

FEDERALISM AND CAPITAL PUNISHMENT: NEW ENGLAND STORIES

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*No state without capital punishment is farther than one hideous murder
away from bringing it back.*¹

INTRODUCTION

Application of the federal death penalty to crimes committed in states that have abolished capital punishment is a tiny problem with a disproportionately powerful scholarly impact. Federal death sentences represent only 0.53% of death sentences imposed in the United States.² Even more striking, only *six* individuals, out of 3,242 on death row nationwide,³ currently await execution on federal capital charges for crimes committed in states that have abolished capital punishment.⁴ Yet, in an era of alarmism over the federal government's role in enforcing criminal laws,⁵ an increasing body of scholarly literature has focused on the federalism concerns posed by this rare capital punishment practice. Overwhelmingly, scholars have argued that federal death sentences should be constitutionally impermissible for crimes committed within the borders of abolitionist states strictly on federalism grounds.⁶ Defendants in abolitionist states have used this argument to attack the charges they face as unconstitutional, both facially and as applied. The argument against federal capital prosecutions in

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1. Michael Mello, "The Past is Never Dead; It's Not Even Past": A History of Capital Punishment in Vermont, Draft #3 (July 10, 2008) (unpublished manuscript) (on file with author). Citation to the late Professor Mello's unpublished article is in no way intended to imply that he would agree with the views expressed in this Article.

2. 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, 1721 (2003).

3. See DEATH PENALTY INFO. CTR., DEATH ROW INMATES BY STATE (2011), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

4. *Federal Death Row: State Where Crime Was Committed*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/federal-death-penalty?scid-29&did+147> (last visited July 21, 2011) (Iowa (2), Massachusetts (1), Michigan (1), Vermont (1), North Dakota (1)).

5. JAMES STRAZZELLA ET AL., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 3 (1998), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_pubs_catalog_fedcrimlaw2.authcheckdam.pdf (arguing that the federal government's creation of criminal laws "has serious adverse consequences").

6. See discussion *infra* Part II.

abolitionist states is thus now making its way through the court system, and the few courts to consider the issue have so far largely rejected it, finding no constitutional bar provided that federal jurisdiction to prosecute is properly established.

This Article will examine the prevailing scholarly view that federalism concerns trump Supremacy Clause arguments and render the federal death penalty unconstitutional when applied within the boundaries of abolitionist states. First, it will review the circumstances within the criminal justice system that allow this situation to arise in the first place: the nature of concurrent state and federal criminal jurisdiction, the reinstatement of federal capital punishment after a long hiatus as an increasing number of states have simultaneously abolished capital punishment, and changes to the United States Department of Justice's Death Penalty Protocol (DPP) encouraging the use of federal capital charges as a stopgap measure for particularly heinous crimes when state law prohibits capital punishment. Second, it will review case law and scholarly literature to demonstrate that well-established precedent permits Congress to authorize capital punishment for federal crimes even where state law differs. Third, it will argue that, contrary to prevailing scholarly wisdom, courts have decided these cases properly under prevailing Supremacy Clause precedent; and, that there are major policy advantages in having federal authorities bring capital charges when particularly egregious cases arise in abolitionist states. First, federal capital prosecution can serve as a "safety valve," insulating local communities from political pressures that might otherwise lead to more widespread application of capital punishment or derail state abolitionist movements.⁷ And second, federal capital charges provide opportunities for uniformity of application that may address longstanding concerns regarding racial inequities in the imposition of death sentences.

This policy argument will be made primarily through consideration of two contrasting recent New England case studies. The first, a crime of such unparalleled brutality that it has been compared to the murders of an entire family immortalized in the novel *In Cold Blood*,⁸ stopped in its tracks an imminent successful push to abolish the death penalty in Connecticut. In July 2007, in an idyllic Connecticut suburb, two career criminals followed a woman and her daughter home from the supermarket. They invaded the family's home, brutally raped the mother and her eleven-year-old daughter, strangled the mother, beat the father, tied the family up, and set the home on fire, leaving the family to burn to death. The mother and her two young daughters perished in the fire. The father, Dr. William Petit, escaped and

7. See, e.g., Paul Mysliwicz, *The Federal Death Penalty as a Safety Valve*, 17 VA. J. SOC. POL'Y & L. 257 (2010) (discussing the role of the federal death penalty as a "safety valve").

8. TRUMAN CAPOTE, *IN COLD BLOOD* (1965).

survived to lead a passionate call for the execution of his family's killers.⁹ While federal jurisdiction might have been an option in this case,¹⁰ the State of Connecticut prosecuted the defendants.¹¹ The case exploded in the media just as Connecticut was on the cusp of abolishing capital punishment. The Connecticut legislature had just passed a bill abolishing the death penalty and forwarded it to Governor M. Jodi Rell for signature.¹² Governor Rell, however, vetoed the bill as a direct result of the outcry over the Petit murders.¹³ Connecticut remains a death penalty state.

By contrast, another recent high-profile murder in another small New England town—this one in Vermont, which abolished the death penalty in 1965¹⁴—is being prosecuted federally. The defendant in *United States v. Jacques* is charged with the June 2008 kidnapping, rape, and murder of his twelve-year-old step-niece, Brooke Bennett, through chilling means.¹⁵ According to the indictment and other court documents, Michael Jacques forced another young girl, whom he had allegedly been molesting since she was eight years old, to participate in luring her young cousin to her death.¹⁶ As will be discussed in detail below, federal prosecutors asserted jurisdiction under a 2006 amendment to the Federal Kidnapping Act, 18 U.S.C. § 1201(a), permitting federal prosecution of intrastate kidnappings where the defendant used the Internet or other means or facilities of interstate commerce to commit the crime.¹⁷ Jacques faces the death penalty under federal law,¹⁸ but there has been no public outcry over the federal

9. Mark Pazniokas, *Petit Case Shadows Death Penalty Debate*, N.Y. TIMES, May 17, 2009, <http://www.nytimes.com/2009/05/17/nyregion/connecticut/17polct.html>.

10. Although federal jurisdiction in the Connecticut case is less certain, it is possible that the defendants could have been charged under the same provision of the Federal Kidnapping Act used in *United States v. Jacques*. See *United States v. Jacques*, No. 2:08-cr-117, 2011 WL 1706765, at *4 (D. Vt. May 4, 2011) (opinion and order denying motion to dismiss count one). Jurisdiction would be premised on an incident during the course of the kidnapping in which the mother was forced to go to a bank and withdraw \$15,000, thus implicating use of an interstate commerce facility.

11. Pazniokas, *supra* note 9.

12. H.B. 6578, 2009 Gen. Assemb., Jan. Sess. (Conn. 2009).

13. See Veto Message from M. Jodi Rell, Governor of Connecticut, to Susan Bysiewicz, Secretary of State of Connecticut (June 5, 2009), available at <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204>.

14. 1965 Vt. Acts & Resolves 28 (codified as amended at VT. STAT. ANN. tit. 13, § 2303 (2009)). However, while the 1965 act abolished the death penalty generally, it still permitted the death sentence for an “unrelated second offense.” *Id.* Vermont later removed this qualification in 1987. 1987 Vt. Acts & Resolves 125 (codified as amended at VT. STAT. ANN. tit. 13, § 2303 (2009)).

15. Memorandum of the United States in Opposition to Defendant’s Motion to Dismiss Count One of the Indictment at 1–2, *United States v. Jacques*, No. 2:08-cr-117 (D. Vt. Feb. 26, 2010), ECF No. 135 [hereinafter Memorandum in Opposition].

16. *Id.*

17. See *infra* notes 25–27 and accompanying text.

18. Notice of Intent to Seek a Sentence of Death at 1, *United States v. Jacques*, No. 2:08-cr-117 (D. Vt. Aug. 25, 2009), ECF No. 106.

authorities' decision to seek death for a crime committed within the state, despite Vermont's longstanding abolitionism. A motion by Michael Jacques to strike the death penalty on federalism-based Eighth Amendment grounds was denied by the federal district court, as was a more detailed motion to reconsider. This Article will discuss these opinions in detail. At the time of publication, the capital prosecution of Michael Jacques is proceeding in federal court, and Vermont remains an abolitionist state.

