July 15, 2005, at B1.

<sup>63</sup> Lawrence Buser, *One Brother Wants Trial, the Other Wants to Take Guilty Plea*, COM. APPEAL (Memphis, Tenn.), Mar. 11, 2000, at B1.

<sup>64</sup> The Carpenter brothers were also charged with using a firearm during a crime of violence and killing a witness to a federal crime. Michael Erskine, *Reno OK's Seeking Top U.S. Penalty in Lee Case*, COM. APPEAL (Memphis, Tenn.), Dec. 29, 1999, at B1. The latter charge stems from the fact that the victim, Barbara Lee, was rendered unable to testify regarding the events (the subject of the former charge) resulting in her death. *See id.*

<sup>65</sup> *Id.* Between the 1994 passage of the omnibus federal crime bill, Pub. L. No. 103-322, 108 Stat. 1796 (1994), and the approval of the capital prosecution against the Carpenter brothers, the Justice Department approved approximately seventy capital prosecutions out of about 240 instances in which the death penalty had been requested. *Id.*

death penalty.<sup>66</sup> The federal death penalty was authorized only *after* the defense motion was filed.<sup>67</sup>

In this instance, the federal and state trials proceeded concurrently, requiring the Carpenters to defend themselves in two forums simultaneously. The concurrent trials, combined with the federal trial court's desire to keep a "crisp" schedule in order to move the case "at a steady pace,"<sup>68</sup> created a logistical nightmare for the defense. On July 23, 1999, Fayette County Circuit Court Judge Jon Kerry Blackwood ordered the Carpenter brothers to undergo psychiatric exams.<sup>69</sup> State prosecutors requested the exams in order to determine the defendants' competency to stand trial, as well as their mental states at the time of the offense.<sup>70</sup> At this time, the Carpenters had not yet been appointed counsel in the state proceedings,<sup>71</sup> but their appointed counsel in the federal proceedings did complain, in federal court, about the state-ordered psychiatric evaluations.<sup>72</sup> Without the ability to intervene in the state proceedings, federal defense attorneys were left to rely on assurances from state prosecutors, delivered via federal prosecutors, that the state evaluation would not take place for a month, leaving state defense attorneys (once appointed) enough time to contest the order issued by the state judge.<sup>73</sup> Ultimately, the Carpenters pleaded guilty to lesser charges in federal court.<sup>74</sup> In state court, Robert Carpenter was declared mentally retarded and thus ineligible for the death penalty.<sup>75</sup> Antonio Carpenter was found guilty of first-degree murder largely on the basis of his federal plea, which was entered as evidence

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<sup>66</sup> Bartholomew Sullivan, *Carpenter's Lawyers Try to Kill Death-Penalty Plans*, COM. APPEAL (Memphis, Tenn.), Sept. 25, 1999, at B1. Available records suggested that all twenty-three defendants against whom Rice had sought the death penalty in the previous five years were African-American. She had never filed a notice of intent to seek the death penalty against a white defendant. *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> Tom Bailey Jr., *Lee Murder Case Trial Gets Nov. 15 Start Date*, COM. APPEAL (Memphis, Tenn.), Sept. 1, 1999, at A7.

<sup>69</sup> *See* Tom Bailey Jr., *State Judge Delays Psychiatric Tests for Carpenters*, COM. APPEAL (Memphis, Tenn.), July 29, 1999, at A16.

<sup>70</sup> Tom Bailey Jr., *Collierville Carjacking Gets Long-Distance Attention*, COM. APPEAL (Memphis, Tenn.), July 28, 1999, at B1.

<sup>71</sup> *See* Bailey, *supra* note 68. On July 28, Judge Blackwood appointed Stephen Hale to represent Robert Carpenter and Thomas Minor to represent Antonio Carpenter. *Id.*

<sup>72</sup> *Id.*; *see also* Bailey, *supra* note 70.

<sup>73</sup> Bailey, *supra* note 70.

<sup>74</sup> Tom Bailey Jr., *Carjack Defense Fails; Carpenter Convicted Again*, COM. APPEAL (Memphis, Tenn.), July 21, 2000, at B1.

<sup>75</sup> Michael Erskine, *Judge Rules Brother Can't Face Death in Fatal Carjack: He's Retarded*, COM. APPEAL (Memphis, Tenn.), Apr. 28, 2000, at B1. Psychologists testified that Carpenter's IQ was in the mid-60s. *Id.*

against him in state court,<sup>76</sup> but the jury rejected the death penalty and instead sentenced him to life in prison without the possibility of parole.<sup>77</sup>

### 3. *Federal Prosecutions Following Reversal of State Convictions*

In other instances, federal capital prosecutions have been initiated only after state convictions have been reversed in the state appellate process for Fourth Amendment violations. In North Carolina, Richard Jackson was convicted of first-degree murder and sentenced to death, but the North Carolina Supreme Court reversed the conviction on the grounds that Jackson's confession should not have been admitted at his trial because local police officers continued to question Jackson after he invoked his right to counsel.<sup>78</sup> On remand, Jackson entered a plea and avoided a death sentence in North Carolina but was subsequently indicted on similar federal charges. Although Jackson objected to the admission in federal district court of evidence that had been collected by authorities after his state court plea—Jackson argued that federal authorities were moved to prosecute him vindictively on the basis of statements and interviews that he had given while in jail, apparently unaware of their potential use in a subsequent federal prosecution—he did not object to the admission of his confession in federal court.<sup>79</sup> Thus, the federal court did not need to determine the voluntariness of Jackson's confession, the issue on which the state appellate court had found reversible error. Jackson was convicted and sentenced to death by a federal jury in 2001.<sup>80</sup>

The issue that was averted in Jackson's case arose in the federal prosecution of Samuel Ealy. Charged in relation to three murders arising out of a criminal ring led by a local mayor in West Virginia, Ealy was acquitted of state murder charges in 1991.<sup>81</sup> In his subsequent federal trial on charges arising out of the same underlying facts, the district court rejected the notion that it was bound to follow the West Virginia court's determination that certain evidence had been obtained in violation of Ealy's Fourth Amendment rights. Collateral estoppel did not apply because the federal government was not a party to the state prosecution.<sup>82</sup> In

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<sup>76</sup> Tom Bailey, Jr., *Jury Told of Guilty Plea in Carjack*, COM. APPEAL (Memphis, Tenn.), July 20, 2000, at A13.

<sup>77</sup> Tom Bailey Jr., *Carpenter Jury Spares His Life*, COM. APPEAL (Memphis, Tenn.), July 22, 2000, at B1.

<sup>78</sup> *State v. Jackson*, 497 S.E.2d 409, 412 (N.C. 1998).

<sup>79</sup> *United States v. Jackson*, 327 F.3d 273, 281 (4th Cir. 2001) (rejecting, among others, claim of vindictive prosecution and affirming conviction).

<sup>80</sup> *Id.* at 278.

<sup>81</sup> *See United States v. Ealy*, 363 F.3d 292, 295 (4th Cir. 2004).

<sup>82</sup> *United States v. Ealy*, 163 F. Supp. 2d 633, 635 (W.D. Va. 2001).

determining the issue *de novo*, the court acknowledged that the legal principles remained the same, but credited testimony from law enforcement officers, whereas the state trial court had not.<sup>83</sup>

#### 4. *Federal Prosecution Following State Acquittal*

Kenneth Barrett was tried twice in Oklahoma state court on murder charges before being tried, convicted, and sentenced to death in relation to the same incident by a federal jury.<sup>84</sup> Barrett was a suspected methamphetamine producer, and state and local authorities joined forces to investigate him. They executed a “no-knock” search warrant at Barrett’s property after midnight. During the execution of the warrant, Barrett fatally shot an Oklahoma Highway Patrol officer in an unmarked vehicle from inside his house.<sup>85</sup> A jury was unable to reach a verdict in his first state trial, and another jury acquitted him of intentional murder at his second trial, convicting him instead of a lesser-included offense and sentencing him to thirty years in state prison.<sup>86</sup> A central issue in those trials and in the subsequent federal trial was whether Barrett was aware that the late night visitors to his property were in fact police officers and not just run-of-the-mill trespassers.<sup>87</sup> The federal court also had to resolve whether the warrant violated Oklahoma state law, which required warrants to be executed between the hours of 6 a.m. and 10 p.m. absent certain exceptional circumstances.<sup>88</sup>

Similarly, Claude Dennis was tried capitally in federal court in relation to a murder for which he was acquitted in Virginia state court.<sup>89</sup> Dennis was charged with that murder, among others, after a joint federal-state task force reinvestigated the case.<sup>90</sup> Dennis originally faced charges in the 15<sup>th</sup> Judicial Circuit of Virginia, which is comprised of the city of Richmond.

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<sup>83</sup> *Id.* (“In essence, the state trial judge disbelieved the law enforcement officers as to their version of the search of the garage. I have heard the evidence, and I find that the officers are telling the truth about the search. The legal principles remain the same, but my different view of the evidence causes me to reach an opposite conclusion from the state judge.”).

<sup>84</sup> *United States v. Barrett*, 496 F.3d 1079, 1085 (10th Cir. 2007).

<sup>85</sup> *Id.* at 1084-86.

<sup>86</sup> *Id.* at 1085.

<sup>87</sup> *Id.* at 1083.

<sup>88</sup> *Id.* at 1090-93.

<sup>89</sup> *United States v. Beckford*, 211 F.3d 1266 (4th Cir. 2000).

<sup>90</sup> *United States v. Beckford*, 964 F. Supp. 1010, 1013 (E.D. Va. 1997). Dennis was part of the “Poison Clan,” a Richmond, Virginia gang involved in narcotics distribution. The Richmond Cold Homicide Task Force was comprised of members of the Richmond Police Department, the Virginia State Police and the Federal Bureau of Investigation, and involved the Commonwealth’s Attorney for the City of Richmond. *Id.*

However, the federal jury was drawn from the Eastern District of Virginia, a much broader area that includes the suburbs of Richmond. As a federal court noted in a related case, “By bringing the case in federal court, the United States will likely obtain a jury composition that could not exist in the Circuit Court for the City of Richmond absent a *Batson* violation.”<sup>91</sup>

5. *Federal Prosecution When New Evidence Emerges  
After State Conviction*

Federal authorities again took a second bite at a death sentence in the case of Brent Simmons, who was convicted for the murder of his ex-girlfriend and her boyfriend, both students at James Madison University. Simmons was charged in a local court in Virginia, but the jury deadlocked on the issue of guilt. Simmons accepted a plea to second-degree murder and was sentenced to twenty years in jail.<sup>92</sup> Years later, new evidence emerged that made the case against Simmons stronger.<sup>93</sup> State prosecutors were prevented by the Double Jeopardy Clause of the Fifth Amendment (as incorporated by the Fourteenth Amendment) from reopening the case. However, federal authorities were able to bring capital charges against Simmons for the same acts based on anti-stalking provisions of the Violence Against Women Act.<sup>94</sup>

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In sum, the above cases indicate that federal prosecutions are not limited to instances in which the states are unwilling or unable to

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<sup>91</sup> *United States v. Claiborne*, 92 F. Supp. 2d 503, 510-12 (E.D. Va. 2000) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)). Beverly Claiborne’s case, like Claude Dennis’s, was heard in the Richmond court by a jury that was 75% African-American. The typical jury pool for the Richmond Division of the United States District Court for the Eastern District of Virginia is approximately 10% African-American. *Id.* (citing *United States v. Jones*, 36 F. Supp. 2d 304, 307-08 (E.D. Va. 1999)).

<sup>92</sup> *Man Agrees to Plea in Two Slayings*, WASH. TIMES, May 1, 1998, at C8.

<sup>93</sup> Calvin R. Trice, *Killer Could Face New Charges*, RICHMOND TIMES-DISPATCH, Nov. 15, 2002, at B2, available at 2002 WLNR 1467740.

<sup>94</sup> *Death Sought for Students’ Killer*, DAILY PRESS (Newport News, VA), July 30, 2004, at C5. The Supreme Court ruled that Congress lacked the power under the Commerce Clause to provide for civil remedies for gender-based violence as it had done in the Violence Against Women Act (VAWA). See *United States v. Morrison*, 529 U.S. 598 (2000). But the criminal anti-stalking provisions of VAWA have sustained similar challenges. See, e.g., *United States v. Lankford*, 196 F.3d 563 (5th Cir. 1999), cert. denied 529 U.S. 1119; *United States v. Frank*, 8 F. Supp. 2d 253 (S.D.N.Y. 1998) (upholding 18 U.S.C. § 2261 against Commerce Clause challenge because “Congress may rationally have decided that domestic violence is a problem of national importance, with a significant effect on interstate commerce”).

criminalize and prosecute the underlying conduct.<sup>95</sup> Instead, by terms of the *Petite* Policy, the state sentences in each of these cases were “insufficient.” A fair inference is that the federal interest is deemed more substantial than the state interest when a federal prosecution is more likely to produce a death sentence.

Congruently, in some instances the federal interest is seemingly vindicated only by a certain sentencing outcome, regardless of whether a state prosecution has resulted in a conviction and lengthy sentence. As one federal judge, critical of the *Petite* Policy, has written, “I refuse to accept the notion that the federal interest is to demand *convictions* rather than *prosecutions*. I see nothing in the Constitution or any statute that so defines our federal interest.”<sup>96</sup>

### III. IN SEARCH OF A LIMITING CONSTITUTIONAL DOCTRINE

The above examples illustrate that the federal death penalty in practice does not operate in isolation from state criminal justice systems, nor is it limited in application to defendants and crimes that raise a peculiarly federal interest. In some instances, the impact on individuals is manifestly unfair and intuitively out of step with familiar constitutional norms such as equal protection and double jeopardy. However, an examination of these and other constitutional doctrines reveals that none is sufficient to deal with the contemporary realities of federal and state law enforcement.

#### A. THE COMMERCE CLAUSE

The necessary predicate condition for the present relationship between federal and state criminal jurisdiction is an interpretation of the Commerce Clause that deems constitutional all of the criminal legislation passed by Congress. A federal criminal law that proscribes even purely intrastate, noneconomic behavior is facially valid so long as Congress, at the time of enactment, had a rational basis for concluding that such behavior, taken in the aggregate, substantially affects interstate commerce.<sup>97</sup> For example, although the Supreme Court articulated a limit on the ability of Congress to proscribe the possession of a gun within a school zone,<sup>98</sup> that limitation does not prevent Congress from criminalizing the possession of a firearm

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<sup>95</sup> *Accord* ABA TASK FORCE REPORT, *supra* note 15, at 31 (“In most such [federal prosecutions], state interest in pursuing the offending conduct is not lacking.”).

<sup>96</sup> *United States v. Wilson*, 413 F.3d 382, 393 (3d Cir. 2005).

<sup>97</sup> *See* *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (holding that private use of personally cultivated marijuana for medical purposes is part of economic class of activities that have a substantial effect on interstate commerce and thus subject to total congressional ban).

<sup>98</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

by a convicted felon or illegal alien, so long as the legislation contains an express jurisdictional requirement that the gun or ammunition have passed in interstate commerce.<sup>99</sup> Likewise, Congress may proscribe virtually any conduct that relates to drug trafficking.<sup>100</sup> Similarly, the Commerce Clause does not erect a barrier to the criminalization of simple arson, provided that the building is not an owner-occupied residence.<sup>101</sup> Certainly, some policing is done at the margins by as-applied inquiries as to whether the jurisdictional requirements are satisfied in the facts of a particular case. In relation to some criminal statutes, courts have required satisfaction of a jurisdictional element contained in the statute's text,<sup>102</sup> or have required a factual showing of a nexus between the alleged violent crime and otherwise proscribed behavior.<sup>103</sup> Although a comprehensive analysis of the outer

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<sup>99</sup> See, e.g., *United States v. Latu*, 479 F.3d 1153 (9th Cir. 2007) (declining to extend *Lopez* to prohibition on illegal alien possessing firearm); *United States v. Wells*, 98 F.3d 808 (4th Cir. 1996) (declining to extend holding of *Lopez* to 18 U.S.C. § 922(g)); *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996) (same); *United States v. Lee*, 72 F.3d 55 (7th Cir. 1995) (same).