I. FACTUAL AND HISTORICAL BACKGROUND

A. A Problem Made Possible by Concurrent Federal and State Criminal Jurisdiction

Defendants may be subject to federal capital charges for crimes committed within the borders of abolitionist states because the American criminal justice system provides for concurrent federal and state jurisdiction over many crimes. Federal prosecutors conduct approximately five percent of criminal prosecutions in the United States.¹⁹ These federal prosecutors work in ninety-four United States Attorneys' Offices located across the country, which are organized to correspond to federal judicial districts and operate under the supervision of the United States Department of Justice.²⁰ In virtually all federal prosecutions, defendants are charged under criminal statutes enacted by the United States Congress and codified in the United States Criminal Code.²¹ The remaining 95% of criminal prosecutions are carried out at the state and local levels by state and county prosecutors working in thousands of separate offices.²² These cases are charged under state statutes, codified in state criminal codes. For many crimes, there are both federal and state analogues on the books. In these instances, the decision whether to charge the defendant at the state or federal level turns on the presence of a federal interest that rises to the level of a jurisdiction-creating element.

The 2008 murder of Brooke Bennett by Michael Jacques provides a clear example of concurrent jurisdiction in practice. The physical aspects of

19. STRAZZELLA ET AL., *supra* note 5, at 19.

20. *Offices of the United States Attorneys*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/usao/> (last visited Nov. 27, 2011).

21. In a small number of cases each year, federal authorities prosecute crimes committed on federally-owned land or on Indian reservations under the Assimilative Crimes Act, 18 U.S.C. § 13 (2006). The Assimilative Crimes Act allows federal prosecutors to charge defendants under state statutes where no federal statute fits the facts of the crime. *See, e.g.*, *United States v. Sharpnack*, 355 U.S. 286, 297 (1957).

22. STRAZZELLA ET AL., *supra* note 5, at 19.

the crime took place entirely within the boundaries of the State of Vermont; neither Michael Jacques nor Brooke Bennett physically crossed the Vermont border during commission of the crime.²³ While Vermont law allows for the prosecution of kidnapping and murder, federal law also criminalizes kidnapping resulting in death under certain limited circumstances.²⁴ Because Michael Jacques used the Internet and text messaging extensively to lure Brooke Bennett to her death, federal jurisdiction became an option under the Adam Walsh Child Protection and Safety Act of 2006 (AWA), which amended the Federal Kidnapping Act, 18 U.S.C. § 1201(a).²⁵ This amendment broadened federal jurisdiction to include kidnappings where the Internet and text messaging are used to commit the crime, on the grounds that use of these interstate facilities establishes a federal interest in prosecuting the crime. Specifically, Title II, section 213 of the AWA amended the Federal Kidnapping Act as follows:

Section 1201 of title 18, United States Code, is amended—

(1) in subsection (a)(1), by striking “if the person was alive when the transportation began” and inserting “, or the offender travels in interstate . . . commerce or *uses the mail or any means, facility, or instrumentality of interstate . . . commerce in committing or in furtherance of the commission of the offense.*”²⁶

The constitutionality of this amendment was challenged in several federal courts, including in the *Jacques* case, and so far has been unanimously upheld.²⁷ Because the Constitution does not confer upon Congress a general police power, congressional authority to enact criminal laws arises primarily under the Commerce Clause.²⁸ As will be discussed further below, the court in *United States v. Jacques* recently issued an opinion

23. Memorandum in Opposition, *supra* note 15, at 2.

24. VT. STAT. ANN. tit. 13, § 2303 (2009) (stating the penalty for murder); *id.* § 2405 (stating the criminal elements for kidnapping in Vermont); Federal Kidnapping Act, 18 U.S.C. § 1201(a) (2006) (allowing federal prosecution for kidnapping resulting in death under certain limited circumstances).

25. The Adam Walsh Child Protection and Safety Act of 2006 (AWA), Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.), contained a variety of provisions and amendments to existing federal laws intended specifically to address online sexual predation of children.

26. AWA § 213 (emphasis added).

27. *See* *United States v. Jacques*, No. 2:08-cr-117, 2011 WL 1706765 at *11–12 (D. Vt. May 4, 2011) (opinion and order denying motion to dismiss count one) (upholding amended 18 U.S.C. § 1201(a) against facial and as-applied challenges as proper exercise of Congress’s commerce power); *United States v. Augustin*, No. 1:09-cr-187, 2010 WL 2639966 (E.D. Tenn. June 28, 2010) (same); *United States v. Ochoa*, No. 8-cr-1980, 2009 WL 3878520 (D.N.M. Nov. 12, 2009) (same).

28. *See* *United States v. Lopez*, 514 U.S. 549, 553 (1995) (recognizing that Congress may enact criminal laws under the Commerce Clause).

upholding the amendment to the Federal Kidnapping Act as a constitutional exercise of Congress's power to regulate under the Commerce Clause.²⁹ In the wake of this decision, it is clear that federal prosecutors had the power to bring charges for the Brooke Bennett murder, as did Vermont prosecutors.

That federal prosecutors chose to bring charges, rather than deferring to Vermont state authorities, was a matter of prosecutorial discretion governed by internal Department of Justice policy and was likely also the subject of negotiations between the jurisdictions. The Department of Justice has stated that:

[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. Such cooperation is a central feature of current federal law enforcement policy. In some areas, these cooperative efforts lead to agreements that certain kinds of offenses, particularly violent crimes, will be handled by federal authorities.³⁰

Nothing in federal policy would have prevented such an agreement from being reached in the *Jacques* case. A written Department of Justice policy known as the "Petite Policy" restricts federal prosecutors from charging defendants who are *already* charged or were previously charged and acquitted under state criminal statutes based on the same acts.³¹ But where,

29. See *infra* notes 260–67 and accompanying text.

30. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000) 4 (2000) [hereinafter DOJ STATISTICAL SURVEY], available at <http://www.justice.gov/dag/pubdoc/dpsurvey.html>.

31. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (updated July 2009) [hereinafter USAM]. The provision states in relevant part:

This policy precludes 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) unless three substantive prerequisites are satisfied: first, 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 by an unbiased trier of fact. In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be approved by the appropriate Assistant Attorney General.

Satisfaction of the three substantive prerequisites does not mean that a proposed prosecution must be approved or brought. The traditional elements of federal prosecutorial discretion continue to apply.

Id.

as in the *Jacques* case, state authorities have not yet charged the defendant, federal prosecutors have discretion to prosecute despite the existence of concurrent state authority to do so. Federal prosecutors are allowed—but not required—to decline prosecution in favor of state authorities if they believe that “[n]o substantial Federal interest would be served by [Federal] prosecution” or that “[t]he person is subject to effective prosecution in another jurisdiction.”³² This same provision clearly allows them to bring federal charges if they believe a federal interest is at stake. As will be discussed below, changes to the DPP during the George W. Bush Administration specifically allow federal prosecutors to consider the availability of state capital punishment as a sentencing option when determining whether to prosecute federally or decline in favor of a state prosecution.³³

B. A Four-Decade Hiatus in Federal Executions Comes to an End

The imposition of federal capital sentences in abolitionist states, in addition to being a rare phenomenon, is a relatively recent one. This can be explained by the fact that a four-decade-long hiatus in federal executions ended at roughly the same time as a newly energized abolitionist movement succeeded in eliminating several state death penalty statutes. Thus, during the 2000s, there were both more federal capital cases and more abolitionist states, making such prosecutions more likely to arise.

The federal government executed no prisoners between 1963, when Victor Harry Feguer was executed by hanging for the kidnapping and murder of a doctor he had lured to his home under the ruse of a house call,³⁴ and 2001, when Timothy McVeigh was executed by lethal injection for the murder of 168 people in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.³⁵ Overall, the federal death penalty was infrequently imposed during the twentieth century.³⁶ Beginning in the 1960s, it was, in the words of one commentator, “virtually moribund” due to growing concern over arbitrariness of jury decisions and racial disparities

32. *Id.* § 9-27.220.

33. *See infra* notes 97–106 and accompanying text.

34. Sean M. Morton, *Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1438 (2001).

35. *Executions of Federal Prisoners (Since 1927)*, FED. BUREAU OF PRISONS, <http://www.bop.gov/about/history/execchart.jsp> (last visited Nov. 27, 2011); John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL'Y 195, 198 (2004). *See infra* pp. 29, 45–50 for a discussion on the degree to which the Department of Justice's centralized review process for capital charges provides opportunities to address remaining concerns with racial injustice in the capital sentencing process.

36. The Federal Bureau of Prisons reports thirty-four federal executions between 1927 and Feguer's execution in 1963. FED. BUREAU OF PRISONS, *supra* note 35.

in imposition of death sentences.³⁷ In 1972, in *Furman v. Georgia*, the United States Supreme Court struck down Georgia's death penalty statute as cruel and unusual punishment under the Eighth Amendment.³⁸ Although there was no single majority opinion in *Furman*, a number of justices expressed concerns that arbitrary jury determinations were leading to racial disparities in imposition of the death penalty.³⁹

Furman led to a nationwide moratorium on death sentences that lasted until *Gregg v. Georgia* upheld the revised Georgia "guided discretion" statute in 1976.⁴⁰ Post-*Gregg*, many states moved to revise their death penalty statutes and reinstate capital punishment. However, the federal capital punishment moratorium significantly outlasted those of most states. Despite *Gregg's* holding that a "guided discretion" framework for death penalty statutes could pass constitutional muster, Congress repeatedly failed to pass revised federal capital-sentencing legislation between 1976 and 1988.⁴¹ Commentators have explained Congress's repeated failure to agree on legislation as either the result of diverging views between abolitionist and non-abolitionist states⁴² or the political parties' ingrained ideological disagreements over the death penalty.⁴³

Congress's failure to reinstate federal capital punishment was at odds with public opinion favoring the death penalty for the most serious crimes. According to a Gallup poll, opposition to the death penalty peaked in the United States in mid-1966, when 42% of survey respondents favored the death penalty for defendants convicted of murder, while 47% opposed it.⁴⁴ This poll result was highly anomalous: It is the only result reported by Gallup between 1936 and 2010 in which a higher percentage of respondents opposed the death penalty than favored it. During the 1960s, when courts and the public alike were most vigorously questioning the death penalty, slim majorities continued to favor it.⁴⁵ Interestingly, the Supreme Court's decision in *Furman*, striking down Georgia's capital punishment statute,⁴⁶ appeared to *increase* support for the death penalty—at least temporarily. A

37. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 370 (1999).

38. *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

39. *Id.* at 255.

40. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

41. Little, *supra* note 37, at 377.

42. *Id.* at 377–78.

43. Charles C. Boettcher, *Testing the Federal Death Penalty Act of 1994*, 18 U.S.C. §§ 3591–98 (1994); *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), 29 TEX. TECH L. REV. 1043, 1053 (1998).

44. *Death Penalty: Are You in Favor of the Death Penalty for a Person Convicted of Murder? 1936–2010*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Nov. 27, 2011).

45. *Id.*

46. *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

Gallup poll conducted between March 3 and 5, 1972, showed 50% of respondents favoring the death penalty for murder and 41% opposed, whereas a Gallup poll conducted between November 10 and 13, 1972, showed 57% of respondents favoring capital punishment for murder and 32% opposed.⁴⁷ By the 1980s, support for capital punishment had rebounded further, commanding solid majorities—usually in the 70th and 80th percentiles—throughout the decade. This support reached an all-time high of 80% in September 1994.⁴⁸ Not surprisingly, 1994 was also the year in which Congress succeeded in passing comprehensive federal death penalty legislation.⁴⁹ It was not until 2001, however, when Timothy McVeigh died by lethal injection for carrying out the Oklahoma City bombing, that federal authorities first executed a prisoner under the new law. Since then, two federal prisoners have been executed⁵⁰ and fifty-eight other federal prisoners await execution under federal statutes.⁵¹

The same period that has witnessed the reinstatement of federal capital punishment has also seen a resurgent abolitionist movement, with “a wave of states . . . reconsider[ing] capital punishment” and deciding to abolish the death penalty.⁵² Currently, sixteen states, the District of Columbia, and

47. GALLUP, *supra* note 44.

48. *Id.*

49. In 1988, Congress passed its first post-*Gregg* capital punishment legislation, authorizing death as a penalty for certain murders committed in furtherance of a “Continuing Criminal Enterprise” (CCE), as defined in 21 U.S.C. § 848(c), (e) (2006). The CCE statute is essentially the RICO statute (Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961–1968) of narcotics crimes, providing enhanced penalties for defendants who engage in “a continuing series of violations [of federal narcotics law] . . . in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and . . . from which such person obtains substantial income.” 21 U.S.C. § 848(c). If the drug kingpins prosecutable under the CCE statute commit or order murders in furtherance of their drug enterprise, the legislation, passed by Congress in 1988 and codified at 21 U.S.C. § 848(e), allows a federal jury to impose a sentence of death after conviction. This provision was not frequently utilized because it was limited to convictions for murders in furtherance of CCE violations. As such, it was repealed in 2006 by the USA PATRIOT Improvement and Reauthorization Act of 2005. *See* USAM, *supra* note 31, § 9-10.020 (detailing the repeal of the federal death penalty).

50. Juan Raul Garza died by lethal injection on June 19, 2001, for murders committed in furtherance of a CCE in violation of 21 U.S.C. § 848(e); Louis Jones was executed on March 18, 2003, for kidnapping resulting in death in violation of 18 U.S.C. § 1201(a). FED. BUREAU OF PRISONS, *supra* note 35. Jones challenged his sentence, attacking the constitutionality of the Federal Death Penalty Act of 1994 (FDPA); the Fifth Circuit’s opinion rejected the challenge in the first opinion upholding the FDPA. *See* *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998); *see also* Boettcher, *supra* note 43, at 1044–45 (discussing *United States v. Jones*). Jones’s challenge eventually reached the Supreme Court, which upheld the capital sentence against an argument that the district-court judge erred by failing to instruct the jury as to the effect of a deadlock. *Jones v. United States*, 527 U.S. 373, 384 (1999).

51. DEATH PENALTY INFO. CTR., *supra* note 4.

52. John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011, <http://www.nytimes.com/2011/03/10/us/10illinois.html>.

Puerto Rico have no death penalty.⁵³ Of these states, four abolished the death penalty either legislatively or by judicial decree since 2004.⁵⁴ Thus, at the same time that federal death sentences have been on the rise, more states have abolished capital punishment; therefore, more defendants are likely to be sentenced to death federally for crimes committed within the borders of abolitionist states.

Given that only sixteen states have no death penalty, lodging federal capital charges poses no federalism concerns in the significant majority of states. Moreover, even within abolitionist states—as will be discussed below when considering the Connecticut and Vermont case studies—a substantial majority of citizens may still favor capital charges in particularly heinous murders. Under a reformist (as opposed to a strictly abolitionist) approach to capital punishment, the occasional federal charge in an abolitionist state does not undercut federalist values; rather, it furthers these values by giving abolitionist state legislatures the political breathing room they need to take a sometimes unpopular stance. Particularly shocking crimes, such as the murders of the Petit family or Brooke Bennett, incite such public outrage that capital charges do not subvert the will of the public but better reflect it, according to poll results.⁵⁵ Moreover, the extremely small number of federal capital cases in abolitionist states suggests that federal prosecutors exercise meaningful restraint in determining which cases to charge as federal capital crimes.⁵⁶ Rather than using federal authority wholesale to subvert state laws against capital punishment, statistics indicate that federal charges are lodged in limited instances where public opinion would likely favor them anyway, even in abolitionist states. Thus, federal charges are giving state legislatures the necessary political breathing room to allow them to continue to eschew capital punishment for garden-variety murder charges.

53. *Id.*; see also D.C. CODE § 22-2104 (2001) (stating the penalty for murder in the first and second degrees); P.R. CONST. art. II, § 7 (stating that “[t]he death penalty shall not exist” in Puerto Rico).

54. These states are, in reverse chronological order, as follows: Illinois abolished the death penalty in 2011, when Governor Pat Quinn signed S.B. 3539. S.B. 3539, 96th Gen. Assemb., Reg. Sess. (Ill. 2011). New Mexico abolished the death penalty in 2009. N.M. STAT. ANN. § 31-18-14 (LexisNexis 2009). New Jersey abolished the death penalty in 2007. N.J. STAT. ANN. § 2C:11-3 (West 2011). New York’s death penalty was invalidated when the Court of Appeals struck down the capital punishment statute’s deadlock instruction in *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). Current New York law prohibits capital punishment. N.Y. PENAL LAW § 70.00 (McKinney 2009).

55. Bryan Joyce, *Do Vermonters Support the Death Penalty?*, WCAX, Oct. 31, 2008, <http://www.wcax.com/story/9275396/do-vermonters-support-the-deathpenalty?nav=4QcS&redirected=true>.