<sup>100</sup> See, e.g., *Gonzales*, 545 U.S. at 17-22; *United States v. Walker*, 142 F.3d 103, 110-11 (2d Cir. 1998) (rejecting Commerce Clause challenges to various criminal provisions of Controlled Substances Act because the Act "provide[s] a specific, reasonable finding by Congress that local narcotics activity substantially affects interstate commerce," and drug trafficking is an inherently economic activity).

<sup>101</sup> See *Jones v. United States*, 529 U.S. 848 (2000). *Jones* interpreted 18 U.S.C. § 844(i), which addresses the destruction by means of fire or explosive of any property used in interstate commerce or in any activity affecting interstate commerce, narrowly so as not to reach the behavior of Dewey Jones, who threw a Molotov cocktail into the home of his cousin. *Id.* at 851. The government argued that the home was "used" in interstate commerce in the respect that it secured a loan from an out-of-state lender, was the subject of an insurance policy from an out-of-state insurer, and received natural gas from a source out of state. *Id.* at 854-55. Justice Ginsburg observed that under the government's reading, "hardly a building in the land would fall outside the federal statute's domain." *Id.* at 857. Other courts have not hesitated to apply 18 U.S.C. § 844(i) to instances in which the house was a rental property. See, e.g., *United States v. Logan*, 419 F.3d 172, 181 (2d Cir. 2005); *United States v. Soy*, 413 F.3d 594 (7th Cir. 2005).

<sup>102</sup> See, e.g., *United States v. Patton*, 451 F.3d 615, 632 (10th Cir. 2006) (noting that jurisdictional hook is not "a talisman that wards off constitutional challenges" but rather tends to "make a facial constitutional challenge unlikely or impossible, and to direct litigation toward the statutory question of whether, in the particular case, the regulated conduct possesses the requisite connection to interstate commerce"); *United States v. Holston*, 343 F.3d 83, 88 (2d Cir. 2003) (conducting Commerce Clause inquiry that goes beyond whether jurisdictional requirement of statute superficially met); *United States v. Morrison*, 529 U.S. 598, 612 (2000) (explaining that the presence of a "jurisdictional hook" in a statute's text that limits reach of statute to activities having an explicit connection with or effect on interstate commerce helps establish the statute's legitimacy under the Commerce Clause).

<sup>103</sup> See, e.g., *United States v. Garcia*, 68 F. Supp. 2d 802 (E.D. Mich. 1999). In *Garcia*, the court considered a defendant's indictment under 18 U.S.C. § 1959, which prohibits violent crimes in aid of racketeering (VCAR). In contrast to the Racketeer Influenced and

limits of the Commerce Clause and the basis of authority for the federal government to enact criminal laws is beyond the scope of this Article, the vast majority of such legislation has been and will continue to be facially valid under the Commerce Clause, barring a drastic change of interpretation by the Supreme Court.<sup>104</sup>

## B. DOUBLE JEOPARDY AND THE DOCTRINE OF DUAL SOVEREIGNTY

A defendant searching for refuge from a federal capital prosecution successive to state charges, such as Kenneth Barrett or Claude Dennis, might look next to the Fifth Amendment's Double Jeopardy Clause. The clause enshrines a "fundamental idea in our constitutional heritage,"<sup>105</sup> borne out of a persistent "fear and abhorrence of governmental power to try people twice for the same conduct."<sup>106</sup> The underlying justification for the prohibition on double jeopardy is that:

the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

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Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2006), which incorporates a jurisdictional element by defining "enterprise" as one that is engaged in interstate commerce, the VCAR contains no such requirement tying the violent act to interstate commerce. The court in *Garcia* found that the *de minimis* impact on interstate commerce of the defendant's alleged activities—which were purely intrastate but did involve the use of federal interstate highways—was sufficient to sustain a RICO indictment but not a charge under VCAR. *Id.*

<sup>104</sup> *Accord Gonzales*, 545 U.S. at 12 (recognizing Controlled Substances Act (CSA) as "a comprehensive regime to combat the international and interstate traffic in illicit drugs"). *Compare Gonzales*, 545 U.S. at 70 (Thomas, J., dissenting) (arguing that the justification of legislation under the Necessary and Proper Clause converts the clause into a pretext for accomplishment of objects not entrusted to government, thereby stripping states of ability to regulate local activities), *with id.* at 38-39 (Scalia, J., concurring) (denying that broad reading of Necessary and Proper Clause will obliterate distinction between local and national spheres because power can only be exercised in conjunction with congressional regulation of an interstate market). Federal crimes that touch upon narcotics trade in some manner, such as 21 U.S.C. § 848 (continuing criminal enterprise), are presumptively valid because in enacting the CSA, "Congress made specific findings . . . that local narcotics activity substantially affects interstate commerce." *United States v. Walker*, 142 F.3d 103, 111 (2d Cir. 1998). Similarly, criminal activity that involves the use of a firearm may be proscribed by the federal government under the Commerce Clause. *See, e.g., United States v. Weems*, 322 F.3d 18, 26 (1st Cir. 2003) (upholding 18 U.S.C. § 922(g)(1)). *But see United States v. Patton*, 451 F.3d 615, 634-36 (10th Cir. 2006) (noting inconsistency between firearms cases and recent Supreme Court Commerce Clause jurisprudence).

<sup>105</sup> *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *see also Bartkus v. Illinois*, 359 U.S. 121, 151-53 (1959) (Black, J., dissenting) (characterizing the prohibition on double jeopardy as a "universal maxim of the common law").

<sup>106</sup> *Bartkus*, 359 U.S. at 151-53 (Black, J., dissenting).

anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>107</sup>

However, the interpretation of this common law tenet is limited in its ability to address concerns of defendants subject to successive state and federal prosecutions for the same act. In the middle of the last century, the Supreme Court articulated what is known as the “dual sovereignty doctrine” when it ruled that the Double Jeopardy Clause does not bar a state from prosecuting and convicting a defendant who previously had been tried in federal court.<sup>108</sup> Conversely, no bar exists to a federal prosecution following a state prosecution for the same conduct.<sup>109</sup> These decisions reiterated a formalistic application of double jeopardy and dual sovereignty: the sovereignty of the states and the federal government derive from different sources; a single act that violates the laws of each is actually two crimes against two separate sovereigns; the Double Jeopardy Clause prevents only multiple prosecutions by the same sovereign.<sup>110</sup>

The dual sovereignty doctrine conceives of the Double Jeopardy Clause as a mechanism for policing within the bounds of federal and state sovereignty, and ignores the interaction between the two. As a result, the clause’s role in protecting the individual against oppressive governmental power is lost when the federal and state governments act in concert. The dissent in *Bartkus* observed that, when “looked at from the standpoint of the individual,” the doctrine’s position “that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State” is “too subtle . . . to grasp.”<sup>111</sup>

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<sup>107</sup> *Green v. United States*, 355 U.S. 184, 187-88 (1959).

<sup>108</sup> *Bartkus*, 359 U.S. at 121 (allowing state prosecution where defendant had been acquitted in federal court).

<sup>109</sup> *Abbate v. United States*, 359 U.S. 187 (1959) (allowing federal prosecution where defendants pleaded guilty in state court).

<sup>110</sup> *See id.* at 193 (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)). In *Moore v. Illinois*, the Court explained,

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction in the other . . . .

55 U.S. 13, 20 (1852).

<sup>111</sup> *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Justice Black feared that “[t]he power to try a second time will be used, as have all similar procedures, to make scapegoats of helpless, political, religious, or racial minorities and those who differ, who do not conform and who resist tyranny.” *Id.* at 163. His dissent echoes that of Justice McLean, who earlier argued that although the prohibition on multiple prosecutions applies to respective

The continued viability of the dual sovereignty doctrine as articulated in *Bartkus* and *Abbate* is open to question on multiple grounds.<sup>112</sup> *Bartkus* and *Abbate* were decided before incorporation of the Double Jeopardy Clause through the Fourteenth Amendment.<sup>113</sup> Thus, those decisions were fundamentally concerned with avoiding any potential mischief that asymmetrical application of the Double Jeopardy Clause could work in the balance of power between the federal government and the states. Of particular concern was the potential obstruction of federal law enforcement priorities by lenient state prosecutions. As noted, “[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law must necessarily be hindered.”<sup>114</sup> The concern with federal-state tension is also reflected in the precedent marshaled in support of the dual sovereignty doctrine. Justice Frankfurter’s majority opinion in *Bartkus* cited a line of cases culminating with *Moore v. Illinois* in which the Court held that states could permissibly enforce statutes that were identical to the Fugitive Slave Act, so long as the rule of *Prigg v. Pennsylvania*, protecting the rights of slaveholders, was observed.<sup>115</sup> The second major precedent cited by

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governments, “its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government . . . . Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization.” In Justice McLean’s view, such a situation “would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments.” *Fox v. Ohio*, 46 U.S. 410, 439-40 (1847) (McLean, J., dissenting). In a later case employing the same view of dual sovereignty that would allow for multiple prosecutions for the same offense by federal and state governments, Justice McLean noted that the state and federal governments “operate on the same people,” and those people “would not be satisfied with the logic or justice of the argument.” *Moore*, 55 U.S. at 22.

<sup>112</sup> See, e.g., *United States v. Grimes*, 641 F.2d 96 (3d Cir. 1981) (questioning doctrinal underpinnings of decisions and their continued relevance in light of changed circumstances).

<sup>113</sup> Justice Frankfurter noted in *Bartkus* that “we have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such.” 359 U.S. at 124. In *Palko v. Connecticut*, the Supreme Court declined to extend the Double Jeopardy Clause to the states, and therefore confirmed that states were not prohibited from appealing a criminal conviction. 302 U.S. 319 (1937). More than two decades later, the Court held that the Double Jeopardy Clause does apply to the states. See *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969).

<sup>114</sup> *Abbate*, 359 U.S. at 195; see also *Bartkus*, 359 U.S. at 156 (Black, J., dissenting) (criticizing majority opinion for “rel[ying] on the unwarranted assumption that State and Nation will seek to subvert each other’s laws”); *United States v. Lanza*, 260 U.S. 377, 383 (1922) (“If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make respect for the federal statute or for its deterrent effect.”).

<sup>115</sup> 359 U.S. at 131-33.

Frankfurter was *United States v. Lanza*, which involved enforcement of the Eighteenth Amendment, the text of which explicitly committed its enforcement to both the state and federal governments.<sup>116</sup> Although the potential for state obstruction of the enforcement of Prohibition was not as high as with fugitive slave laws, it was still far from negligible, given the express rejection of the Eighteenth Amendment in states like Rhode Island and Connecticut. In this context, the prioritization of federal power over potential individual rights issues is perhaps inevitable, but for precisely these reasons, the decisions may not articulate the most balanced rule of decision for resolution of contemporary cases.<sup>117</sup>

In addition to concerns about the use of precedent inscribed in a particular historical moment, a significant change in circumstances calls into question the current usefulness of the dual sovereignty doctrine. Incorporation of the Double Jeopardy Clause against the states has obviated the need for a doctrine that protects against unilateral state obstructionism, and expanded federal criminal jurisdiction has challenged a core presumption of the doctrine that “the benignant spirit in which the institutions both of the state and federal systems are administered” is “almost certain” to prevent double punishment for “essentially the same” acts, except “in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.”<sup>118</sup> In fact, a “central feature” of current federal law enforcement policy is cooperation with state and local entities.<sup>119</sup>

When courts do recognize the threat posed to individual liberty by concurrent state and federal criminal jurisdiction, the posited solution has been that Congress could elect under the Supremacy Clause to make federal criminal jurisdiction exclusive, or else could pass a law restricting federal courts from entertaining successive state-federal prosecutions.<sup>120</sup> Clearly,

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<sup>116</sup> U.S. CONST. amend. XVIII, § 2 (“The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.”), *repealed by* U.S. CONST. amend. XXI.

<sup>117</sup> *Accord Grimes*, 641 F.2d at 103 (advising that “given such a politically freighted issue,” the holding of those cases “should be read with considerable caution”).

<sup>118</sup> *Fox v. Ohio*, 46 U.S. 410, 435 (1847).

<sup>119</sup> See DOJ STATISTICAL SURVEY, *supra* note 13, at 4 (“[S]tate and federal law enforcement officials often work cooperatively to maximize their overall ability to prevent and prosecute violent criminal activity in their respective communities.”).

<sup>120</sup> *United States v. Lanza*, 260 U.S. 377, 383 (1922) (“If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision, but it has not done so.”). In limited instances, Congress has provided that a judgment of conviction or acquittal on the merits in state court will bar federal prosecution of the same conduct. See 18 U.S.C. §§ 659, 660, 1991, 2101, 2117 (2006); see also 15 U.S.C. §§ 80a-36, 1282 (2006).

Congress has not adopted this approach, and the dual sovereignty doctrine now allows states and the federal government to act in conjunction (whether willfully or not) to accomplish what neither could under the Constitution if acting alone.<sup>121</sup>

Nonetheless, the Supreme Court has not undertaken a reexamination of the doctrine, and today courts routinely dismiss the arguments of individual defendants subject to multiple prosecutions with little more than a cursory analysis and recitation of the doctrine that one act can be a crime against two sovereigns, neither bound by the actions of the other.<sup>122</sup> As discussed, the dual sovereignty doctrine developed in part out of a concern with the ability of states to undermine and obstruct federal law enforcement. Thus, in the first instance, the doctrine requires a subordination of judicial concern for the rights of individuals to the rights of competing political units within our federal system. The inability of the dual sovereignty doctrine to address the concerns of individuals has grown as the doctrine remains unyielding in the face of mounting and routine federal-state *cooperation* in criminal justice matters.

Federal-state cooperation has been particularly prolific in the area of drug law enforcement.<sup>123</sup> Even when federal and state authorities act through one single task force to investigate criminal activity, courts do not treat them as one prosecuting authority. Thus, defendants cannot invoke the doctrine of collateral estoppel to carry over favorable rulings from a prior prosecution into a second trial by a separate sovereign, even when both sovereigns participated in the investigation of the case.<sup>124</sup> A narrow

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<sup>121</sup> *Accord Grimes*, 641 F.2d at 101 (“Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone.”).

<sup>122</sup> *See, e.g., United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990) (asserting that “successive prosecutions for the same conduct remain rarities” and declining to apply state court suppression ruling in federal court because federal government “cannot be fairly considered to have had its day in court”); *United States v. Aboumoussallem*, 726 F.2d 906, 909 (2d Cir. 1984) (“The Supreme Court has long held that an acceptable cost of federalism, tolerable under principles of both double jeopardy and due process, is the risk of successive prosecutions by state and federal authorities for identical conduct.”).

<sup>123</sup> *See Davis*, 906 F.2d at 831 (“As the challenge facing the nation’s law enforcement authorities has grown in sophistication and complexity, cooperation between federal and local agencies has become increasingly important and increasingly commonplace. In particular, joint federal-state operations have proved a crucial weapon in the long struggle against those who deal in illegal drugs.”).