56. For example, there were seventeen homicides in Vermont in 2008, the year in which Brooke Bennett was murdered. *Statewide Crime Index, January–December 2008*, VT. DEP’T OF PUB. SAFETY DIV. OF CRIMINAL JUSTICE SERVS., http://vcic.vermont.gov/crime_statistics/crime_report/2008/statewide (last visited Nov. 27, 2011). However, her murder was the only one charged by federal authorities as a capital crime. *Id.*

C. The Federal Death Penalty Act of 1994

Congress reinstated the federal death penalty post-*Furman* by passing the Federal Death Penalty Act of 1994 (FDPA)⁵⁷ contained in Title VI of the Violent Crime Control and Law Enforcement Act of 1994.⁵⁸ While full treatment of all provisions of this legislation is beyond the scope of this Article, a brief summary is in order.⁵⁹

The FDPA authorized death as a potential penalty for approximately sixty offenses, including both previously existing and newly created federal crimes.⁶⁰ The crimes for which the death penalty was authorized included various homicide offenses, espionage and treason offenses, and a limited number of narcotics offenses under the Continuing Criminal Enterprise Act.⁶¹ The FDPA also provided catch-all language stating that its procedural provisions applied to “any other offense for which a sentence of death is provided” under federal law, thus ensuring the act’s applicability to newly created federal capital crimes.⁶²

The FDPA set forth specific “guided discretion” capital-sentencing procedures designed to pass constitutional muster post-*Gregg*. Trial and sentencing in capital cases would be “bifurcated,” meaning that prosecutions would be divided into separate guilt and sentencing phases, usually taking place before the same jury.⁶³ The prosecutor in any federal capital case would be required to file with the court and serve on the defense a notice of intent to seek the death penalty “a reasonable time before the trial.” The notice was required to set forth the aggravating factors that the government planned to present to the jury.⁶⁴ The defendant would then be tried before a jury, unless the defendant opted for a bench trial or plead guilty. If the defendant was convicted of a capital offense, the FDPA

57. Federal Death Penalty Act of 1994 (FDPA), Pub. L. No. 103-322, 108 Stat. 1959 (codified in main part at 18 U.S.C. §§ 3591–98 (1994), also codified in scattered sections of Title 18, United States Code).

58. U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001) [hereinafter SUPPLEMENTARY DATA], available at <http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm>.

59. For a comprehensive discussion of the FDPA’s provisions, see Little, *supra* note 37 at 385–403; Boettcher, *supra* note 43, at 1057–75; Christopher Q. Cutler, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U. L. REV. 1189, 1209–16 (2000).

60. USAM, *supra* note 31, § 9, Criminal Resource Manual 69 (explaining the FDPA).

61. For a list of the crimes for which the FDPA authorized capital punishment, see Little, *supra* note 37, at 391 n. 237–38.

62. USAM, *supra* note 31, § 9, Criminal Resource Manual 69 (quoting FDPA § 3591(a)(2)).

63. A defendant may waive a jury verdict at either the guilt phase (by pleading guilty or by opting for a bench trial) or the sentencing phase (by opting to have the judge decide his sentence). FDPA, Pub. L. No. 103-322, § 3593(b), 108 Stat. 1959 (1994); see also, Little, *supra* note 37, at 392–93.

64. FDPA § 3593(a).

provided for a separate sentencing hearing to take place after conviction.⁶⁵ Assuming the defendant had been convicted at a jury trial, the hearing would take place before the same jury that heard the evidence during the guilt phase.⁶⁶ If the defendant pleaded guilty or was convicted at a bench trial, he would be entitled to have a special jury empaneled to hear the sentencing phase, although he could choose to have the court determine his sentence.⁶⁷

At the sentencing hearing, the FDPA required that the finder of fact first decide a threshold question: whether the defendant acted with one of several specified mental states that would render him eligible for the death penalty.⁶⁸ The requisite mental states included the following: defendant intentionally killed the victim;⁶⁹ defendant intentionally inflicted serious bodily injury that resulted in the victim's death;⁷⁰ defendant intentionally committed an act intended to kill or inflict serious bodily injury on another and that the victim died as a result;⁷¹ or defendant intentionally participated in an act of violence that created a grave risk of death which caused the victim's death.⁷² If the fact-finder determined that the requisite mental state was present, the sentencing hearing would proceed to a presentation of evidence of aggravating and mitigating factors.⁷³ Aggravating factors are specified in the statute, and the government is required to give prior notice to the court and defense counsel of which aggravating factors it will seek to prove.⁷⁴ The government was allowed to present evidence on aggravating factors not specified in the statute so long as notice was given; however, the jury unanimously must have found at least one statutorily specified aggravating factor in order to impose a death sentence.⁷⁵ The FDPA also required the fact-finder to consider evidence of "any mitigating factor" that the defense might choose to present.⁷⁶ The statute gave a non-exhaustive list of possible mitigating factors.⁷⁷

The fact-finder would then be required to consider the evidence of aggravating and mitigating factors and provide "special findings" stating

65. *Id.* § 3593(b).

66. *Id.* § 3593(b)(1).

67. *Id.* § 3593(b)(2), (3).

68. Little, *supra* note 37, at 393.

69. FDPA § 3593(a)(2)(A).

70. *Id.* § 3593(a)(2)(B).

71. *Id.* § 3593(a)(2)(C).

72. *Id.* § 3593(a)(2)(D).

73. Little, *supra* note 37, at 393.

74. FDPA § 3592(b).

75. Little, *supra* note 37, at 401.

76. FDPA § 3592(a) (emphasis added).

77. *Id.*

which factors were proved.⁷⁸ Juries were required to find the existence of aggravating factors unanimously, but a mitigating factor could be found if as few as one juror believed that it had been proved.⁷⁹ If no aggravating factor was found unanimously, the court was required to impose a sentence less than death.⁸⁰ If at least one aggravating factor was found unanimously, the jury (or judge, if the defendant had waived a jury for the sentencing phase) was then required to

consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.⁸¹

Assuming the sentencing hearing had taken place before a jury, it was then the province of the court to impose the sentence recommended by the jury, or a lesser one.⁸² In other words, if the jury recommended death, the court could still decide to impose life without the possibility of release; however, the court could not impose a death sentence if the jury had not recommended one.⁸³

Two other provisions of the FDPA are particularly relevant to this Article. First, the FDPA included a provision specifically designed to address concerns about implementing federal death sentences within the borders of abolitionist states. The FDPA section entitled “Implementation of a sentence of death” contains a transfer provision requiring federal courts sitting in capital cases to transfer the defendant to another state for execution if the state of conviction does not allow capital punishment.⁸⁴ Notably, this provision makes such transfer mandatory: “If the law of the State does not provide for implementation of a sentence of death, the court *shall* designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence *shall* be implemented in the latter State”⁸⁵ One commentator views the inclusion of this provision as “federal recognition that state opposition to

78. *Id.* § 3593(d).

79. *Id.*

80. *Id.*

81. *Id.* § 3593(e).

82. *Id.* § 3594.

83. *Id.*

84. *Id.* § 3596(a).

85. *Id.* (emphasis added).

capital punishment, whether expressed by outright prohibition or merely by the absence of a state capital punishment scheme, is a genuine concern.”⁸⁶ While a sentence may be issued within an abolitionist state, the execution itself will be carried out elsewhere. Certainly, the provision ensures that no facilities or employees of any abolitionist state will be required to participate in an execution.

Second, the FDPA contains a conscientious-objector provision, entitled, “Excuse of an Employee on Moral or Religious Grounds,” which allows Department of Justice and other employees to decline to participate in capital prosecutions or executions on moral or religious grounds.⁸⁷ Thus, within an abolitionist state, state citizens who are federal employees may entirely decline to participate in capital prosecutions. These provisions lessen the impact of federal capital punishment within abolitionist states.⁸⁸

D. Changing Considerations Under the Federal Death Penalty Protocol

As described above, the Federal Death Penalty Act of 1994 reinstated the federal death penalty, making death an available punishment for numerous new and existing federal crimes and defining procedures to be followed by lawyers, judges, and juries in federal capital cases. Shortly after the FDPA passed, the Department of Justice, under Attorney General Janet Reno, acted to provide more specific internal guidelines for prosecutors bringing death penalty prosecutions. These guidelines were codified in an amendment to the U.S. Attorneys’ Manual adopted in 1995 and provided for centralized decision-making for capital cases.⁸⁹ As will be argued below in Section III, this centralized review renders federal capital

86. Morton, *supra* note 34, at 1444.

87. Section 3597(b) provides:

No employee of any State department of corrections, the United States Department of Justice, the Federal Bureau of Prisons, or the United States Marshals Service, and no employee providing services to that department . . . shall be required . . . to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee.

FDPA § 3597(b).

88. Additionally, if a state citizen has a moral or religious objection to capital punishment so strong that the citizen could never vote to impose the death penalty, that citizen may be excused for cause from a federal jury considering capital charges. *Lockhart v. McCree*, 476 U.S. 162, 165 (1986). Thus, it is highly unlikely that such a citizen would be selected to serve on a capital-sentencing jury.

89. Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 77 (2009). The Death Penalty Protocol has been amended several times since its adoption in 1995, including in 2001, 2007, and 2011. References in this Article are to the current version of the Death Penalty Protocol unless otherwise indicated.

punishment more susceptible to reforms intended to combat potential inequities in capital-sentencing procedures.

While prosecutors in the local U.S. Attorneys' Offices make most decisions in federal criminal cases, decision-making in capital cases is now handled by the Attorney General's Review Committee on Capital Cases (Review Committee).⁹⁰ The Review Committee is made up of senior prosecutors from the Criminal Division of the Department of Justice in Washington, D.C., where the committee meets.⁹¹ The Review Committee reviews every potential federal capital case and makes a recommendation to the Attorney General of the United States—who has final say—about whether the local U.S. Attorney's Office will be permitted to seek the death penalty in any given case. The Review Committee operates according to the DPP as set forth in sections 9-10.101 through 9-10.190 of the Department of Justice's United States Attorneys' Manual.⁹²

The DPP requires local federal prosecutors to submit for review all cases “for which the death penalty is a legally authorized sanction, regardless of whether the United States Attorney wishes to seek the death penalty.”⁹³ Prosecutors are required to submit to the review committee all charging information relating to the case, detailed memoranda analyzing the evidence of the defendant's guilt, and written materials defense counsel has submitted in opposition to the death penalty.⁹⁴ The review committee then meets with the prosecutors from the U.S. Attorneys' Office handling the case and the attorney representing the defendant. At this meeting, defense lawyers “are afforded an opportunity to present any arguments against seeking the death penalty for their client.”⁹⁵ The review committee is required to consider all information the defense presents, “including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty.”⁹⁶

After meeting with the attorneys and considering all materials submitted, the review committee makes a recommendation to the Attorney General of the United States regarding whether to seek the death penalty. Only the Attorney General can give final authorization to seek the death penalty. The Department of Justice's stated purpose in requiring this centralized review of all potential federal death penalty cases is to ensure

90. DOJ STATISTICAL SURVEY, *supra* note 30, at 2.

91. SUPPLEMENTARY DATA, *supra* note 58.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (quoting USAM, *supra* note 31, § 9-10.050).

“even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors—such as a defendant’s race, ethnicity, or religion—will not inform any stage of the decision-making process.”⁹⁷

The DPP then provides guidelines for how to weigh this information in making a decision. At the general level, the protocol requires application of principles “includ[ing] fairness, national consistency, adherence to statutory requirements, and law-enforcement objectives.”⁹⁸ More specifically, the protocol gives the following instructions for weighing the aggravating and mitigating factors set forth in the FDPA in order to reach a decision:

The analysis employed in weighing the aggravating and mitigating factors should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Reviewers may accord weak aggravating or mitigating factors little or no weight. Finally, there must be substantial, admissible, and reliable evidence of the aggravating factors.⁹⁹

The DPP specifically addresses the question of whether federal prosecutors should seek the death penalty for crimes committed in abolitionist states. The current protocol allows federal prosecutors to weigh the absence of a state death penalty as a factor *favoring* pursuit of federal capital charges. This policy, contained in the language of the provision

97. USAM, *supra* note 31, § 9-10.030.

98. *Id.* § 9-10.130.

99. *Id.* § 9-10.130(C). A subsequent provision requires prosecutors to consider the following additional factors beyond weighing aggravating and mitigating factors:

(1) The strength and nature of the evidence; (2) The relative roles in the offense of defendants in jointly undertaken criminal activity; (3) Whether the offense was intended to obstruct justice or was otherwise motivated by the victim’s cooperation with law enforcement or the belief that the victim was cooperating with law enforcement; (4) Whether the offense was committed to retaliate against a third-party for cooperating with law enforcement or against a third party believed to be cooperating with law enforcement; (5) Whether the victim engaged in criminal activity which was a relevant circumstance of the offense; (6) Whether a defendant without serious prior convictions had nonetheless engaged in criminal activity for which he had not been held accountable; (7) Whether the defendant is already serving a substantial sentence such that an additional sentence of incarceration would have little punitive impact; (8) Whether the defendant has a history of infractions or offenses while incarcerated; and (9) Whether the defendant has accepted responsibility for his conduct as demonstrated by his willingness to plead guilty and accept a life or near-life sentence without the possibility of release.

Id. § 9-10.130(D).

governing the exercise of prosecutorial discretion in cases of concurrent state and federal jurisdiction, provides in pertinent part:

When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities. The judgment as to whether there is a more substantial interest in Federal, as opposed to State, prosecution may take into account any factor that reasonably bears on the relative interests of the State and the Federal Governments, including

. . . .
[t]he relative ability and willingness of the State to prosecute effectively *and obtain an appropriate punishment upon conviction*.¹⁰⁰

Thus, federal prosecutors are instructed to consider a state's ability to "obtain an appropriate punishment upon conviction" in determining whether there is a substantial federal interest warranting prosecution.¹⁰¹ When considering the evolution of this provision since its adoption, it becomes clear that this language is intended to encourage federal prosecutors to step in with capital charges in non-death penalty states.

The 1995 protocol expressly prohibited basing the decision to bring federal capital charges solely on the absence of a state death penalty, stating: "In states where the imposition of the death penalty is not authorized by law the fact that the maximum federal penalty is death is insufficient, standing alone, to show a more substantial interest in federal prosecution."¹⁰²

In 2001, during George W. Bush appointee John Ashcroft's tenure as Attorney General, a number of changes were made to the DPP with the stated goal of increasing uniformity of application of capital sentencing.¹⁰³ This was done in the wake of a report on the application of the Federal Death Penalty commissioned by then-Attorney General Reno and issued by the Department of Justice in September 2000, at the end of the Clinton Administration. The report—*The Federal Death Penalty System: A Statistical Survey (1988–2000)* (DOJ Statistical Survey)—examined in detail "the Department of Justice's internal decision-making process for deciding whether to seek the death penalty in individual cases, and

100. *Id.* § 9-10.090 (emphasis added) (citation omitted).

101. *Id.*

102. Tirschwell & Hertzberg, *supra* note 89, at 79 (citation omitted).

103. *Id.* at 82.

present[ed] statistical information focusing on the racial/ethnic and geographic distribution of defendants and their victims.”¹⁰⁴ The DOJ Statistical Survey was commissioned primarily to address decades-long concerns about racial disparities in capital sentencing; and indeed, it did contain extensive analysis of Department of Justice death penalty decision-making broken down by race and ethnicity.¹⁰⁵ Additionally, the report documented major disparities in the rate at which the various U.S. Attorneys’ Offices sought the death penalty. Out of ninety-four U.S. Attorneys’ Offices, ten districts had submitted only recommendations in favor of seeking the death penalty, while twenty-three districts had submitted only recommendations against seeking the death penalty.¹⁰⁶ In June 2001, in a follow-up to the DOJ Statistical Survey issued early in the George W. Bush Administration, the Department of Justice announced that, while it had found “no evidence of bias against racial or ethnic minorities,” it would nevertheless revise the DPP in order to “promote public confidence in the process’s fairness and to improve its efficiency.”¹⁰⁷ The changes contemplated “increased centralization” in order to promote uniformity of application.¹⁰⁸

The disparity in the rates at which local U.S. Attorneys’ Offices recommended seeking the death penalty, along with a passage in the September 2000 report detailing the ways in which local U.S. Attorneys’ Offices were able to avoid centralized review of potential capital cases,¹⁰⁹ presumably caught the attention of newly appointed Attorney General Ashcroft. As such, the 2001 revision to the DPP included several changes that reduced the amount of discretion individual U.S. Attorneys’ Offices had to decide *not* to seek the death penalty, as well as increased the

104. DOJ STATISTICAL SURVEY, *supra* note 30, at 1.

105. *Id.* Tables in the DOJ Statistical Survey included such data as overall racial and ethnic distribution of defendants whose cases were submitted for review; rates at which various racial and ethnic groups submitted for review were recommended for the death penalty; offenses committed by defendants submitted for review to the committee; defendants authorized for capital prosecution, broken down by race and ethnicity; race and ethnicity of victims correlated to race and ethnicity of defendant—i.e., whether intra-racial or inter-racial crimes were more likely to be authorized for the death penalty; and a number of other statistics regarding frequency of approved capital charges broken down by race. *Id.* at 6–8.

106. *Id.* at 12.

107. SUPPLEMENTARY DATA, *supra* note 58.

108. *Id.*

109. Three categories of cases escaped centralized review: (1) concurrent jurisdiction cases where the local U.S. Attorney’s Office defers prosecution in favor of state authorities; (2) cases where the local U.S. Attorney’s Office does not believe they could win a conviction on a capital charge; and (3) cases in which the local U.S. Attorney’s Office chooses to enter into a plea agreement with the defendant, which forecloses the option of the death penalty. DOJ STATISTICAL SURVEY, *supra* note 30, at 9–10.

likelihood that death would be sought for crimes committed within abolitionist states:

Three changes were particularly significant regarding the operation of the federal death penalty in non-death penalty states: (1) all potential capital cases had to be submitted to Main Justice, even if the U.S. Attorney did not intend to seek the death penalty; (2) U.S. Attorneys were stripped of the ability to dispose of potentially capital cases by plea bargain without [centralized review]; and (3) the section of the Protocol stating that the absence of a stateside death penalty would not, by itself, justify a federal capital prosecution was stricken. . . . [The stricken provision had been replaced by one stating that the] relative likelihood of . . . appropriate punishment upon conviction in the State and Federal jurisdictions should be considered.¹¹⁰

The stated purpose of the 2001 changes to the DPP was to increase uniformity in decision-making in federal capital cases and ensure that the same standards of review were applied in all regions of the country.¹¹¹ The push towards uniform application across states and regions necessarily triggered an incipient conflict with states that had abolished capital punishment and with the goals of federalism itself.

II. THE LAW AND SCHOLARSHIP OF FEDERALISM AND CAPITAL PUNISHMENT

As reinstatement of the federal death penalty and changes to the DPP have led to slightly more frequent—though still extremely rare—federal capital charges in abolitionist states, a growing number of scholars have taken notice. Federal capital sentencing in abolitionist states is an area of the law where scholarship and legal practice are more intertwined than is often the case. Several prominent theories challenging the constitutionality of the practice have grown out of judicial opinions that, while lacking the force of law, have nonetheless spurred thoughtful considerations of the issues involved. These theories argue that it is, or should be, unconstitutional for the federal government to pursue such charges. When raised by defendants in actual court cases, however, these arguments inevitably fall afoul of Supremacy Clause doctrine. Only one quickly

110. Tirschwell & Hertzberg, *supra* note 89, at 81–82 (emphasis omitted) (footnotes omitted) (quoting USAM, *supra* note 31, § 9-10.040).

111. Gleeson, *supra* note 2, at 1698–99. It cannot be ignored, however, that the Clinton and George W. Bush Administrations differed perceptibly in general policy toward capital punishment, with Bush Administration officials favoring capital punishment in more cases.

overruled federal district-court opinion and one very interesting dissent by Judge Calabresi in a Second Circuit case have taken up the banner of federalism in this context.¹¹² All other courts have soundly rejected federalism arguments, recognizing the clear imperatives of the Supremacy Clause in our federal system.

*A. Acosta-Martinez and the Unique Puerto Rican Context: A
Commonwealth and a Constitutional Prohibition*

The federal district court in *United States v. Acosta-Martinez* is the only court ever to have held that federal capital charges could not proceed because of a local objection to capital punishment.¹¹³ That decision was swiftly overruled by the First Circuit, and future courts are unlikely to adopt its reasoning. However, the decision has formed the basis for scholarly commentary arguing that the FDPA is unconstitutional when applied in abolitionist states.

Defendants Hector Oscar Acosta-Martinez and Joel Rivera Alejandro were charged federally in Puerto Rico with murder with a firearm in relation to a crime of violence and murder in retaliation for providing information to law enforcement.¹¹⁴ Both charges were subject to the death penalty under the FDPA.¹¹⁵ In an opinion subsequently overruled by the First Circuit, federal district court judge Salvador E. Casellas found the FDPA “locally inapplicable” within the Commonwealth of Puerto Rico under the terms of section 9 of the Puerto Rican Federal Relations Act (PRFRA)¹¹⁶ because the Constitution of the Commonwealth of Puerto Rico included an affirmative prohibition on capital punishment.¹¹⁷ Moreover, the court reasoned that—as opposed to other federal statutes for which similar arguments had been raised and rejected in federal courts¹¹⁸—the FDPA

112. *United States v. Acosta-Martinez (Acosta-Martinez I)*, 106 F. Supp. 2d 311 (D.P.R. 2000), *rev'd*, 252 F.3d 13 (1st Cir. 2001); *United States v. Fell (Fell IV)*, 571 F.3d 264, 282 (2d Cir. 2009) (en banc) (Calabresi, J., dissenting).

113. *Acosta-Martinez I*, 106 F. Supp. 2d at 311.

114. *United States v. Acosta-Martinez (Acosta-Martinez II)*, 252 F.3d 13, 15 (1st Cir. 2001).

115. *Acosta-Martinez I*, 106 F. Supp. 2d at 311–12. The district court was troubled because the U.S. Attorney’s Office for the District of Puerto Rico, at the time the opinion was issued, had submitted more potential death penalty cases to the Department of Justice’s review committee than any of the other U.S. Attorney’s Offices. *Id.* at 311 n.1.

116. *Id.* at 321; *see also* Puerto Rican Federal Relations Act (PRFRA) § 9, 48 U.S.C. § 734 (2006).

117. “The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist.” P.R. CONST. art. II, § 7.

118. The applicability of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, had previously faced a similar challenge because of a bar on wiretapping included in the Puerto Rican constitution. This argument was raised in several cases and repeatedly rejected by federal courts. *See Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989); *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985); *United States v. Gerena*, 649 F.

failed to include a specific provision indicating congressional intent to make it applicable within Puerto Rico.¹¹⁹

Acosta-Martinez arose in a context that was unique in two respects, both critical to the court's decision. First, Puerto Rico is a commonwealth rather than a state, and its relationship with the United States is governed in significant part by the terms of the PRFRA. The PRFRA contains a provision stating that, "[t]he statutory laws of the United States *not locally inapplicable*, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States."¹²⁰ Judge Casellas relied on the language of this unique provision to construct a theory that allowed him to discount the normal principles of the supremacy of federal law in federal courts. This view, however, was rejected on appeal by the First Circuit. After determining that it would hear an interlocutory appeal of the decision under its mandamus jurisdiction,¹²¹ the First Circuit reversed the district court and reinstated the death penalty as a potential sentence for both defendants.¹²² The court of appeals rejected the district court's finding that the FDPA was "locally inapplicable" under the terms of the PRFRA, holding that Congress manifested its intent to apply the FDPA to Puerto Rico by specifically making federal crimes enacted in conjunction with the FDPA applicable to Puerto Rico.¹²³ The court then reaffirmed the basic federalist principle that congressional enactments take precedence in federal court, stating, "[t]his choice by Congress does not contravene Puerto Rico's decision to bar the death penalty in prosecutions for violations of crimes under the Puerto Rican criminal laws in the Commonwealth courts. The choice simply retains federal power over federal crimes."¹²⁴

The second unique factor underlying Judge Casellas's opinion in *Acosta-Martinez* was that Puerto Rican law prohibited the death penalty not pursuant to legislative action or judicial decree, as with the states that prohibited capital punishment, but rather because of an affirmative

Supp. 1183 (D. Conn. 1986); Morton, *supra* note 34, at 1450–53. For a complete discussion of this Title III litigation and its implications for the FDPA argument in the *Acosta-Martinez* case, see Morton, *supra* note 34, at 1449–53.

119. *Acosta-Martinez I*, 106 F. Supp. 2d at 318–19.

120. PRFRA § 734 (emphasis added).

121. Normally, the prosecution has no right of appeal in a criminal case. *United States v. Scott*, 437 U.S. 82, 84–85 (1978). However, one exception to this rule allows a superior federal court to hear the appeal pursuant to a writ of mandamus where the lower court opinion is "palpably erroneous," and poses a question "of great public importance, and likely to recur." *Acosta-Martinez II*, 252 F.3d 13, 17 (1st Cir. 2001) (citing *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994); *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 25 (1st Cir. 1982)). The First Circuit found that Judge Casellas's opinion below was properly subject to mandamus review. *Id.*

122. *Acosta-Martinez II*, 252 F.3d at 16.

123. *Id.* at 18, 20.