<sup>124</sup> *See id.* at 829. In *Davis*, the defendant was investigated by the “Capital District Drug Enforcement Task Force” in Albany, New York. The task force was comprised of state and local officers who were “deputized as Special Deputy United States Marshals and operated under the direct control and supervision of the United States Drug Enforcement Agency.” *Id.* at 831. The policy of the task force was to elect prosecution in “either state or federal

exception exists where a second trial is so thoroughly controlled by the sovereign who directed the first trial that it can be said to be a “sham and cover” for a second prosecution by that sovereign,<sup>125</sup> but the conditions for applying this exception are rarely, if ever, found by a court.<sup>126</sup>

### C. EQUAL PROTECTION

A defendant, such as Ronell Wilson or Donald Fell, selected for capital prosecution federally where concurrent jurisdiction exists with a state that does not have the death penalty might also hope to find some shelter in the Equal Protection Clause of the Fourteenth Amendment (rendered applicable to the federal government through the Fifth Amendment).<sup>127</sup> However, courts have heard and rejected similar claims from defendants facing dramatically higher sentences on narcotics charges as a result of federal,

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court, whichever is most appropriate.” *Id.* Apparently the prosecution was “most appropriate” initially in the court of Greene County, until that court suppressed key evidence. Two weeks later, a federal indictment was returned in the Northern District of New York. *Id.* The Second Circuit reversed the district court’s ruling that the prosecution should be bound by the Green County suppression ruling, finding that the federal government “cannot be fairly considered to have had its day in court” because it was not a party to the state case—no federal prosecutors were present during the suppression hearing, and “[n]othing indicates that they provided assistance or advice to the local authorities at any time, or were involved in any way with the local prosecution or the decision not to appeal the suppression order.” *Id.* at 835. Other courts invoke a “laboring oar” theory and allow nonmutual collateral estoppel when there was substantial and active participation by the federal government in a prior state trial. *See United States v. Parcel of Land at 5 Bell Rock Road*, 896 F.2d 605, 610 (1st Cir. 1990); *United States v. Nasworthy*, 710 F. Supp. 1353, 1355 (S.D. Fla. 1989).

<sup>125</sup> Justice Brennan articulated this exception in his *Bartkus* dissent. He wrote that “the record before us shows that the extent of participation of the federal authorities here constituted this state prosecution actually a second federal prosecution.” *Bartkus v. Illinois*, 359 U.S. 121, 165-66 (1959) (Brennan, J., dissenting); *see also United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976) (recognizing exception to the *Bartkus* rule to prevent federal authorities from manipulating state processes to accomplish that which they cannot constitutionally do themselves).

<sup>126</sup> *See, e.g., Aboumoussallem*, 726 F.2d at 901 (declining to “refine the somewhat ambiguous contours” of the “sham and cover” exception but finding it inapplicable in the context of joint investigation of criminal activity by state and federal authorities).

<sup>127</sup> The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Although by its terms the Amendment applies to the states, the Supreme Court has read a concomitant restriction against the federal government into the Due Process Clause of the Fifth Amendment. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

rather than state, prosecutions.<sup>128</sup> And although it seems inherently unfair to select certain offenders for federal capital prosecution out of the vast numbers of those eligible for such treatment, unfairness alone does not give rise to an equal protection claim.<sup>129</sup> It is not clear whether or how equal protection's demand that federal and state governments have, at a minimum, a rational basis for treating similarly situated individuals differently extends to the charging decisions of prosecutors.<sup>130</sup> If a statute is of general application and clearly satisfies the rational basis standard, claims that a prosecutorial action violates equal protection are treated as tantamount to claims of selective prosecution.<sup>131</sup> Such claims place the burden not on the government to explain its treatment of the defendant in relation to others similarly situated, but on the defendant, who must ultimately establish that the prosecutorial decision was motivated by impermissible factors.<sup>132</sup> The desire to attain harsher penalties is not an impermissible factor,<sup>133</sup> nor is the desire to circumvent state constitutional

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<sup>128</sup> See, e.g., *United States v. Jacobs*, 4 F.3d 603 (8th Cir. 1993) (rejecting equal protection and due process claims from defendant who urged that sole purpose of charging case federally was to attain higher penalties); *United States v. Oakes*, 11 F.3d 897, 898-99 (9th Cir. 1993); see also Beale, *supra* note 15, at 997-99 (discussing disparities between federal and state sentences).

<sup>129</sup> But see Beale, *supra* note 15, at 996-1001; Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 668-73 (1997) (arguing that disparate treatment violates equal protection in absence of rational basis for distinguishing defendants tried in federal court versus state court).

<sup>130</sup> See Clymer, *supra* note 129, at 684-86 (listing federal court decisions denying implicitly and explicitly existence of rational basis requirement for prosecutorial decisions); see also *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (ruling that federal prosecutor's decision not to file recommendation for downward departure in sentencing must be rationally related to a legitimate government end).

<sup>131</sup> See Clymer, *supra* note 129, at 684-86.

<sup>132</sup> See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also *United States v. Oakes*, 11 F.3d 897, 899 (9th Cir. 1993) (“[W]e have no jurisdiction to review prosecutors’ charging decisions, absent proof of discrimination based on suspect characteristics such as race, religion, gender or personal beliefs.”); *United States v. Mills*, 964 F.2d 1186 (D.C. Cir. 1992) (en banc); *United States v. Carter*, 953 F.2d 1449, 1461-62 (5th Cir. 1992) (rejecting equal protection claim based on federal/state sentencing disparity); *United States v. Parson*, 955 F.2d 858 (3d Cir. 1992); *United States v. Allen*, 954 F.2d 1160 (6th Cir. 1992). To establish a selective prosecution claim, defendants must demonstrate that they have been singled out for prosecution based upon an “unjustifiable standard such as race, religion, or other arbitrary classification.” *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); *United States v. Diggs*, 613 F.2d 988, 1003 (D.C. Cir. 1979).

<sup>133</sup> See, e.g., *Oakes*, 11 F.3d 897. In *Oakes*, the defendant's federal prosecution resulted in his imprisonment and forfeiture of his family home to the government. *Id.* at 898. As a first-time offender, had he been prosecuted for the possession of one hundred marijuana plants in state court, his sentence would have been between zero and ninety days. *Id.* “The government admit[ted] that *Oakes* was prosecuted in federal court primarily because federal

protections.<sup>134</sup> Although a racial disparity has been demonstrated in the application of the federal death penalty,<sup>135</sup> this fact alone does not give rise to an equal protection claim, absent a showing of intentional discrimination.<sup>136</sup>

Intentional discrimination in a criminal justice litigation context is notoriously difficult to prove.<sup>137</sup> In order to gain discovery rights on a selective prosecution claim, the defense must establish a “colorable basis” for the conclusion that impermissible factors were in operation in the decision to seek federal charges.<sup>138</sup> Discovery, if attained, may not be

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law provides for stiffer penalties and more rigorous forfeiture of the defendants’ property.” *Id.* The court, although troubled by this disparity, found that “[u]nfortunately, the law gives us no choice but to affirm.” *Id.*; see also *United States v. Nance*, 962 F.2d 860, 865 (9th Cir. 1992) (“[T]here are no grounds for finding a due process violation, even when the motive for federal prosecution is that harsher sentences are possible.”).

<sup>134</sup> See, e.g., *United States v. Ucciferri*, 960 F.2d 953 (11th Cir. 1992). The question facing the court in *Ucciferri* was whether the district court properly dismissed a federal indictment upon finding that the case had been investigated primarily by state authorities, had no federal ties, and had been referred for federal prosecution solely for purposes of taking advantage of less stringent federal standards concerning search warrants, wire surveillance, and informants. *Id.* at 953. The district court found that the federal indictment was “making a mockery of state constitutional protections.” *Id.* The Court of Appeals reinstated the indictment, acknowledging that although “systematic transfer of what may properly be called ‘state’ cases to federal court is a legitimate source of concern to federal courts, precedent in this circuit suggests that an indictment may not be dismissed based upon concerns of this kind.” *Id.* at 954.

<sup>135</sup> Between 1995 and 2000, United States Attorneys recommended the death penalty with respect to 494 defendants, 85 of whom were white and 242 of whom were black. See DOJ STATISTICAL SURVEY, *supra* note 13, at 12. The Department of Justice disputes that a racial disparity exists in the operation of the federal death penalty. See, e.g., U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm> (acknowledging that “[t]he proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population,” but asserting that “[t]his is not the result of any form of bias,” but rather a product of the fact that “organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups”).

<sup>136</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 295 n.15 (1987) (finding a statistical demonstration that African-American perpetrators of murder against white victims were significantly more likely to be charged with a capital offense than other groups is not sufficient to establish an equal protection violation because “decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations”); see also *United States v. Bass*, 536 U.S. 862 (2002) (per curiam) (rejecting claim that statistics from Department of Justice reports supported claim of selective prosecution under *Armstrong*, 517 U.S. at 456).

<sup>137</sup> See, e.g., *McCleskey*, 481 U.S. at 297 (requiring “exceptionally clear proof before . . . infer[ring] that the discretion has been abused”).

<sup>138</sup> See, e.g., *Armstrong*, 517 U.S. at 465 (ruling that defendant who seeks discovery on a claim of selective prosecution must show some evidence both of discriminatory effect and

particularly helpful, given that prosecutorial authorities, federal or state, are not required to make the charging decision pursuant to any written policy.<sup>139</sup> Information relating to specific capital charging decisions of the United States Attorney may not be disclosed outside of the Department of Justice without prior approval of the Attorney General,<sup>140</sup> and the Department takes the position that “[t]he prosecution memoranda, death penalty evaluation forms, non-decisional information forms and any other internal memoranda informing the review process and the Attorney General’s decision are not subject to discovery by the defendant or the defendant’s attorney.”<sup>141</sup> Courts have consistently held that the internal policy of the Justice Department creates no substantive rights for those prosecuted under circumstances within the purview of the *Petite* Policy.<sup>142</sup>

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discriminatory intent). In *Armstrong*, the decision to charge defendants with federal rather than California offenses meant that they faced a sentence of at least ten years and up to life in prison. Under California law, the minimum sentence for that offense was three years, and the maximum was five. See also *United States v. Davis*, 904 F. Supp. 554 (E.D. La. 1995) (rejecting selective prosecution claim that sought to shift burden to state to prove that death penalty was not being used in a racially biased manner).

<sup>139</sup> See, e.g., *United States v. Jacobs*, 4 F.3d 603 (8th Cir. 1993). Jacobs argued that the Fifth Amendment requires federal and state authorities to develop a formal procedure to be used to determine which sovereign will charge a particular defendant. *Id.* at 604. The court felt that “Jacobs’s arguments border[ed] on the frivolous.” *Id.* Because Jacobs did not establish that the decision to prosecute him in federal court was based on impermissible factors such as race, religion, or other arbitrary and unjustifiable classifications, his claim failed. *Id.* (citing *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)). One federal court found that due process required the existence of a neutral policy by which a joint federal-state task force would determine which cases to refer for federal prosecution, *United States v. Williams*, 746 F. Supp. 1076 (D. Utah 1990), but this case was reversed on appeal, 963 F.2d 1337 (10th Cir. 1992), and its reasoning was thoroughly rejected in *United States v. Andersen*, 940 F.2d 593 (10th Cir. 1991), where the court wrote: “[a]lthough a prosecutor obviously cannot base charging decisions on a defendant’s race, sex, religion, or exercise of a statutory or constitutional right, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in his discretion.’” *Id.* at 596 (quoting *Bordenkircher*, 434 U.S. at 364).

<sup>140</sup> See USAM, *supra* note 29, § 9-10.040.

<sup>141</sup> See *id.* § 9-10.080. The Department of Justice successfully shields these materials from discovery under the deliberative process privilege. See, e.g., *United States v. Frank*, 8 F. Supp. 2d 253, 283-84 (S.D.N.Y. 1998) (denying discovery request and upholding deliberative process privilege where “[d]iscovery of the deliberative materials would have a chilling effect on the thorough evaluation of these issues and hinder the just, frank, and fair review of the decision for every individual defendant who faces the prospect of receiving a Notice of Intent to Seek the Death Penalty”).

<sup>142</sup> See, e.g., *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000) (“[I]t is clear that the USAM [United States Attorney Manual] . . . ‘is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any manner civil or criminal.’” (quoting USAM, *supra* note 29, § 1.1-000)); see also *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990) (clarifying that *Petite* Policy

Finally, the Attorney General's decision to authorize a death penalty prosecution is not reviewable under the Administrative Procedure Act.<sup>143</sup>

Additionally, the formalistic rigidity of the dual sovereignty doctrine limits the ability of defendants to get at the charging practices of both relevant prosecuting authorities in instances of joint federal-state cooperation. As noted above, the doctrine is oriented toward state-federal obstruction. The formalism of first separating the actions of one sovereign from another, and then persisting in strictly cabining them off as though they have no bearing on one another, has the potential to obfuscate what could otherwise be deemed discriminatory charging practices. When the state and federal governments collude, an equal protection or due process violation may have occurred in a jurisdiction other than the one in which the prosecution takes place. Just as the courts have been loath to find that the state and federal government ought to be bound by the other's actions for purposes of double jeopardy or collateral estoppel, courts may not hold one sovereign accountable for discriminatory charging practices of another jurisdiction—including the practice of referring certain defendants for federal prosecution—even though the presence of the second prosecution may very well be the product of that discrimination or arbitrariness.

#### D. THE SIXTH AMENDMENT

As learned by Claude Dennis, the decision to charge a federal crime can result in the summoning of a dramatically different jury pool than had the crime been charged in a state court. For example, a defendant charged for a crime in Suffolk County, the jurisdiction of which encompasses Boston, Massachusetts, would draw a jury from a voting-age population that is 20% African-American.<sup>144</sup> However, if charged by the United States Attorney in the Eastern Division of the District of Massachusetts, the jury would be drawn from a voting-age population that is 7% African-

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“is not a limitation on the government's sovereign right to vindicate its interests and values”); *United States v. Booth*, 673 F.2d 27, 30 (1st Cir. 1982) (“The [*Petite* Policy] does not create a corresponding right in the accused.”); *United States v. Alston*, 609 F.2d 531, 536-37 (D.C. Cir. 1979) (“The *Petite* policy is not law, but rather an executive policy that permits exceptions in the Attorney General's discretion.”); *United States v. Snell*, 592 F.2d 1083, 1087 (9th Cir. 1979) (rejecting the claim that the “internal housekeeping rule” of the Department of Justice entitled criminal defendant to judicial relief).

<sup>143</sup> See *Walker v. Reno*, 925 F. Supp. 124 (N.D.N.Y. 1995) (ruling that actions undertaken by the Attorney General within the exercise of his or her prosecutorial discretion are committed to agency discretion and should be presumed immune from judicial review under 5 U.S.C. § 701(a)(2)). The *Walker* court rejected the argument that the protocols set forth in USAM § 9-10.000 provided standards by which courts might review individual charging decisions. *Id.* at 128-29.

<sup>144</sup> See *United States v. Green*, 389 F. Supp. 2d 29, 37 (D. Mass. 2005).

American.<sup>145</sup> In practice, moreover, after accounting for the rate of return on jury summonses in the Eastern Division, the percentage of the pool that is African-American drops to 3%.<sup>146</sup> The vast majority of juries drawn in the Eastern Division, in fact, do not have a single African-American member.<sup>147</sup> Similar disparities exist in many other areas, where the jury pool in federal court will have a dramatically lower incidence of minority representation and participation.<sup>148</sup>

As dramatic as these numbers may be, they do not necessarily amount to a violation of the Sixth Amendment's guarantee to criminal defendants of a jury that represents a fair cross-section of the community.<sup>149</sup> In order to prove a Sixth Amendment fair cross-section claim,

a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venirees from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.<sup>150</sup>

Although this analysis, like the double jeopardy rubric, has been criticized as being overly formalistic in general,<sup>151</sup> it is particularly problematic in relation to the differences in composition between juries in the federal and state systems. A change in forum brings a change in "community," and the second prong of the Sixth Amendment inquiry does not interrogate the choice of forum or the boundaries of "community" as drawn by the forum. Although the third prong calls for a showing that the system itself is responsible for producing the disparity (rather than failure on the part of the

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 47-49.

<sup>147</sup> *Id.* at 39.

<sup>148</sup> *See* Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 89-90 (2004) (comparing the 42% African-American population in Wayne County, which contains Detroit, with the 21% African-American population of the Eastern District of Michigan, Southern Division).

<sup>149</sup> The purposes of the fair cross-section requirement are threefold: (1) "to guard against the exercise of arbitrary power" and invoke "the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor"; (2) to preserve "public confidence in the fairness of the criminal justice system"; and (3) to share "the administration of justice" as "a phase of civic responsibility." *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

<sup>150</sup> *Duren v. Mississippi*, 439 U.S. 357, 364 (1979).

<sup>151</sup> *See, e.g.,* Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of The Jury Wheel*, 103 YALE L.J. 1913, 1921 (1994) (noting criticism of the "absolute disparity" metric to assess levels of underrepresentation); *see also* *Green*, 389 F. Supp. 2d at 50 (criticizing the fair cross-section cases for measuring underrepresentation using "something of a contrivance, a normative determination of *how much* disparity is *too much*," and stating that "there should not be a magic number").

distinctive group to respond to jury summonses, for example), the very decision which accounts for a significant portion of the disparity—the decision of the United States Attorney to charge the case federally—is not part of the analysis.<sup>152</sup> Of course, a defendant might attempt to establish a claim under equal protection that the choice of forum was motivated in part by the desire of the United States Attorney to obtain a racially stilted jury,<sup>153</sup> but this claim requires proof of intentional discrimination, whereas a prima facie case under the Sixth Amendment may be established by proof that a particular method of jury selection has a disparate impact on distinctive groups within the community.<sup>154</sup> As discussed, in order to succeed, a defendant would need to show that the United States Attorney violated his or her equal protection rights by engaging in intentional discrimination or relied intentionally on impermissible factors—in this instance, that the decision to charge the crime federally was motivated in part by a desire to obtain an all-white jury.<sup>155</sup>

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The constitutional doctrines discussed above did not develop in anticipation of the contemporary landscape of federal criminal jurisdiction

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<sup>152</sup> In *United States v. Green*, the district court confronted the question of whether the jury drawn for the capital trial of the defendants in the Eastern Division of the District of Massachusetts violated the Sixth Amendment. 389 F. Supp. 2d at 29. The court, citing the statistics concerning the size of African-American populations in the relevant state and federal jury pools as well as the rate of return on jury summonses in federal court, found nonetheless that a Sixth Amendment challenge could not be sustained. *Id.* at 38. In so ruling the district court judge noted that because “defendants 1) cannot prove the magnitude of the disparity that the First Circuit has thus far required, *although they have proved substantial disparity*, and 2) cannot prove the precise extent to which that disparity is attributable to flaws in the system itself, *although they have proved that official action and inaction contributes to the problem*, I am obliged to deny their constitutional challenges.” *Id.* The court went on to read the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869, to set the bar higher than the Sixth Amendment in imposing an affirmative obligation on districts to use a jury selection process that ensures a fair cross-section of the community. *Green*, 389 F. Supp. 2d at 63-75. The First Circuit reversed. See *In re United States*, 426 F.3d 1 (1st Cir. 2005).

<sup>153</sup> *Cf. Green*, 389 F. Supp. 2d at 42 n.20 (“Defendants have not argued that the government chose a federal forum precisely to affect the racial composition of the jury, an argument that may well raise Equal Protection concerns.”).

<sup>154</sup> Compare *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965) (finding that a 10% disparity in representation of a minority group in a jury is insufficient to prove intentional discrimination required for equal protection claim), with *Taylor v. Louisiana*, 419 U.S. 522, 526-33 (1975) (finding a Sixth Amendment violation based on systemic underrepresentation of women in jury pool without requiring showing of intentional discrimination).

<sup>155</sup> *Cf. Green*, 389 F. Supp. 2d at 42 n.20 (“Defendants have not argued that the government chose a federal forum precisely to affect the racial composition of the jury, an argument that may well raise Equal Protection concerns.”).

and increasing federal and state cooperation in law enforcement and criminal prosecution. As a consequence, each government can accomplish, acting in tandem, what it could not when acting alone. These conditions allow for the subversion or avoidance of constitutional limitations on governmental power and their corresponding safeguards for individuals. These constitutional doctrines do not grapple with and address the realities of concurrent criminal jurisdiction within our dual government.

In sum, criminal defendants experience an on-the-ground reality that is starkly different than the operative backdrop against which these doctrines developed. That dual sovereignty results in multiple prosecutions, escalating sentences, and a subversion of individual rights that cuts against a fundamental and founding precept of federalism—that by vesting the power conferred by the people in two spheres of government, state and federal, “a double security arises to the rights of the people.”<sup>156</sup>

#### IV. CAPITAL POLICYMAKING AND INSTITUTIONAL CAPACITIES

This section examines the institutional capacity of the federal government as a criminal justice policymaker. Part IV.A identifies structural features that distinguish the federal government from the states and that have bearing on how the former enacts criminal justice legislation. These factors include the size and heterogeneity of the territory within the federal government’s jurisdiction, the limited nature of the federal government’s police power, and a decreased sensitivity to the cost of criminal justice legislation. These factors dictate that Congress as a criminal justice policymaker is less able than states to aggregate preferences in writing criminal laws and sustaining a dynamic connection between public values and criminal justice policy.

These institutional features and limitations have particular relevance to the ability of the federal government to formulate a coherent and constitutional death penalty scheme. The death penalty is not like other sentences, and the Eighth Amendment requires that the legislature put forth a rational statutory scheme that ensures that the death penalty will only be available for a subset of murderers—the worst of the worst.<sup>157</sup> Furthermore,

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<sup>156</sup> THE FEDERALIST No. 51 (James Madison); *see also* *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (“Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.”); THE FEDERALIST No. 28 (Alexander Hamilton).

<sup>157</sup> *See, e.g., Kennedy v. Louisiana*, No. 07-343 (U.S. June 25, 2008) (“Confirmed by repeated, consistent rulings of this Court . . . [the] use of the death penalty [must] be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that the resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application.”); *Gregg v. Georgia*, 428

the “evolving standards of decency” to which the Eighth Amendment is keyed suggest that legislatures engage in a dynamic and ongoing calibration of their death penalty regime. For the reasons discussed below in Part IV.C, the states are institutionally better suited to maintaining a sustained dialogue regarding criminal justice policy, as recent history bears out.

Given the overlap of federal and state criminal laws, it may be tempting to view federal and state governments as similar or even fungible actors. However, this would be a mistake. The federal government and the respective states have very different attributes and responsibilities with respect to criminal justice. Each political unit has the ability to make certain policy choices regarding criminal justice, from legislating against certain conduct to allocating resources for law enforcement and punishment. Likewise, each political unit has the ability to subscribe to a certain rationale for punishment and to determine the overall degree of punitiveness with which it metes out criminal sanctions. At issue in this section is not that the states and the federal government might strike this balance differently, particularly with respect to capital punishment, but rather the process by which that balance is reached. This Part argues that the states are significantly better suited to reach policy decisions that are genuinely reflective of the body politic’s preferences regarding whether the death penalty should be available in any case and, when it is to be available, which class of murderers represents the “worst of the worst.”

#### A. SPECIFIC CHALLENGES DUE TO SIZE AND HETEROGENEITY OF THE JURISDICTION

The first structural feature that distinguishes the federal government from the states as a criminal justice actor is perhaps the most obvious—the federal government must write laws that are generally applicable across the entirety of the vastly varied nation. The experiences of states and the federal government in formulating and implementing determinate sentencing systems over the last several decades provide a useful illustration of the special challenges that arise given the size and heterogeneity of the territory over which the federal government legislates.

Many jurisdictions, including the federal government, have implemented determinate sentencing schemes or guidelines in order to

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U.S. 153, 187 (1976) (reasoning that in extreme cases, where a crime is “so grievous an affront to humanity[,] the only adequate response may be the penalty of death”); *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring) (“[I]t is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.”).

achieve uniformity and rationality in sentencing.<sup>158</sup> Guidelines systems, which are now only constitutional if strictly advisory,<sup>159</sup> rely on a rank ordering of offenses and a system for evaluating the characteristics of the offender. When combined, these two considerations form a matrix that assigns incrementally harsher punishments for incrementally “worse” offenses.

Just as capital policymaking requires a judgment about which types of offenses qualify as among the worst and thus ought to be eligible to be punished by death, jurisdictions enacting guideline systems need to address the relative seriousness of the range of criminal offenses. One of the first tasks facing the United States Sentencing Commission was to rank order the list of crimes in the United States Code according to the relative harm they caused and therefore the relative harshness in sentence length each crime ought to carry. This was particularly challenging for the federal government. Whereas states, with their smaller size and relative homogeneity of population, might, through shared political traditions or common experience, reach a consensus on such an issue, no such homogeneity of preference can be discerned within the nation as a whole.<sup>160</sup>

For the United States Sentencing Commission, the attempt to rank order crimes resulted in an overall increase in punishments. Justice Breyer explained the unfolding of a process that led not to a coherent rationale or theory of punishment, but to an overall ratcheting up of punishment across the board. As he described, the Commission

may first accept the singular view of Commissioner *A*, who believes that environmental crimes are particularly serious; later, the group would strongly address the criminal conduct which Commissioner *B* finds repugnant; then the Commission would turn the floor over to Commissioner *C*, who feels strongly about some other set of crimes.”<sup>161</sup>

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<sup>158</sup> See generally Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post-Blakeley Era*, 4 OHIO ST. J. CRIM. L. 27 (2006); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

<sup>159</sup> See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

<sup>160</sup> Before he sat on the Supreme Court, Justice Breyer observed that “Minnesotans may agree, for example, that building new prisons is undesirable or impractical; they may be willing to tailor prison sentences to create a total prison population of roughly consonant size. There is no such consensus, however, throughout the nation as a whole.” See Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3-4 (1988). To illustrate his point, Justice Breyer cites conflicting testimony before the Subcommittee on Criminal Justice, of Margaret Giari, arguing against the construction of additional prisons, and of Congressman George W. Gekas, arguing in favor of building bigger and better jails. *Id.* at 4 n.18.

<sup>161</sup> See *id.* at 15.

The Commission abandoned any attempt to rationally order criminal offenses according to their respective “badness,” instead basing their grid on average past practice, culled from an analysis of ten thousand actual cases.<sup>162</sup>

Two points about this are relevant. First is the difficulty faced by a national body in aggregating or ascertaining preferences in relation to criminal justice policy across the entire nation. This difficulty renders the federal government at a disadvantage, compared to the states, in rationally and coherently selecting the category of crimes that are subject to capital punishment. Even if Congress had the capacity to assess accurately national sentiment in relation to the death penalty, the existence of such a sentiment is belied by the current patchwork landscape of capital punishment. As has recently been observed, “the United States is not monolithic in its death penalty practices.”<sup>163</sup> At the state level, it is not a simple question of whether the state has the death penalty or does not. In reality there are three categories: states without the death penalty, states with the death penalty but insignificant numbers of executions, and states with both the death penalty in law and in practice.<sup>164</sup>

Furthermore, it may be too simplistic to assume that an opinion on the death penalty, as reflected by state legislation and local practice, translates perfectly in the aggregate to nationwide support for, or rejection of, the federal death penalty. An individual might have differing criminal justice preferences in relation to his state versus the federal government. Distinctions surely exist, in the public’s view, between the appropriateness of the death penalty for crimes that fall within the core of federal concern—crimes that target the United States *qua* the United States or concern territories or borders; crimes of international terrorism; or crimes that are beyond the capacity of any one state to prosecute—and the appropriateness of the death penalty in relation to all instances in which it is legally available under federal law. So while nationwide support might exist for a national death penalty to be used against those who commit, for example, terrorist acts aimed at undermining the federal government, it is not necessarily true that the public supports the federal death penalty for garden-variety murder.

Second, the Sentencing Commission demonstrated the tendency, in the absence of discernable preferences, to elevate punitiveness across the board. This is out of step with the general trend of constitutional jurisprudence

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<sup>162</sup> See *id.* at 8; see also U.S. SENT’G GUIDELINES MANUAL § 1A1.3 (2009).

<sup>163</sup> Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006).

<sup>164</sup> *Id.*

surrounding the death penalty, which calls for increasingly finer distinctions and narrowing determinations to be made with respect to that punishment. Although one cannot analogize from the experience of the Sentencing Commission to the practice of Congress in writing criminal laws and setting punishment in general, there are other structural features, discussed below, which render Congress at a higher risk for writing hortatory and harsh criminal laws than the states.

B. EFFECT OF THE LACK OF PRIMARY RESPONSIBILITY FOR GENERAL LAW ENFORCEMENT ON CONGRESS AS A CRIMINAL JUSTICE ACTOR

Another structural feature with important implications for the way in which the federal government functions as a criminal justice actor is the limited nature of its police power. Given that the vast majority of crimes are punished by state authorities,<sup>165</sup> it is more likely that citizens hold their local and state-level representatives responsible for maintaining general law and order, and are cognizant of or reliant on federal law enforcement only in cases that fall in the interstices of state power,<sup>166</sup> or for crimes in which the United States *qua* the United States is a victim.<sup>167</sup>

The fact that the states remain the primary enforcers of criminal law stands to have a distorting effect on the federal government as a criminal justice actor. In cases where the federal government does not risk suffering in the eyes of the people for failing to maintain general law and order, members of Congress nonetheless may gain by enacting criminal legislation that is responsive to a particularly outrageous or high-profile type of criminal behavior. Criminal legislation allows politicians to appear “tough on crime” without internalizing any of the costs of administering the law—appropriation does not necessarily accompany criminalization—and in the end, the general populace still relies on local and state governments for day-

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<sup>165</sup> See *supra* note 13 and accompanying text (explaining incidences of federal murder prosecutions); see also ABA TASK FORCE REPORT, *supra* note 15, at 18 (“Due to limited resources—investigative personnel, federal prosecutors, and court facilities—federal criminal law can realistically respond to only a relatively small number of local crimes at any given time.”).

<sup>166</sup> See, e.g., INTERSTATE COMM’N ON CRIME, HANDBOOK ON INTERSTATE CRIME 114 (1938) (praising the National Bank Robbery Statute for rendering “flight” from prosecution more difficult).

<sup>167</sup> See Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996) (noting that early federal offenses, including treason, bribery of federal officials, perjury in federal court, and theft of government property “dealt with injury to or interference with the federal government itself or its programs”).

to-day law enforcement.<sup>168</sup> Thus, “the impetus for [a federal criminal law] derives from public discomfort about the offense at a time of intense publicity.”<sup>169</sup> This reactionary tendency of federal criminal law has been evident from the passage of the Lindbergh Law<sup>170</sup> through the Antiterrorism and Effective Death Penalty Act<sup>171</sup> and beyond. In practice, Congress “typically enacts broad criminal statutes that satisfy the public’s desire to ‘do something’ about crime yet avoid the hard political choices that more specificity implicates.”<sup>172</sup> The hard political choices often come with face-

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<sup>168</sup> See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1294 (2005) (“[S]entencing legislation is often passed as a symbolic gesture of concern for a particular high profile incident . . .”); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 897-98 (2000) (arguing Congress deserves blame for over-federalization of criminal law because interest group support for new criminal legislation often makes federalization irresistible to federal lawmakers). Professor Barkow also speaks of the “availability heuristic,” by which people estimate how frequently an event occurs based on how easy it is to recall the event, and the impact of this cognitive phenomenon on the public demand for criminal justice legislation that is responsive to sensational or newsworthy crime. Barkow, *supra*, at 1284-94.

<sup>169</sup> Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SC. 15, 20 (1996). Zimring and Hawkins identify the federal carjacking statute, 18 U.S.C. § 2119 (2006), as an example of such a proposal because “[t]he behavior that constitutes carjacking is punishable in all fifty states, and increasingly, states are defining carjacking as a separate substantive offense.” *Id.*; see also ABA TASK FORCE REPORT, *supra* note 15, at 14-15 (“New crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need.”).