124. *Id.* at 20.

prohibition adopted as part of the Commonwealth's constitution. The district court reasoned that inclusion of the prohibition in the commonwealth constitution, which had been ratified by the people of Puerto Rico, created "a reasonable expectation that the death penalty would not exist under Commonwealth status."¹²⁵ The decision to impose a federal death penalty within Puerto Rico would therefore constitute a violation of Puerto Ricans' substantive due process rights because "[t]he keystone of Commonwealth status is the principle of the consent of the governed."¹²⁶

The First Circuit also rejected this portion of Judge Casellas's opinion, relying on the basic principle that federal law preempts state law in federal court. The court held that "the Constitution of Puerto Rico does not trump a federal criminal statute, where Congress intends to apply the statute to Puerto Rico."¹²⁷ The court went on to say that this principle was also applicable to any states whose constitutions prohibited capital punishment:

[T]his is true of state constitutions and proceedings in state courts. Those constitutions do not govern the definitions or the penalties Congress intends for federal crimes. Indeed, Puerto Rico is not alone in its abhorrence of the death penalty. Some twelve states join it in its views. But those state constitutions also do not trump federal criminal law when Congress intends otherwise.¹²⁸

125. *Acosta-Martinez I*, 106 F. Supp. 2d 311, 321 (D.P.R. 2000), *rev'd*, 252 F.3d 13 (1st Cir. 2001).

126. *Id.* at 321–22.

127. *Acosta-Martinez II*, 252 F.3d at 20.

128. *Id.* (citing *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487 (1st Cir. 1989)). The court's opinion fails to take note of the fact that all current state prohibitions on capital punishment were accomplished either by legislative action or judicial decree rather than by constitutional enactment. States that prohibited capital punishment by legislative action include: Alaska in 1957, ALASKA STAT. § 12.55.015 (West 2010); District of Columbia in 1981, D.C. CODE § 22-2104 (2011); Hawai'i in 1948, HAW. REV. STAT. ANN. § 706-656 (2011); Illinois in 2011, 720 ILL. COMP. STAT. 5/9-1 (repealed 2011 by S.B. 3539, 96th Gen. Assemb., Reg. Sess. (Ill. 2011)); Iowa in 1965, IOWA CODE ANN. § 902.9 (West 2011); Maine in 1887, ME. REV. STAT. ANN. 17-A, § 1251(2006); Michigan in 1864, MICH. COMP. LAWS ANN. § 750.316 (West 2011); Minnesota in 1911, 1911 Minn. Laws 572; New Jersey in 2007, N.J. STAT. ANN. § 2C:11-3 (West 2011); New Mexico in 2009, N.M. STAT. ANN. § 31-18-14 (West 2009); North Dakota in 1979, N.D. CENT. CODE ANN. § 12.1-32-01 (West 2009); Rhode Island in 1984, R.I. GEN. LAWS § 11-23-2 (West 2010); Vermont in 1964, VT. STAT. ANN. tit. 13 § 2303 (2010); Wisconsin in 1853, WIS. STAT. ANN. § 939.50 (West 2010); West Virginia in 1965, W. VA. CODE ANN. § 62-3-15 (West 2010). States that have abolished the death penalty by judicial decree include: Massachusetts in 1984, *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124 (Mass. 1984); New York in 2004, *People v. LaValle*, 817 N.E.2d 341 (2004) (holding a deadlock jury instruction unconstitutional) (eventually followed by N.Y. PENAL LAW § 70.00 (McKinney 2009)).

The First Circuit's bald rejection of Judge Cassellas's reasoning has not prevented the *Acosta-Martinez* district-court opinion from finding a scholarly following. Commentators are taken with the district court's arguments that an affirmative constitutional prohibition on capital punishment carries moral force above and beyond that of a legislative enactment. One commentator fused this view with an Eighth Amendment argument, suggesting that the standard for what constitutes cruel and unusual punishment should be calibrated to local views where a constitutional prohibition is involved.¹²⁹ "Arguably, just as obscenity is reckoned with regard to 'contemporary community standards,' 'cruel and unusual punishment' should more properly be defined at the local level."¹³⁰ Another observer used this perspective as the basis of an international law argument, arguing that implementation of the FDPA in Puerto Rico "violat[es] the norm of regional customary law that has developed in the Latin American region, which . . . prohibits imposition of the death penalty."¹³¹

In short, the unique Puerto Rican context produced the only court opinion to date finding the FDPA inapplicable in a federal capital prosecution based on a local prohibition on capital punishment. While Judge Casellas's *Acosta-Martinez* opinion still resonates with scholars, it has been definitively overruled and is unlikely to be followed in other federal-court cases.

B. The Calabresi Dissent in United States v. Fell: A Sixth Amendment Approach

Several years before *Jacques*, another defendant was sentenced to death in a federal capital case in Vermont, which has no state death penalty. Donald Fell was a twenty-year-old with a history of drug and alcohol abuse and a long criminal record.¹³² On November 26, 2000, Fell and his accomplice Robert Lee were playing cards with Fell's mother and her boyfriend when an altercation broke out.¹³³ Fell stabbed the boyfriend approximately fifty times, killing him, and Lee stabbed and killed Fell's mother.¹³⁴ Both men showered, then left Fell's mother's residence on foot at

129. Morton, *supra* note 34, at 1463.

130. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)).

131. Monique Marie Gallien, Note, "No Existira la Pena de Muerte": Does the United States Violate Regional Customary Law by Imposing the Death Penalty on Citizens of Puerto Rico?, 30 BROOK. J. INT'L L. 727, 756 (2005).

132. *United States v. Fell (Fell III)*, 531 F.3d 197, 205 (2d Cir. 2008).

133. *Id.*

134. *Id.*

around 3:30 a.m., carrying a shotgun for which they had no ammunition.¹³⁵ They went to a local Price Chopper and kidnapped Teresca King, a fifty-three-year-old grandmother, from the parking lot, stealing her car and forcing her into the back seat at gunpoint.¹³⁶ They took King to some nearby woods where they kicked her and beat her with a rock until she died.¹³⁷ After killing King, Fell cleaned his boots by wiping them on her clothing.¹³⁸

Fell was indicted on federal charges of carjacking and kidnapping resulting in death.¹³⁹ In October 2001, Fell agreed to plead guilty to all charges in exchange for the government agreeing to forego the death penalty; however, the agreement he signed with the U.S. Attorney's Office in Vermont required approval from the Attorney General in Washington.¹⁴⁰ As discussed above, the Department of Justice under Attorney General Ashcroft had just amended the DPP to take away from local offices the discretion to enter into such plea agreements and mandated greater consistency among the U.S. Attorneys' Offices in death penalty decision-making.¹⁴¹ The Capital Case Review Committee rejected the plea agreement, and the U.S. Attorney's Office in Vermont subsequently filed a Notice of Intent to Seek a Sentence of Death.¹⁴²

Prior to trial, Fell filed a motion challenging the constitutionality of the FDPA on a number of grounds.¹⁴³ Judge William Sessions granted the motion, striking down the FDPA as unconstitutional because it followed evidentiary standards more relaxed than those prescribed by the Federal Rules of Evidence in the fact-finding phase of a capital-sentencing hearing.¹⁴⁴ The Second Circuit overruled this decision on interlocutory appeal, and the case proceeded to trial.¹⁴⁵ At trial, the government proved the facts discussed above and did not dispute substantial mitigation evidence—including that Fell's parents were chronic alcoholics, that Fell was raped by a babysitter as a child, and that he was abandoned by his parents to be raised by relatives.¹⁴⁶ The jury weighed the mitigating evidence against the aggravating factors and voted to sentence Fell to

135. *Id.*

136. *Id.*

137. *Id.* at 205–06.

138. *Id.* at 206.

139. *Id.*

140. *Id.*

141. *See supra* notes 103–06 and accompanying text.

142. *Fell III*, 531 F.3d at 206.

143. *United States v. Fell (Fell I)*, 217 F. Supp. 2d 469, 473–74 (D. Vt. 2002), *vacated*, 360 F.3d 135 (2d Cir. 2004).

144. *Id.* at 489.

145. *United States v. Fell (Fell II)*, 360 F.3d 135, 138 (2d Cir. 2004).

146. *Fell III*, 531 F.3d at 205.

death.¹⁴⁷ A lengthy appeals process followed, with the Second Circuit ultimately rejecting challenges by Fell, both to his conviction and death sentence, on numerous grounds.¹⁴⁸

The most interesting federalism issues raised by Fell's death sentence arose after he lost his appeal. After the Second Circuit denied Fell's appeal, he filed for rehearing *en banc*, which the court denied.¹⁴⁹ Two judges issued separate opinions in connection with that denial, engaging in the most significant judicial dialogue to date on federalist objections to federal capital sentences in abolitionist states.¹⁵⁰

Judge Guido Calabresi issued a written opinion dissenting from the denial of rehearing, stating:

[T]his is an appeal of a federal death sentence from a state that does not have capital punishment. That is an unusual occurrence for any federal court, and it is particularly important that our Circuit address it, because two of the three states in our jurisdiction, [Vermont and New York] . . . have effectively done away with capital punishment. The imposition of the death penalty in states that have rejected it raises issues that have not yet been addressed.¹⁵¹

Judge Calabresi then took a unique, Sixth Amendment-based approach to the question, focusing on the excusal for cause of a juror who had expressed strong reservations about capital punishment. Vermont abolished the death penalty legislatively, which indicated to Judge Calabresi that its citizens opposed capital punishment.¹⁵² He argued that the Sixth Amendment mandate that jurors be drawn from the district where the crime was committed means that the Framers intended juries to reflect community values.¹⁵³ Only by including jurors who oppose capital punishment could the will of the community be properly reflected.¹⁵⁴ “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 . . . be reflected in trial juries, even

147. *Id.* at 208.