<sup>170</sup> Congress adopted the federal kidnapping statute, 18 U.S.C. § 1201 (2006), in response to the kidnapping of the infant son of Charles Lindbergh and the public’s “serious concern about the mounting incidence of professional kidnapping and the apparent inability of state and local authorities to cope with the interstate aspects of the problem.” *United States v. Jackson*, 390 U.S. 570, 589 n.34 (1968); see also Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What Is Truly National and What Is Truly Local*, 65 WASH. & LEE L. REV. 767 (2008).

<sup>171</sup> See President’s Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 721 (Apr. 24, 1996) (remarking on legislation created in response to the bombing of the federal building in Oklahoma City); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 701 (2002).

<sup>172</sup> Simons, *supra* note 168, at 929. Simons elaborates, “Even if it were possible to draft a statute detailed and specific enough to cover only the precise conduct warranting federalization, the opportunity costs involved in such an effort and the difficulty in reaching agreement on the exact goals of the legislation remain formidable barriers . . . [T]he more detailed a criminal statute is, the more difficult it will be to obtain a legislative consensus on the policy underlying the statute . . . The end result is that Congress paints with a broad brush, establishing only the minimum criteria for a crime.” *Id.* at 929-30.

to-face accountability and with the considerations of cost against a backdrop of scarcity.

Because the federal government is not responsible for administering a general and comprehensive criminal justice regime, it may be freer in its criminal law enactments. For example, the federal death penalty may be available in instances where the theory of liability is felony-murder, rather than intentional murder.<sup>173</sup> In general, allowing the death penalty to apply beyond intentional murder will mean a significant increase in the number of potential capital prosecutions in a jurisdiction. Whereas a state might factor in the cost of bringing unintentional murders within the ambit of its death penalty statute, Congress does not similarly consider that the overall number of capital prosecutions will increase significantly based on its actions, because the overall pool of federal criminal justice resources remains the same.<sup>174</sup> The intent of Congress in enacting legislation that, for example, makes the death penalty available for kidnapping felony murder<sup>175</sup> or bank robbery felony murder<sup>176</sup> was not necessarily to alter dramatically the number of federal death penalty prosecutions by pressing the reach of the regime beyond intentional murders. A second consequence of the limited police power possessed by the federal government is that Congress often must legislate against crime in an indirect manner.<sup>177</sup> For example, the United States may not directly prohibit first-degree murder *simpliciter*, except in those places subject to its maritime or territorial jurisdiction. Thus, within 18 U.S.C. § 1111, which describes the crimes of first and second degree murder, is a punishment provision that references other crimes that Congress may directly proscribe under its commerce power.<sup>178</sup> This circuitous relationship to the crimes at issue may make more difficult a frank political dialogue about the relative harms caused by different criminal behavior, as well as the situations in which capital punishment might be appropriate. The link between the crime, the power of the government to punish, and the duty of the government to protect the citizenry against the criminal conduct is substantially more direct and transparent at the state level than it is at the federal level.

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<sup>173</sup> The federal death penalty statute codifies the intent required by *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), for non-triggermen at 21 U.S.C. § 848(n)(1)(A)-(D) (2006).

<sup>174</sup> See *supra* Part IV.A.

<sup>175</sup> 18 U.S.C. § 1201.

<sup>176</sup> *Id.* § 2113(e).

<sup>177</sup> See *supra* Part IV.A.

<sup>178</sup> Cf. *United States v. Lopez*, 514 U.S. 549, 596-97 n.6 (1995) (Thomas, J., concurring) (citing early federal criminal statutes and cases for proposition that Congress has “no general right to punish murder committed within any of the States” (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821))).

Finally, as a result of the limited nature of its police power, the federal government has fewer theories under which it may rationally enact penal legislation than do the states. The infrequency with which the federal death penalty is applied weakens its capacity to serve as a deterrent.<sup>179</sup> Furthermore, the full extent of federal criminal law—and the correspondingly broad applicability of the federal death penalty—is not well understood by the general public. That federal prosecutions are initiated in only a small percentage of instances in which a federal law has been broken<sup>180</sup> only serves to reinforce the public impression that federal police power is limited rather than comprehensive, and targeted only at offenses that are exceptional in their national importance. However, the reality, as noted by numerous legal scholars, the federal courts, and other observers, is that federal criminal law reaches behavior that is well outside a core of obvious federal concern.<sup>181</sup> These reasons caution, therefore, that under the “rational actor” theory of deterrence, the ability of federal law to create either specific or general deterrence is weak.

While deterrence is not the only theory under which legislatures may rationally enact criminal laws, it has played a special role in upholding the validity of the death penalty against Eighth Amendment challenges. When the Supreme Court reinstated the death penalty in *Gregg v. Georgia*, a key finding was that the punishment could not be said to be cruel and unusual given that legislatures might legitimately conclude that the punishment had some social utility as a deterrent of crime.<sup>182</sup> The Court deferred to “the legislatures” on the “complex factual issue” of whether the death penalty deters crime, trusting them to “evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”<sup>183</sup> It seems clear from the context of this quote that the Court had in mind state legislatures. For the reasons discussed above, deterrence does not seem to have particular relevance to the validity

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<sup>179</sup> This limitation applies to federal criminal law in general. See ABA TASK FORCE REPORT, *supra* note 15, at 22 (“[R]are use of many federalization statutes calls into question the belief that federalization can have a meaningful impact on street safety and local crime”).

<sup>180</sup> See, e.g., DOJ STATISTICAL SURVEY, *supra* note 13, at 4.

<sup>181</sup> See, e.g., Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1128-31 (1997) (recognizing that federal jurisdiction, concerning the power of the federal government to enact criminal law, is broader than federal interest to be vindicated by such legislation).

<sup>182</sup> 428 U.S. 153, 185-86 (1975).

<sup>183</sup> *Id.*; see also *Spaziano v. Florida*, 468 U.S. 447, 478-49 (1984) (Stevens, J., concurring in part and dissenting in part) (“A majority of the Court has concluded that the general deterrence rationale adequately justifies the imposition of capital punishment . . . . However, in reaching this conclusion we have stated that this is a judgment peculiarly within the competence of legislatures.”).

of the federal death penalty, even if the national legislature were capable of using a flexible approach to study local conditions.

C. EFFECT OF LACK OF COST-SENSITIVITY ON THE FEDERAL GOVERNMENT AS A CRIMINAL JUSTICE ACTOR

In addition to those mentioned above, another institutional feature that distinguishes the federal government from the state as a criminal justice actor is that Congress is less sensitive to cost. As a general matter, states, unlike the federal government, cannot print money or otherwise manipulate currency. Furthermore, most state governments are required by statute or by constitution to balance the budget, and deficit spending is likewise generally not an option for states.<sup>184</sup> It is also the case that the cost of corrections comprises a significant portion of state budgets—6% of the general funds of all states in the aggregate.<sup>185</sup>

Here again the experiences of the states and the federal government with sentencing guideline systems provide useful examples of the respective cost-sensitivity of these actors. The guideline systems of states generally possess one critical attribute lacking in the Federal Sentencing Guidelines: state sentencing bodies are often explicitly required to consider cost and correctional resources when establishing their guidelines.<sup>186</sup> For example, Kansas was one of the first states to adopt a guidelines system. Senate Bill 50, adopted in 1989, created the Kansas Sentencing Commission (Commission), and charged it with “[d]evelop[ing] a sentencing guideline model or grid based on fairness and equity and . . . provid[ing] a mechanism for linking justice and corrections policies.”<sup>187</sup> In developing this model, the Commission was directed by the legislature to “take into substantial consideration current sentencing and release practices and correctional resources, including but not limited to the capacities of local and state correctional facilities.”<sup>188</sup> Any recommendations by the Commission must include a report on the impact of the proposed guidelines on the state’s prison population, corrections programs, and a study of ways to “more effectively utilize correction dollars and to reduce prison

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<sup>184</sup> See Barkow, *supra* note 168, at 1290.

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* at 1288 (“Most state sentencing commissions are required to produce resource impact statements or fiscal notes that alert the legislature to how a particular sentencing proposal will affect corrections resources.”). Virginia’s sentencing commission must provide economic impact statements for any proposed sentencing legislation, and the legislation cannot go to the floor until the bill’s sponsor secures revenue for the initiative. *Id.*

<sup>187</sup> KAN. STAT. ANN. § 74-9101(b)(1) (2008).

<sup>188</sup> *Id.*

population.”<sup>189</sup> The Commission is further charged with providing the legislature with inmate population figures annually, and when the projected population exceeds capacity, the Commission must propose specific options for reducing the number of prison admissions or adjusting sentence lengths for certain groups of offenders.<sup>190</sup>

In contrast, the Sentencing Reform Act, which created the United States Sentencing Commission, did not set any fiscal impact imperatives. Although, according to now-Justice Stephen Breyer, an original member of the Commission, a “prison-impact study” was commissioned,<sup>191</sup> its results were wildly incorrect. Using twenty different assumptions, the study predicted that the federal prison population under the Federal Sentencing Guidelines would differ from what it would be in the absence of the Guidelines by anywhere from negative 2% to positive 10%.<sup>192</sup> Data indicate that between 1995 and 2003—years in which the Federal Sentencing Guidelines were in effect—the federal prison population increased by 81%.<sup>193</sup> Although there are indications that the increase in prison population is attributable largely to the harshness of drug sentences under the Federal Sentencing Guidelines—between 1992 and 2002, the average sentence for a drug offense increased by 31%, and in 2003 a full third (34.4%) of the federal prison population was comprised of first time, nonviolent offenders<sup>194</sup>—the important point for this analysis is that the federal sentencing system, unlike most of those in the states, contained no requirement that sentencing policy choices be accountable or in any way dynamic in relation to correctional resources.

Because an institution is bound by cost does not in and of itself mean that a jurisdiction will reach better criminal justice policies and outcomes. It does mean, however, that the debate regarding those policies will be more sustained and ongoing and thus more likely to reflect reasoned

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<sup>189</sup> *Id.* § 74-9101(b)(6).

<sup>190</sup> *Id.* § 74-9101(b)(15).

<sup>191</sup> See Breyer, *supra* note 160, at 24.

<sup>192</sup> *Id.*

<sup>193</sup> THE SENT’G PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1-2 (2004), available at [http://www.sentencingproject.org/doc/publications/inc\\_federalprisonpop.pdf](http://www.sentencingproject.org/doc/publications/inc_federalprisonpop.pdf) (relying on BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SURVEY OF INMATES IN STATE AND FEDERAL CORRECTIONAL FACILITIES (1997); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2003 (2004); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002 (2004); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994 (1998); U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004); U.S. SENT’G COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2003); U.S. SENT’G COMM’N, COCAINE AND FEDERAL SENTENCING POLICY (2002)).

<sup>194</sup> *Id.* at 1.

contemporary values. This is precisely the type of ongoing calibration of “evolving standards of decency” from which the Eighth Amendment draws its meaning.<sup>195</sup>

There is ample evidence that states, unlike the federal government, are currently engaged in searching reviews of various aspects of their death penalty systems. Concurring in the Supreme Court’s recent consideration of the constitutionality of lethal injection protocols, Justice Stevens suggested that “[t]he time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has certainly arrived.”<sup>196</sup> His suggestion was as much descriptive as prescriptive. Among states with the death penalty,<sup>197</sup> a significant number have undertaken a process to reevaluate the merits of continuing the practice. In the past several years, the legislatures of Arizona,<sup>198</sup> California,<sup>199</sup> Connecticut,<sup>200</sup> Illinois,<sup>201</sup> Indiana,<sup>202</sup> Kansas,<sup>203</sup>

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<sup>195</sup> See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

<sup>196</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1548-49 (2008) (Stevens, J., concurring).

<sup>197</sup> Currently, thirty-five states authorize the death penalty by statute. The District of Columbia, Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin do not. See DEBORAH FINS, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. 1 (2008), available at [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Winter\\_2008.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2008.pdf).

<sup>198</sup> Arizona Attorney General Janet Napolitano formed the Attorney General’s Capital Case Commission in 2000 to “study key issues and make recommendations to try to ensure that the death penalty process in Arizona is just, timely, and fair to defendants and victims.” See OFFICE OF THE ATT’Y GEN., STATE OF ARIZ., CAPITAL CASE COMMISSION FINAL REPORT 1 (2002), available at <http://www.azag.gov/CCC/FinalReport.html>. The study was not commissioned by the legislature, but members of the commission included members of the Arizona legislature, as well as prosecutors, defense attorneys, trial and appellate judges, victims’ rights advocates, and citizens. *Id.*

<sup>199</sup> California Senate Resolution 44 created the California Commission on the Fair Administration of Justice and charged it with studying a variety of criminal justice issues, including the death penalty system. S.R. 44, 2003-04 Leg., Reg. Sess. (Cal. 2004). The final report of the Commission with respect to the death penalty concluded that the system was dysfunctional and required immediate legislative attention in several key areas. See CAL. COMM’N ON THE FAIR ADMIN. OF JUST., REPORT AND RECOMMENDATIONS ON THE FAIR ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 3-4 (2008) (hereinafter CALIFORNIA REPORT), available at <http://www.ccfaj.org/rr-dp-official.html>.

<sup>200</sup> In 2001, the General Assembly of Connecticut created a commission to study fourteen specific aspects of the death penalty in that state, including the existence of disparities in its application based on race, ethnicity, or jurisdiction, and its cost. See STATE OF CONN. COMM’N ON THE DEATH PENALTY, STUDY PURSUANT TO PUBLIC ACT NO. 01-151 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT 1-2 (2003), available at <http://www.cga.ct.gov/olr/Death%20Penalty%20Commission%20Final%20Report.pdf>.

<sup>201</sup> In 2000, an executive order of the Governor of Illinois created the Commission on Capital Punishment, and charged it with studying several aspects of the death penalty with special attention to the need for greater procedural safeguards. See REPORT OF THE

Maryland,<sup>204</sup> Nevada,<sup>205</sup> New Jersey,<sup>206</sup> New York,<sup>207</sup> North Carolina,<sup>208</sup> Tennessee,<sup>209</sup> and Virginia<sup>210</sup> have ordered commissions to study aspects of

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GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), *available at* [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf). The Governor's Commission succeeded the House Death Penalty Task Force, which declined to issue a formal report. *Id.* at 1.

<sup>202</sup> In 2002, at the request of the Governor and the General Assembly, the Indiana Criminal Justice Institute studied the costs and racial dynamics, among other things, of the death penalty in Indiana. IND.A CRIM. JUST. INST., THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW STUDY COMMISSION (2002), *available at* [http://www.in.gov/cji/files/law\\_book.pdf](http://www.in.gov/cji/files/law_book.pdf).

<sup>203</sup> Under the Kansas Governmental Operations Accountability Law, two Kansas state senators requested in 2003 that a special audit commission study the costs of capital punishment to state and local units of government. *See* STATE OF KAN. LEG. DIV. OF POST AUDIT, PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 1 (2003), *available at* [http://www.kslegislature.org/postaudit/audits\\_perform/04pa03a.pdf](http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf). The report estimated the costs of a death penalty case to be 70% more than the cost of a comparable non-death case. *Id.* at 11. In 2004, the Kansas Judicial Council studied specific aspects of the death penalty, including the existence of geographical and racial disparities in the penalty's application, the existence of legal protections for the wrongly convicted, and the existence of a general deterrent effect under the death penalty. *See Report of the Kansas Judicial Council Death Penalty Advisory Committee on Certain Issues Related to the Death Penalty* 6 (2004), *available at* [http://www.kscourts.org/pdf/studies/death\\_penalty\\_rpt11-12-04.pdf](http://www.kscourts.org/pdf/studies/death_penalty_rpt11-12-04.pdf).

<sup>204</sup> On May 13, 2008, Governor Martin O'Malley signed into law Senate Bill 614, thereby creating the Maryland Commission on Capital Punishment. S. 614, 2008 Leg., Reg. Sess. (Md. 2008), *available at* [http://mlis.state.md.us/2008rs/chapters\\_noln/Ch\\_430\\_sb0614E.pdf](http://mlis.state.md.us/2008rs/chapters_noln/Ch_430_sb0614E.pdf). The Commission is charged with studying "all aspects of capital punishment as currently and historically administered" and with making "recommendations concerning the application and administration of capital punishment in the state so that they are free from bias and error and achieve fairness and accuracy." *Id.*

<sup>205</sup> Created in 2007, Nevada's Advisory Commission on the Administration of Justice, NEV. REV. STAT. ANN. § 176.0123 (West Supp. 2009), undertook a study of the cost of administering the death penalty in the state. *See* Cy Ryan, *Death Penalty a Costly Proposition*, L.V. SUN, July 9, 2008, at 3.

<sup>206</sup> The New Jersey legislature created a commission to assess the merits of the death penalty and determine whether its continued use was justified. Act of Jan. 12, 2006, ch. 321, 2005 N.J. Laws 2165. The commission issued its final report in January 2007. *See* N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (2007) (hereinafter NEW JERSEY REPORT), *available at* [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf). The legislature adopted the Commission's recommendation, and abolished the death penalty on December 17, 2007. Act of Dec. 17, 2007, ch. 204, 2007 N.J. Laws 1427.

<sup>207</sup> In the wake of *People v. LaValle*, 817 N.E. 2d 341 (N.Y. 2004), a decision by the state's high court that struck as unconstitutional the state's death penalty statute, the chairs of three standing committees of the Assembly—the Committee on Codes, the Committee on the Judiciary, and the Committee on Corrections—held a series of five public hearings in order to "review New York's death penalty statute in all of its dimensions and solicit the widest range of views possible before considering" whether to restore the death penalty. *See* N.Y. STATE ASSEMBLY, THE DEATH PENALTY IN NEW YORK 1 (2005), *available at*

their death penalty systems. Some studies have focused on the error rate and protective process afforded to those wrongfully convicted; some have asked searching questions about deterrence, retribution, and the overarching moral justifications for the death penalty; and others have additionally focused on the pragmatic question of cost.<sup>211</sup> Some commentators have noted a shift in the debate over the death penalty toward a frank consideration of cost.<sup>212</sup>

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<http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>. The committees undertook “to review whether the death penalty should be enacted not only through the prism of our moral, ethical and legal beliefs, but with the benefit of the real-world experience which the past nine years of practice in New York has given us.” *Id.* at 2. No recommendation was made in the report; the legislature has not acted to reinstate the death penalty to date.

<sup>208</sup> The Legislative Research Commission, the general-purpose study group of North Carolina’s legislature, undertook a study, through a special committee, on the role of race and mental retardation in the state’s death penalty system at the direction of the state senate. Studies Act of 1999, Ch. S.L. 1999-395 § 2.1(11)(a)-(b), 1999 N.C. Sess. Laws 1564, 1568. The Capital Punishment-Mentally Retarded and Race Basis Committee recommended the adoption of legislation barring the death penalty for the mentally retarded and recommended that the legislature enact a moratorium on the death penalty for further evaluation of potential racial bias in the death penalty’s administration. *See* LEG. RES. COMM’N, CAPITAL PUNISHMENT: MENTALLY RETARDED AND RACE BASIS 27-28 (2001), available at <http://www.ncga.state.nc.us/gascripts/DocumentSites/browseDocSite.asp?nID=1> (follow “Study Reports to the 2001 NCGA” hyperlink; then follow “Legislative Research Committee (LRC) Study Reports '01”; then follow “Capital Punishment - Mentally Retarded and Race Basis (LRC)”).

<sup>209</sup> In 2007, the Tennessee General Assembly created the Special Committee to Study the Administration of the Death Penalty and directed it “to study, receive testimony, deliberate upon, and make recommendations for public policy designed to provide fairness and accuracy in the application of capital punishment” at “all stages of the capital process.” Act of June 27, 2007, ch. 549, §§ 1-7, 2007 Tenn. Pub. Acts 1. The creation of this committee followed on the heels of a report from the state comptroller, prepared at the request of the House Judiciary Committee, finding that the costs of death penalty cases are greater than non-death first-degree murder cases. *See* OFFICE OF RESEARCH, STATE OF TENN. COMPTROLLER OF THE TREAS., TENNESSEE’S DEATH PENALTY: COSTS AND CONSEQUENCES 48-49 (2004) (hereinafter TENNESSEE REPORT), available at [http://www.tba.org/Sections/CriminalJustice/TabD\(1\).pdf](http://www.tba.org/Sections/CriminalJustice/TabD(1).pdf).

<sup>210</sup> In late 2000, the Joint Legislative Audit and Review Commission unanimously recommended the formation of a subcommittee to study capital punishment in Virginia. *See* JOINT LEG. AUDIT AND REV. COMM’N, VA GEN. ASSEMBLY, REVIEW OF VIRGINIA’S SYSTEM OF CAPITAL PUNISHMENT (2001) (Commission Draft), available at <http://jlarc.state.va.us/meetings/December01/capital.pdf>. The Commission focused its inquiry on two elements of Virginia’s system: the use of prosecutorial discretion and judicial review of death sentences in state courts. *Id.* at i.

<sup>211</sup> *See, e.g.*, CALIFORNIA REPORT, *supra* note 199, at 10.

<sup>212</sup> *See, e.g.*, Steve Mills, *States Weigh Cost of Capital Punishment*, L.A. TIMES, Mar. 14, 2009, at A15 (“Debate over the death penalty has undergone shifts over the years. During the last decade, the discussion has focused on accuracy and fairness, with exonerations of dozens of death row inmates sparking calls for reform and abolition. Now, with the nation’s

This wave of self-study on the part of the states supports the idea that states as criminal justice actors are engaged in a dynamic process with respect to criminal justice. Even when a part of this debate is necessitated by fiscal concern, the process of regular assessment of the cost of certain criminal justice programs surely provides the states with opportunities to reaffirm, modify, or disavow prior policy choices. It is also true that focus on an issue such as cost may provide cause for a discussion that evolves beyond its original parameters with a salutary effect. For example, states such as Tennessee and New Jersey incorporated discussions of non-economic costs in their studies of capital punishment, including intangible effects on jurors, judges, and family members of the parties.<sup>213</sup>

In contrast, cost does not appear to factor into the federal decision about whether to charge a case capitally. In response to a congressional request for information about the average and median total cost to the federal government of a capital prosecution versus prosecution of the defendant on non-capital charges,<sup>214</sup> the response under Attorney General Ashcroft was that “[t]he Department does not track or attempt to attribute specific sums to the capital review process.”<sup>215</sup> Indeed, when the national

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economy slumping, the issue is cost.”); Editorial, *High Cost of Death Row*, N.Y. TIMES, Sept. 28, 2009, at A22 (noting trend of states reexamining death penalty over issue of cost of administration).

<sup>213</sup> See TENNESSEE REPORT, *supra* note 209, at iii-iv (“First-degree murder causes emotional stress and pain for jurors, the victim’s family, and the defendant’s family. Although any traumatic trial may cause stress, the pressure may be at its peak during capital trials. Jurors serving on traumatic trials are six times more likely to suffer from symptoms of depression than jurors serving on non-capital trials. While many victims’ families seek retribution or closure in an execution, others renounce the death penalty as causing more suffering to themselves and others. Defendants’ family members may face shame and social isolation from media coverage or health problems from stress related conditions.”). The New Jersey Death Penalty Study Commission specifically considered the psychological and emotional costs of capital punishment, including “the adverse effects of executions on third parties: judges, jurors, judicial staff, correctional staff, journalists, clergy and spiritual advisors, as well as the families of the victim and the families of the condemned inmate.” NEW JERSEY REPORT, *supra* note 206, at 34.

<sup>214</sup> When Attorney General John Ashcroft promulgated the DOJ’s revised policy on capital cases, Senator Russ Feingold asked, “What steps does the Department take to track the monetary cost to the U.S. Government of seeking the Federal death penalty in death-eligible cases? Please provide the average and median total cost (including investigative costs) to the Justice Department of seeking the death penalty in death-eligible cases between 2001 and 2006. Please also provide information on the average and median total cost (including investigative costs) to the Justice Department should an otherwise death-eligible case instead be brought as a non-capital case (*i.e.* where life without parole is sought).” *Federal Death Penalty Hearing*, *supra* note 34, at 60 (responses of Department of Justice to questions submitted by Senator Feingold).

<sup>215</sup> *Id.* at 60-61.

legislature reacted to calls from President George H. W. Bush<sup>216</sup> and President Bill Clinton<sup>217</sup> to reenact and later to expand the federal death penalty, the ensuing debates in most instances assumed the legitimacy of the penalty, argued for its appropriateness in the instance of certain crimes,<sup>218</sup> or exhibited a blanket moral opposition to the death penalty.<sup>219</sup> The debate did not focus on the cost or benefit of a death penalty regime that would be broadly applicable to almost any murder occurring in the United States.<sup>220</sup> This is not to say that the federal government engages in no review of its criminal justice policies, or that it is completely insensitive to cost.<sup>221</sup> However, the level of dialogue currently existing at the state level is unmatched.

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<sup>216</sup> President Bush challenged Congress to pass anti-crime legislation, including a reinstatement of the federal death penalty, within one hundred days of a March 11, 1991 address. See 137 CONG. REC. S18,664-02 (1991) (statement of Sen. Dole).

<sup>217</sup> President Clinton pressured Congress to pass his crime bill, which contained death penalty provisions. See John Aloysius Farrell, *Clinton Seeking Public Support for Crime Bill*, BOST. GLOBE, Aug. 16, 1994, at 3; Christopher Hanson, *House Adopts Crime Bill; Clinton Forced to Muster GOP Support for Passage*, SEATTLE POST-INTELLIGENCER, Aug. 22, 1994, at A1.

<sup>218</sup> See, e.g., 139 CONG. REC. S2408 (1993) (statement of Sen. D'Amato) (referring to recent bombing of the World Trade Center and arguing that "we should have a death penalty for these kinds of savage acts").

<sup>219</sup> See, e.g., 140 CONG. REC. S2226 (1994) (statement of Sen. Hatfield) ("I oppose the death penalty because I believe that government-sponsored killing in all of its forms is immoral. . . . When human beings attempt to take on authority that only our Creator possesses they are doomed to failure.") (augmenting record with statement of Justice Blackmun in *Callins v. Collins*, 510 U.S. 1141 (1994) (mem.) (Blackmun, J., dissenting from denial of certiorari)).

<sup>220</sup> Even when the possible deterrent effects of the death penalty are referenced, it is often in support of authorizing the death penalty for a specific offense, rather than in relation to the panoply of offenses for which the federal death penalty is available. See, e.g., 140 CONG. REC. S1820-01 (1994) (statement of Sen. Hatch). Senator Hatch invoked the example of Aldrich Ames, accused of selling state secrets to the Soviet Union, to argue for the death penalty for crimes of treason and espionage: "when a potential turncoat calculates whether he will betray his country for profit, the prospect that he or she may be sent to the electric chair should be part of his or her calculation. The death penalty is a strong deterrent to such crimes. For crimes like espionage and treason for profit, the likelihood of such a crime being committed will be diminished if the potential punishment includes the death penalty. This is a price some criminals will not want to pay for a new Jaguar."

<sup>221</sup> For example, the Senate has held a hearing on, among other things, the racial and geographical disparities in the federal death penalty system. See *Racial and Geographic Disparities in the Federal Death Penalty System: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 107th Cong. (2001).

## D. CONCLUSIONS

This section does not suggest that the states and federal government must have identical concerns in administering criminal justice in general or the death penalty in particular. Quite the opposite. The differences in institutional capacities ought to be recognized, especially in light of the different purposes of federal criminal law and state criminal law.

Although the mode of promulgating state criminal justice legislation is by no means free from the same types of interest group pressures that lead to an overrepresentation in the national political process of those seeking to increase criminal justice penalties,<sup>222</sup> the institutional factors discussed herein dictate that states are more accountable to the people than is the federal government in the realm of criminal justice. Without suggesting a particular outcome with respect to criminal justice or the death penalty, it is possible that it may be normatively preferable within our dual federal system to allocate especially the most controversial aspects of criminal justice administration to the states. A fundamental principle of our constitutional design is that “keeping the government close to the individual” will enhance the institutions of representative democracy.<sup>223</sup> As one scholar noted,

[S]tates have an abiding interest in defining criminal conduct and in enforcing their criminal code. State criminal law is written and enforced by elected officials who are closer to the community than are their federal counterparts. Consequently, state

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<sup>222</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378-79 (1974) (terming unwillingness of lawmakers to commit “political suicid[e]” by enacting protections for criminals “legislative default”). However, the confluence of legislative hesitancy posited by process theory, and the phenomenon that the majority of citizens imagine themselves as the victims (rather than perpetrators) of crime, means that the “overwhelming preponderance of political incentives favor unrestricted enforcement of the criminal law, even if this means abusive police methods or convicting the innocent.” Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice*, 44 SYRACUSE L. REV. 1079, 1081 (1993). Predicting from this model, one might expect to see few substantive or procedural criminal laws, because the benefits of such legislation are widely dispersed. See Dan M. Kahan, *Is Chevron Relevant to Criminal Law?*, 110 HARV. L. REV. 469, 474 (1996). Process theory posits that legislatures are not sensitive to protecting the rights of those accused of crimes. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991) (arguing that judicial supervision of criminal procedure law substitutes for legislative rulemaking because all segments of society are not equally likely to come into contact with the criminal justice system). Public choice theory posits that the political process results in overrepresentation of the interests of well-organized but non-majoritarian groups in the legislative process. See generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

<sup>223</sup> Lino A. Graglia, Lopez, Morrison, and Raich: *Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL’Y 761, 761 (2008).

criminal law is more likely to reflect the values and mores of state residents than is the uniform regulation that results from federal legislation.<sup>224</sup>

#### V. THE EFFECT OF THE FEDERAL DEATH PENALTY ON STATE ACTORS

The foregoing section isolated the state and federal governments as criminal justice actors and, viewing them in isolation from one another, considered variations in their institutional features and the ways in which these variations might impact their capacity to set criminal justice policy in general and with respect to capital punishment in particular. However, these two levels of government do not operate in isolation from one another. This section examines the impact of the federal death penalty on criminal justice actors at the state level. The potential for federal capital prosecution across the nation threatens to seriously undermine the ability of states to make reasoned policy choices for the benefit of their citizenry, as examined in Part V.A; the ability of local prosecutors to remain accountable for their charging decisions, as examined in Part V.B; and the capacity of local juries to breathe contemporary values into the substance of the law, as examined in Part V.C. The capacity for obscuring local preferences and undermining the role of capital juries is particularly at odds with the Eighth Amendment requirement that death sentences be the result of channeled discretion and free from arbitrariness or unconstrained emotion.

Given the relatively small number of federal criminal prosecutions annually, the notion that the federal government will dictate capital punishment policy across the nation is not realistic. However, in the instigation of virtually every capital trial, there will be numerous occasions, discussed *infra*, in which federal rule will supplant local policies and practices. The absolute number of these instances might today be relatively low, yet they are significant in their capacity to weaken accountability of state policymakers.

#### A. THE FEDERAL DEATH PENALTY, DECREASED STATE LEGISLATIVE ACCOUNTABILITY, AND THE DISPLACEMENT OF LOCAL PREFERENCES

Even though a primary motivating factor in the centralized capital charging policies is the attainment of national uniformity in law enforcement,<sup>225</sup> in most practical senses this goal is illusory.<sup>226</sup> All capital

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<sup>224</sup> Moohr, *supra* note 181, at 1172.

<sup>225</sup> See *supra* notes 29-34 and accompanying text.

<sup>226</sup> See Gleeson, *supra* note 37, at 1701-22 (discussing reasons, including prosecutorial discretion and regional differences, for persistent disparities in federal sentencing outcomes).

trials, even those conducted in federal court by federal prosecutors, will have effects that are primarily local. That crime and its prosecution will remain tethered to a specific locality is inscribed in the Constitution. The Sixth Amendment vicinage requirement guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law.”<sup>227</sup> Current federal law provides for venue in criminal cases “in a district where the offense was committed.”<sup>228</sup> Thus, the jury will be drawn entirely from within the state, and the family members of the victim and accused are likely to reside within the state. The defense lawyers, especially if the defendant is indigent, will be drawn from the local community within the state, and the judge that hears the case will reside within the state. Likewise, local newspapers and media outlets will cover the trial, guaranteeing that the prosecution will be an event in the consciousness of state and local residents. Lastly, federal law requires states to carry out the execution of a federal prisoner in certain instances.<sup>229</sup>

If a state acts, as have New Jersey and New Mexico, to abolish the death penalty, it has reached a policy conclusion that is against the weight of special interests and reflects the determination that the death penalty is not justifiable in light of its costs. In the event that the action abolishing (or declining to enact or reenact) a death penalty regime was premised on a consideration of intangible costs, the state is without recourse should the

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<sup>227</sup> U.S. CONST. amend. VI (emphasis added).

<sup>228</sup> FED. R. CRIM. P. 18.

<sup>229</sup> 18 U.S.C. § 3596 (a) (2006). A federal judge rejected a claim that this provision of the Federal Death Penalty Act violates the Tenth Amendment. In *United States v. Taveras*, No. 04-156, 2006 WL 473773 (E.D.N.Y. Feb. 28, 2006), Judge Weinstein of the Eastern District of New York noted that although the Tenth Amendment forbids the “commandeering” of state officials into federal service, no New York official had objected to assisting the federal government in this manner. Thus, “[t]he effort of defendant to protect an unknown state official against being compelled to carry[] out this grisly duty shows a commendable sensitivity and humanity, but establishes no standing.” *Id.* at \*6. Further litigation on this issue may develop, however. A federal judge has ordered that Gary Sampson, convicted of multiple homicides and sentenced to death by the federal government, must be executed by New Hampshire state officials. New Hampshire, which has the death penalty but has not carried out an execution since 1939, see *New England Conducts First Execution Since 1960*, N.Y. TIMES, May 13, 2005, <http://www.nytimes.com/2005/05/13/world/americas/13iht-web.0513execution.html>, must construct a facility in which to administer lethal injection according to the United States government’s protocol. *United States v. Sampson*, 300 F. Supp. 2d 278 (D. Mass. 2004) (ordering Sampson to be executed in New Hampshire by lethal injection or by hanging, pursuant to N.H. REV. STAT ANN § 630:5 (XIII)-(XIV) (2003)); Dan Gorenstein, *How to Build an Execution Chamber*, NEW HAMPSHIRE PUBLIC RADIO, Mar. 18, 2008, [www://nhpr.org/node/15587](http://www://nhpr.org/node/15587).

federal government decide to seek death for a crime that occurred within the territorial jurisdiction of the state. By virtue of the Supremacy Clause, the federal government may impose a capital punishment regime in states that have elected not to have one. Unlike other areas of federal regulation, which coerce state compliance with federal policy initiatives or goals through the spending power, the commerce power, or through its powers pursuant to Section Five of the Fourteenth Amendment, the states are not free to decline this particular policy initiative.<sup>230</sup> When the federal government seeks participation in a federal program where “state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program.”<sup>231</sup> However, with a federal death penalty “program,” costs will always be externalized to some extent on local actors, and the states and their citizenry will inevitably bear those costs. This undermines the ability of state governments to “remain responsive to the local electorate’s preferences,”<sup>232</sup> for ultimately their decisions may be overruled by the federal government.

The presence of the federal death penalty in state jurisdictions may decrease state accountability in the opposite direction as well, where the state government or local prosecutors may desire to seek the death penalty in a specific case or as a general matter, but may not have the authorization of state law to do so. In these instances, the availability of the federal death penalty undermines respect for the process by which a political consensus on the death penalty was arrived. Human-on-human killing is an extreme violation of the fabric of civil society, and reactions to such an action will necessarily be inflected with great emotion. In the context of our justice system, we rely on preexisting rules of law to achieve equitable outcomes driven by reason rather than naked emotion; likewise, our democracy is premised on the idea that our legislatures will reflect the “cool and deliberate sense of the community” rather than ideas or positions “stimulated by some irregular passion.”<sup>233</sup> We have designed our political institutions to protect against instances in which “a number of citizens, whether amounting to a majority or a minority of the whole . . . are united

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<sup>230</sup> *Cf.* *New York v. United States*, 505 U.S. 144, 166-69 (1992). In the case of such federal advances, “the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.” *Id.* at 168.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> THE FEDERALIST No. 63 (James Madison).

and actuated by some common impulse of passion . . . adverse . . . to the permanent and aggregate interests of the community.”<sup>234</sup>

It is often the case that the transient impulse of a community may be in favor of the death penalty even when its reasoned position is firmly against capital punishment. As former Attorney General Alberto Gonzales said, in relation to his decision to seek the death penalty in federal cases in Vermont and North Dakota, neither of which has the death penalty under state law, “I believe the fact the state doesn’t have the death penalty doesn’t mean that the people of the state would not impose the ultimate sanction when the right circumstances dictate that that happen.”<sup>235</sup> He was proven right by a North Dakota jury, when it returned a verdict of death for Alfonso Rodriguez, Jr., convicted of murdering college student Dru Sjodin.<sup>236</sup>

The federal prosecution and resulting death sentence registered a sense of community outrage over Rodriguez’s crime, but it failed to respect the reasoned conclusion of that same community regarding the undesirability of the death penalty. This conclusion has been reaffirmed multiple times by North Dakota. When North Dakota had the death penalty in the early part of the twentieth century, the penalty was reserved only for those convicted of first-degree murder and who were already serving a life sentence on a prior conviction of first-degree murder.<sup>237</sup> The state had not carried out an execution since 1905, when a hanging was botched; North Dakota only carried out eight legal executions as a state.<sup>238</sup> The death penalty was taken off the books in 1975.<sup>239</sup> In 1995, the state legislature considered a bill that would have reauthorized the death penalty for the murder of a law enforcement or correctional officer, and for murders that occurred in relation to kidnapping or rape.<sup>240</sup> The bill was introduced in part as a response to the particularly heinous and newsworthy murder of Donna Martz, whose sister testified before the senate in favor of the measure.<sup>241</sup>

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<sup>234</sup> THE FEDERALIST No. 10 (James Madison); *see also* Barkow, *supra* note 168, at 1296-97 (citing Madison in Federalist No. 49 for premise that “government should reflect the public’s reasoned preferences, not their impulsive ones”).

<sup>235</sup> Dave Kolpack, *Attorney General Visits North Dakota Law Officials*, ABERDEEN AM. NEWS, July 22, 2005, at A7.

<sup>236</sup> *See* United States v. Rodriguez, No. 04-55, 2007 WL 466752 (D.N.D. Feb. 12, 2007).

<sup>237</sup> Act of Mar. 9, 1915, ch. 63, 1915 N.D. Laws 76.

<sup>238</sup> Frank E. Vyzralek, *Legal Execution in Northern Dakota & North Dakota*, in N.D. HUMANITIES COUNCIL, MORE ABOUT JUSTICE ON THE DAKOTA FRONTIER 8 (2000).

<sup>239</sup> Act of Mar. 15, 1973, ch. 116, 1973 N.D. Laws 287 (new criminal code to become effective July 1, 1975 listing sentencing alternatives with the maximum possible penalty of twenty years imprisonment).

<sup>240</sup> Carter Wood, *Senate Kills the Death Penalty*, GRAND FORKS HERALD, Jan. 31, 1995, at A1.

<sup>241</sup> *Id.*

The bill was defeated by a vote of thirty-three to fourteen; Senator Wayne Stenehjem,<sup>242</sup> who later was elected Attorney General of North Dakota, led the opposition.<sup>243</sup> The next time the legislature debated the death penalty was in 2003, in response to the murder of Dru Sjodin,<sup>244</sup> but it had little support even in the face of this heinous crime.

Certainly, uniform federal law supplants local rule in numerous instances by design of our federal system. However, given the structural features and institutional capacities favoring states as criminal justice policy actors, there may be good reason to invest state criminal justice policies with favor, and to be cautious in relation to federal criminal justice policies that unseat them.

Additionally, the Eighth Amendment is especially concerned with the policy judgments made by states in the capital arena, as these judgments create the very substance of the Eighth Amendment as it is understood to “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>245</sup> Decisions regarding categorical restrictions on the death penalty rendered by the Supreme Court are based in part on the way in which states have answered the question for themselves.<sup>246</sup> If consensus in the states is undermined by the presence of

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<sup>242</sup> *Id.* Senator Stenehjem argued that the death penalty was costly and an unproven deterrent of violent crime, and furthermore advised, “We, as individual senators, need to weigh, within our own conscience, whether it is appropriate for the state to condone violence to show that we will not tolerate violence.” *Id.*

<sup>243</sup> Office of Att’y Gen., State of N.D., Biography of Attorney General Stenehjem, <http://www.ag.state.nd.us/Wayne.htm> (last visited Nov. 17, 2009).

<sup>244</sup> Dale Wetzel, *North Dakota May Consider Death Penalty but Support for Bill Is Sparse*, GRAND FORKS HERALD, Dec. 6, 2003, at A1.

<sup>245</sup> *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

<sup>246</sup> In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the Eighth Amendment bars the execution of the mentally retarded. In so holding, the majority noted that “[t]he large number of States prohibiting the execution of mentally retarded persons and the complete absence of States passing legislation reinstating the power to conduct such executions [of the mentally retarded] provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.” *Id.* at 315-16. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the Eighth Amendment bars execution of those who committed a crime before the age of eighteen. The majority relied on “objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice” as evidence that “today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’” *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316). In *Kennedy v. Louisiana*, the Court ruled that imposition of the death penalty for child rape where death did not occur violates the Eighth Amendment. No. 07-343, slip op. at 1 (U.S. June 25, 2008). There, in ascertaining the

the federal death penalty, so too is the ability of states to register their norms as part of the evolving substance of the Eighth Amendment. The Supreme Court also looks to the behavior of state juries in locations that have the death penalty to ascertain “social consensus” on an Eighth Amendment practice.<sup>247</sup> It is not clear how death sentences meted out under federal law in jurisdictions that do not otherwise have or use the death penalty factor into the “social consensus” existing in the state.

#### B. THE FEDERAL DEATH PENALTY AND DECREASED ACCOUNTABILITY OF LOCAL PROSECUTORS

In states where the death penalty is authorized, a second order of policy decisions transpires at the county level. Decisions about whether to seek death in any one case are made by local prosecutors.<sup>248</sup> There is strong evidence that communities exhibit their preferences regarding the death penalty through the selection of the local prosecutor, because even within states that allow the death penalty, its use varies dramatically by county. A study in the last decade revealed that only 3% of counties account for 50% of the death sentences imposed nationally.<sup>249</sup> The federal death penalty rests across a patchwork of counties that composes the national fabric, each subsidiary unit exercising a degree of autonomy within the overarching framework of state law. The federal death penalty has the capacity to override local preferences or undermine the accountability of local prosecutors to the communities that elected them.

A federal death penalty agenda which seeks to initiate capital prosecutions in jurisdictions where local prosecutors, such as Robert Johnson of the Bronx<sup>250</sup> and Kamala Harris of San Francisco,<sup>251</sup> have a

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existence of a national consensus on the question, the Court found it “of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind.” *Id.* at 15.

<sup>247</sup> See, e.g., *Kennedy*, No. 07-343, slip op. at 22 (“There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society.”).

<sup>248</sup> See, e.g., Brian P. Janiskee, *Prosecutorial Discretion in Death Penalty Cases: Democracy in Action*, 2 J. INST. ADVANCEMENT CRIM. JUST. 39 (2008) (“Variances in the application of the death penalty statute among local jurisdictions by different elected district attorneys are a natural and desirable by-product of our constitutional and representative democracy.”). Janiskee further argues, “Because the prosecutor is not under the immediate supervision of other local officials, the prosecutor has the discretion to pursue the public good as defined by the electoral relationship between this official and his or her constituents. These constituencies vary from county to county.” *Id.* at 41 (citation omitted).

<sup>249</sup> See *Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring).

<sup>250</sup> The conflict between the anti-death penalty policy of District Attorney Johnson and the charging practices of the federal government are discussed in relation to the *Quinones* case, *supra* notes 50-53 and accompanying text.

longstanding policy against the death penalty raises questions about the nature of the federal interest vindicated by such prosecutions. As discussed in Part II, the United States Attorney Manual recommends federal abstention from prosecution when concurrent jurisdiction exists with a state, except “when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities.”<sup>252</sup> One factor that bears on the relative interests of the state and federal governments is “[t]he relative ability and willingness of the State to prosecute effectively and *obtain an appropriate punishment* upon conviction.”<sup>253</sup> Similarly, the *Petite* Policy, which applies where a defendant’s conduct already has formed the basis for a state prosecution, precludes federal prosecution based on substantially the same acts unless the matter involves a “substantial federal interest” that has been left “demonstrably unvindicated” by the foregoing prosecution.<sup>254</sup> The Department’s presumption that a prior state prosecution has vindicated the federal interest “may be overcome even when a conviction was achieved in the prior prosecution . . . if the prior sentence was *manifestly inadequate in light of the federal interest involved*.”<sup>255</sup>

The implication, then, when the United States brings capital charges in a district in which the local prosecutor evidences a willingness to pursue first-degree murder charges but not the punishment of death, is that there are instances in which the only appropriate sentence for a given crime is death. Further, that even in instances in which a defendant has been prosecuted by the state, convicted of first-degree murder, and sentenced to life imprisonment without the possibility of parole, this sentence fails to vindicate a substantial federal interest.

The suggestion that there are crimes for which death is the *only* appropriate punishment is manifestly out of step with modern death penalty jurisprudence. Taken together, *Furman* and *Gregg* require that the death penalty be imposed only under a statutory scheme that rationally narrows the class of death-eligible defendants and permits a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and circumstances of the crime.<sup>256</sup> It seems strange to posit that a federal interest may only be

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<sup>251</sup> It is the policy of Kamala Harris, District Attorney of San Francisco, not to seek the death penalty even when it is available. See Egelko, *supra* note 20.

<sup>252</sup> USAM, *supra* note 29, § 9-10.090.

<sup>253</sup> *Id.* § 9-10.090(C) (emphasis added).

<sup>254</sup> *Id.* § 9-2.031 (A).

<sup>255</sup> *Id.* § 9-2.031 (D) (emphasis added).

<sup>256</sup> See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (ruling that the legislature may not make the death penalty mandatory punishment for certain offenses).

vindicated by a specific outcome when that outcome cannot be guaranteed even in a federal prosecution. A death sentence “is the one punishment that cannot be prescribed by a rule of law” but is instead a moral judgment of the community as to whether “an individual has lost his moral entitlement to live.”<sup>257</sup>

It may be argued that the outcome sought by the federal government is not a sentence of death, but the signaling effect of a capital charge. Thus, a federal interest may not be vindicated when a local prosecutor declines to charge a case capitally despite the availability of the death penalty. This rationale is belied in practice, however, by instances in which the federal government has found the criterion articulated under the *Petite* Policy to have been met even after the state sought a death sentence.<sup>258</sup>

### C. THE FEDERAL DEATH PENALTY AND THE ROLE OF THE CAPITAL JURY

The Sixth Amendment evinces the fundamental nature of the role that the jury plays in criminal trials.<sup>259</sup> Nowhere is that role more profound than in a capital trial, where the jury is called upon to decide between life and death. The Supreme Court’s death penalty jurisprudence has accorded constitutional significance to the flexibility of a jury to consider a defendant’s individual characteristics<sup>260</sup> and to render a decision that is essentially a moral one.<sup>261</sup>

If in fact the federal interest is lacking, and the crime is essentially a local one that happens to have been charged in federal court, then perhaps the relevant community values to be exercised are local, rather than federal. This position was taken by Judge Calabresi, who, in the case of Donald Fell, urged the Second Circuit to consider whether the vicinage requirement of the Sixth Amendment mandates a different jury selection procedure in federal capital cases arising in a state that does not itself have the death

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<sup>257</sup> *Spaziano v. Florida*, 468 U.S. 447, 468-69 (1984).

<sup>258</sup> See *supra* notes 60-87 and accompanying text (examples of *Petite* Policy cases).

<sup>259</sup> Accord Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79 (2004). Dooley describes the jury as “[t]he quintessential distinguishing feature of the American criminal justice system,” and as “perform[ing] the interrelated functions in criminal trials of rendering verdicts that reflect a sense of community justice and giving normative content to law.” *Id.* at 79.

<sup>260</sup> The Supreme Court’s rulings in *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978), mandate that capital juries are entitled to consider a range of mitigating evidence.

<sup>261</sup> See Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 120 (2004) (“[A]s to any particular case, the law still does and must leave the death sentencing authority free to exercise discretionary moral judgment and to bear the responsibility for the fairness of the exercise.”).

penalty.<sup>262</sup> Reasoning that the vicinage requirement embodies a determination by the Framers of the necessity of the jury in maintaining local values in our federal system and in capital sentencing proceedings, Judge Calabresi concluded that “[t]he relevant community values in the instant case are constitutionally defined as those of Vermont.”<sup>263</sup> He questioned whether the normal rule of capital jury selection, which eliminates from jury pools those jurors with categorical opposition to the death penalty, adequately addresses the fundamental constitutional values at stake.<sup>264</sup> Judge Calabresi also questioned whether the imposition of a federal capital sentence “in situations that involve predominately local crimes in non-death penalty states may be sufficiently rare as to be constitutionally prohibited” under the Eighth Amendment.<sup>265</sup> Although the circuit declined to rehear the case on the grounds identified by Judge Calabresi, his questions identify poignant and perplexing issues. To further quote Judge Calabresi,

In cases from states without the death penalty, the constitutionally salient values are not just the “local” values, like the existence of substantial generalized opposition to capital punishment, but much more fundamentally the value and endurance of federalism itself—the recognition that we are part of a country, of a polity, that has to live with both Texan values and Northeastern values.<sup>266</sup>

Local juries are undermined in another significant way by this application of the federal death penalty. A state capital prosecution that results in a sentence of life in prison without the possibility of parole amounts to an exercise of mercy by a local jury. However, that mercy can be effectively trumped by a successive federal prosecution in which the death penalty is sought. Such a successive prosecution presents questions of fundamental fairness to the individual defendant,<sup>267</sup> and it is also troubling in its effects on the jury system as a whole. The Supreme Court

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<sup>262</sup> See *United States v. Fell*, 571 F.3d 264, 283-86 (2d Cir. 2009) (Calabresi, J., dissenting from denial of rehearing en banc).

<sup>263</sup> *Id.* at 284.

<sup>264</sup> *Id.* (“For a federalism like ours—made up as it is of states whose populations hold widely different moral viewpoints—to work, perhaps even to survive, it is at least arguable that the values of the citizens of the state in question—not just a minority of them—be reflected in trial juries, even in federal cases.”).

<sup>265</sup> *Id.* at 289-90.

<sup>266</sup> *Id.* at 289.

<sup>267</sup> See *supra* notes 105-19 and accompanying text. The nature of capital sentencing by a jury means that, even at the local level, a differently composed jury could reach a death verdict where another local jury selects life imprisonment as the appropriate punishment. The state would never be able to have a second chance at a death verdict, though, and it is only under cover of a formalistic reading of the Double Jeopardy Clause that the federal government is able to seek death after a state jury has essentially acquitted that defendant of the death penalty in relation to the same underlying offense.

has held that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”<sup>268</sup> In *Caldwell v. Mississippi*, the jury was told that its decision was essentially not final, because it would be subject to automatic review by the state supreme court.<sup>269</sup> The resulting death sentence was deemed “simply not represent[ative of] a decision that the State had demonstrated the appropriateness of the defendant’s death.”<sup>270</sup> The risk in *Caldwell* was that the jury might render a death sentence with the impression that appellate review could always reduce the sentence to life, and thus the perceived lack of finality of the jury decision prejudiced the defendant.<sup>271</sup> Instances of dual prosecution by federal and state authorities may similarly prejudice the capital defendant. Although awareness by the jury of the potential for successive federal prosecution could influence that jury to select life imprisonment because a second jury is available if the death sentence is truly appropriate,<sup>272</sup> it is also possible that the first jury, in an effort to protect its verdict, might select a death sentence. The impression of finality is eroded when a successive federal prosecution may essentially appeal, repeal, or overturn an exercise of mercy by a local jury.

#### VI. PRESCRIPTION—FEDERAL ENACTMENT OF A ROBUST *PETITE* POLICY

In its present configuration, the federal death penalty has far-reaching implications for individual defendants and for states as sovereign entities accountable to their respective citizens. Although cooperation between federal and state law enforcement entities is desirable on the whole, constitutional doctrines have not kept pace with the modern reality, in which federal and state authorities routinely cooperate. Rather, the constitutional doctrines protect against state obstructionism, and therefore

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<sup>268</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

<sup>269</sup> *Id.* at 325-26.

<sup>270</sup> *Id.* at 332.

<sup>271</sup> *Id.* at 332-34.

<sup>272</sup> In *Caldwell*, Justice Marshall reasoned that jurors might seize upon any suggestion that the ultimate burden of deciding a human’s fate does not rest fully on their shoulders alone as

highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community.

*Id.* at 332-33.

do not provide adequate protection for individual defendants faced with successive federal prosecution.

But moreover, the presence of potential federal capital prosecution threatens to undermine the decisions of state and local actors with respect to the death penalty. In jurisdictions where the death penalty is unavailable by legislative decree, this may result in local prosecutors seeking an end-run around state law by actively seeking transfer of the case to the federal system. In other instances, local prosecutors may seek to have a case prosecuted by federal authorities in order to increase the odds of achieving a death sentence, either because federal authorities will seek death whereas the local prosecutor would not, or because the federal jury might be less favorable to the defendant. At the most extreme, a federal capital prosecution might be initiated as a rebuke to a local jury that selected life imprisonment over the penalty of death.

Although the number of federal capital prosecutions is still fairly small in proportion to the number of state murder prosecutions, there are several reasons to think that the problems highlighted in this article may increase over time. First, as described in Section IV.C, states are currently undergoing a reexamination of the death penalty. It is possible that states may follow New Jersey and New Mexico in eliminating the death penalty altogether. The difference between state and federal death penalty policy is at its most extreme—and the effect of the federal death penalty most subversive—in states in which the death penalty has been legislatively abolished. Second, as awareness of the federal death penalty's presence grows, criminal defendants and state juries may alter their behavior. A local jury may be undermined in its sense of finality when making life-or-death decisions. Criminal defendants may be hesitant to strike deals with state prosecutors, knowing that the agreed-upon sentence may be trumped by an ensuing federal prosecution. What began as collaboration may end up having a deleterious effect on the ability of state law enforcement actors to induce cooperation on the part of criminal defendants.

A judicial solution is unavailing. The formalism of the doctrines discussed is deeply entrenched. Although general Eighth Amendment principles favor a recalibration of the doctrines in relation to capital cases, in practice the line between a federal prosecution that truly vindicates a federal interest and one that is merely a second bite at the apple or an instance of forum-shopping for a death verdict is difficult to ascertain. At first blush, it may seem that distinctions may be drawn along statutory lines, such that certain offenses are deemed always to touch upon core federal interests—such as treason and crimes against officers of the United States—but one precept of jurisprudence under the Commerce Clause is that every federal criminal statute proscribes behavior that in at least some

instances will implicate a core federal concern. The awkward asymmetry between this judicial rule, on the one hand, and, on the other, a judicial rule under the Eighth Amendment dictating that some statutes do not present a sufficiently strong federal interest to carry the death penalty, would be great.

The Supremacy Clause militates that this problem can only be dealt with at the federal level. In many respects, this highlights the problem for the states, as the federal government has not demonstrated the capacity for restraint in this area. Federal criminal law is expansive, and there is little reason for Congress to refrain from encroaching on areas of traditional state concern. The Department of Justice's internal policies recognize the potential for encroachment, but they resort to vague and ill-defined terms such as "substantial federal interest."<sup>273</sup> In practice, the standards are malleable and subject to the interpretation of prosecutors in the field.

If one accepts, as argued in Part IV, that states are better at capital policymaking than is the federal government, then the problem becomes how to allow the federal government sufficient room to vindicate its interests without unduly interfering with state policymaking and political accountability. One possible solution is for Congress to enact the substance of *Petite* Policy as law in relation to all first-degree murder cases. In effect, then, the federal government would be prevented from undertaking or continuing first-degree murder prosecution once a prosecution under state law arising out of the same act has been initiated. By situating the instigation of a state prosecution as the triggering point of this federal law, the focus is drawn away from the results of the state proceeding, and the question of whether a state sentence is sufficiently punitive to vindicate federal interests is avoided.

Whereas blanket application of such a restraint in relation to all federal criminal law would not be desirable, its application in the context of homicide is less troubling for several reasons. First, current practice indicates that the states are vigorous in enforcing their proscriptions on human-on-human violence. As states are viewed by citizens as the first line of defense against street crime, political incentives exist for this practice to continue. There exists no potential for state obstruction in this arena, for similar reasons.

Congress has already incorporated similar restraints into federal criminal law in several instances. For example, 18 U.S.C. § 659, which proscribes stealing or tampering with goods in interstate or foreign shipments, provides that "[a] judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under

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<sup>273</sup> USAM, *supra* note 29, § 9-10.050.

this section for the same act or acts.”<sup>274</sup> The material differences between the proposed capital-specific restraint and this statute is that the latter nominally creates a race to judgment: until such time as the state proceeding reaches a conclusion, a federal prosecution based on the same acts may proceed. The language of the current, non-binding *Petite* Policy goes further, in that it bars “the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s).”<sup>275</sup> Such a broadly written prohibition, statutorily adopted, would prevent the situations faced by the Carpenter brothers, who faced simultaneous federal and state capital prosecutions for the same acts, as well as the scenario faced by Samuel Ealy, who was prosecuted federally following a state court acquittal after key evidence was suppressed. From a policy standpoint, proscription of the former scenario avoids the inefficiencies of duplicative prosecutions, and avoidance of the latter scenario prevents the diminishment of state courts as a result of federal relitigation of their evidentiary rulings.

However, adoption of the *Petite* Policy, absent exceptions for “unvindicated federal interests”<sup>276</sup> resulting from the outcomes of state proceedings, would give state courts the ability to exercise an effective veto over federal prosecutions. As explained above, as a general matter the abiding interest of the states in effectively and promptly bringing murder prosecutions would obviate most of the risk associated with allowing for this type of state dominance. However, there may be scenarios in which the murder at issue represents a transgression of the sovereign interests of the United States in a manner such that a federal prosecution is appropriate and necessary. It remains true that “only the federal government can vindicate truly national interests,”<sup>277</sup> and when the federal government moves to prosecute, for example, those responsible for the bombing of the federal building in Oklahoma City, the connection between the prosecuting sovereign and the thrust of the criminal act is unambiguous. Another such situation includes a “crime that intrudes upon federal functions, harming entities or personnel acting in a federal capacity, or when it addresses offenses committed on sites where the federal government has territorial responsibility, or when it addresses matters of international crime.”<sup>278</sup> The problem, however, is how to draw an exception to the statute that is not so large as to render it useless as a limitation on the operation of the federal death penalty. Clearly, the line may not be drawn coextensively with the

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<sup>274</sup> 18 U.S.C. § 659 (2008).

<sup>275</sup> USAM, *supra* note 29, § 9-2.031.

<sup>276</sup> *Id.* § 9-2.031.A.

<sup>277</sup> ABA TASK FORCE REPORT, *supra* note 15, at 47.

<sup>278</sup> *Id.*

outer parameters of federal power to enact criminal laws. A better method of line drawing is to identify exceptions based on the specific characteristics of the offense that make it a crime against the sovereignty of the United States. For example, when the victim is an official of the United States and has been targeted in the course of his or her official duties or because of his or her specific relation to the United States, the interest of the United States in prosecuting the offense is clear.<sup>279</sup>

Any difficulty in drawing appropriate exceptions may be softened by the fact that a federal prosecution is not proscribed entirely—should the state fail to prosecute, the federal government is free to do so. Similarly, the fact that the United States must in some cases exercise restraint in favor of state prosecutions does not mean that it cannot devote law enforcement or prosecutorial resources in aid of the state proceeding.

The proposed statutory remedy would not eliminate all unfairness to individual defendants because it addresses the federal government only and does not place a limit on the ability of a state to undertake a prosecution subsequent to a federal prosecution. The statute and the restraints of the Double Jeopardy Clause still allow for this. However, the institutional features of state criminal justice systems give reasons to think that the potential for abuse in the dual sovereignty doctrine operates primarily in one direction. Whereas the federal government, which is the less cost-sensitive actor, might undertake a successive prosecution in order to obtain a conviction on the highest possible count or to obtain a death sentence, it is more likely that states would decline to follow a federal prosecution even though the law allows for them to do so.

Perhaps a larger concern arises not over the issue of fairness to individual defendants, but from a process standpoint. As discussed, the states are currently engaged in a reevaluation of the costs and benefits of their capital systems. Furthermore, public accountability for criminal justice policy is greater in the states than at the federal level. It is possible that the least desirable outcome among the many troubling scenarios presented in this Article is for the existence of the federal death penalty to short-circuit or create an end-run around reasoned and accountable state death penalty policy. This was the case in North Dakota with the Alfonso Rodriguez prosecution. It is important to note, though, that under the proposed statutory remedy, this scenario could only take place with collusion on the part of state officials to specifically bypass state law in order to seek a death sentence. Authorities in North Dakota, or New Jersey,

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<sup>279</sup> *Accord* Gleeson, *supra* note 37, at 1716 (“In a federal system that rightly accords great deference to states’ prerogatives, the federalization of the death penalty should be limited to cases in which there is a heightened and demonstrable federal interest.”).

or any other state without the death penalty could effectively prevent a federal capital prosecution by initiating a state-level prosecution. Although deliberate bypass of state policies is possible under the proposed remedy, the states are not powerless to stop it. Should state officials request or otherwise invite federal prosecution, the existence of the statutory remedy would make it clear that the officials affirmatively sought federal intervention. This brings an increased level of transparency to the decision-making process, and ultimately enhances the accountability of state actors.

## VII. CONCLUSION

The existence of federal criminal jurisdiction within our system of dual sovereignty is of special concern in relation to capital punishment. The Eighth Amendment jurisprudence of the Supreme Court has required careful procedures by which the discretion and passion of all actors in the criminal justice system are channeled. In spite of these doctrines, the presence of dual jurisdiction over a broad range of capital crimes injects another opportunity for arbitrariness into the system. In addition to creating the potential for unfairness to individual defendants, the presence of the federal death penalty undermines state policymakers at every stage, from the drafting of legislation to the charging decisions of local prosecutors, and the functioning of capital juries. This diminishes the capacity of states to realize their preferences in relation to criminal justice outcomes in their territory. The states are currently engaged in a reevaluation of their death penalty systems, and the presence of the federal death penalty threatens to undermine these discussions. A due regard for the primary role of the states in criminal justice administration suggests that federal restraint, in the form of a statutory adoption of a rule akin to the *Petite* Policy, is in order.