148. *Id.* at 205.

149. *United States v. Fell (Fell IV)*, 571 F.3d 264, 264 (2d Cir. 2009).

150. Judge Raggi, joined by Chief Judge Jacobs and Judges Cabranes, B.D. Parker, Wesley, and Livingston, filed a concurring opinion, *id.* at 265 (Raggi, J., concurring), and Judge Calabresi issued a dissenting opinion, *id.* at 282 (Calabresi, J., dissenting). Judges Pooler and Sack also issued shorter dissenting opinions. *Id.* at 295–96.

151. *Id.* at 282 (Calabresi, J., dissenting).

152. *Id.* at 283.

153. *Id.* at 284.

154. *Id.*

in federal cases.”¹⁵⁵ Later in the opinion, Judge Calabresi tied the federalism issue to the Eighth Amendment, arguing that imposition of the federal death penalty in states that do not permit capital punishment would satisfy the “unusual” portion of the prohibition on “cruel and unusual punishment.”¹⁵⁶

Judge Reena Raggi wrote a separate opinion concurring in denial of the rehearing *en banc* specifically to rebut Judge Calabresi’s federalism arguments.¹⁵⁷ In an opinion joined by five other Second Circuit judges, she found no basis in the Sixth Amendment’s vicinage requirement for the argument that local views on capital punishment should be reflected in jury selection:

I am . . . skeptical of the dissent’s suggestion that federalism requires each state’s adoption or rejection of the death penalty somehow to be factored into the selection of federal capital juries. . . . Federalism is a principle concerned with “the constitutional distribution of *power* as between the Nation and the States.” . . . The selection of a federal jury to hear a case arising under federal law involves the exercise of exclusive federal power. It does not intrude . . . on the exercise of any state *power*.¹⁵⁸

Judge Raggi then argued that the Supreme Court’s precedents on voir dire and jury selection in capital cases are constitutional rules that “must apply equally throughout the states.”¹⁵⁹ Any attempt to calibrate jury selection to local views on capital punishment would result in unequal treatment for federal capital defendants depending on their state of residence.¹⁶⁰ Judge Raggi would be “hard pressed to . . . explain to a capital defendant in Texas” that death penalty opponents should be excused for cause in his capital trial because Texas state law allows capital punishment, while a defendant charged with the same crime in federal court in Vermont was tried by a jury that included people who would never impose a death sentence under any circumstances.¹⁶¹ Judge Raggi believed that principles of uniformity must trump federalism concerns in this context.

Judge Calabresi’s dissent did not argue for striking down the FDPA or prohibiting application of federal capital sentences in abolitionist states. As a dissent from denial of rehearing, it merely raised the federalism issue and

155. *Id.*

156. *Id.* at 289–90.

157. *Id.* at 265 (Raggi, J., concurring).

158. *Id.* at 268–69 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 325–26 (1958)).

159. *Id.* at 271.

160. *Id.* at 272.

161. *Id.*

suggested that further briefing was warranted to explore a previously unexamined question. Nevertheless, Judge Calabresi's dissent remains the only judicial opinion to date, other than *Acosta-Martinez*, to find federalism arguments relevant to the application of the FDPA within abolitionist states. As such, it has attracted considerable scholarly attention.¹⁶² As one observer characterized the opinion, "Judge Calabresi's dissent . . . sought to craft a novel judicial rule that would render a state's death penalty laws binding on federal courts sitting within its boundaries."¹⁶³ But the Calabresi dissent in *Fell* remains a novelty. Given the number of judges joining Judge Raggi's concurrence, the Sixth Amendment-based federalism theory Judge Calabresi advanced is unlikely to become the law in the Second Circuit.

C. Other Case Law Rejects Federalism Theories

Other than *Acosta-Martinez*, which has been overruled, and Judge Calabresi's dissent in *Fell*, which never had the force of law, the few other cases on point have held that longstanding constitutional principles allow the federal government to determine sentences in federal criminal cases, and to trump state law that differs.

These principles are clearly explained in the earliest case to consider and reject a challenge to a federal capital sentence in the post-*Gregg* era on the ground that the crime was committed in an abolitionist state. The defendant in *United States v. Tuck Chong*¹⁶⁴ filed a motion prior to trial challenging federal prosecutors' right to seek the death penalty in his case, which involved federal charges of murder by firearm in relation to a crime of violence or drug-trafficking crime in violation of 18 U.S.C. § 924(j). Defendant Chong argued that, because the crime had occurred in the state of Hawai'i, which has no death penalty, imposition of a federal death sentence would violate Hawai'i state sovereignty, the Tenth Amendment,¹⁶⁵ and the Equal Footing Doctrine.¹⁶⁶ The court wrote:

Defendant[']s . . . argument is based on the flawed premise that the federal government does not have the power under the United States Constitution to try and sentence crimes against the United States. This is simply untrue.

162. Miguel Lopez, *Federalism by Jury in United States v. Fell*, 33 HARV. J.L. & PUB. POL'Y 375 (2010).

163. *Id.* at 376.

164. *United States v. Tuck Chong*, 123 F. Supp. 2d 563, 565 (D. Haw. 1999).

165. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

166. *Tuck Chong*, 123 F. Supp. 2d at 566. The Equal Footing Doctrine holds that all states admitted to the union shall have the same rights of sovereignty as the original states. *Id.* at 566 n.2.

... [I]t is clear that in this case, the federal government has jurisdiction to prosecute Defendant, charged with a crime against the United States, in federal court. Moreover, the federal government has jurisdiction to determine the appropriate sentence under federal law.

... [U]nder the Supremacy Clause of the United States Constitution, to any extent that State law conflicts with federal law, federal law preempts.¹⁶⁷

The court expressly rejected the defendant's Tenth Amendment argument on the grounds that the Constitution expressly allows Congress to determine "what shall be an offense against its authority" and that this power was never reserved to the states.¹⁶⁸ Simply put, in federal cases, the Constitution says that federal law controls.

A similar Tenth Amendment argument against a federal death sentence in abolitionist Michigan was rejected in *United States v. O'Reilly*.¹⁶⁹ The defendant was charged federally with bank robbery, premeditated murder, and use of a firearm in relation to a crime of violence.¹⁷⁰ The court began by rejecting defense arguments that federal prosecutors lacked jurisdiction, holding that Congress had authority under the Commerce Clause to criminalize bank robbery and related murders because banks are both instrumentalities and channels of interstate commerce.¹⁷¹ The court then rejected the defense's Tenth Amendment argument, relying on *Tuck Chong* and the First Circuit's opinion in *Acosta-Martinez* to find that there was no basis to question federal supremacy over state law in federal criminal cases.¹⁷² "While Michigan is free to prohibit the death penalty for state-charged crimes, this federal Court cannot prohibit imposition of the death penalty when authorized by federal law for federally-charged crimes, and when the tide of precedent dictates against a prohibition."¹⁷³

Thus, basic Supremacy Clause principles dictate that federal capital charges may proceed despite state-law prohibitions. This view is unlikely to

167. *Id.* at 567–68.

168. *Id.*

169. *United States v. O'Reilly*, No. 05-80025, 2007 WL 2421378, at *3–4 (E.D. Mich. Aug. 23, 2007).

170. *Id.* at *2.

171. *Id.* (citing *United States v. Spinello*, 265 F.3d 150, 155 (3d Cir. 2001)).

172. *Id.* at *3–4. The court also noted that federal capital charges had been allowed to proceed against defendants in the abolitionist states of Vermont and Massachusetts, though the courts in those cases had not expressly considered the Tenth Amendment issue. *Id.* at *4 (citing *United States v. Fell (Fell II)*, 360 F.3d 135 (2d Cir. 2004); *United States v. Sampson*, No. 01-10384-MLW (D. Mass. 2004)).

173. *Id.*

change because it springs from longstanding and fundamental principles of federalism that allow states and the federal government to prescribe penalties for criminal cases within their spheres of jurisdiction.

III. CASE STUDIES: NEW ENGLAND STORIES

The Supremacy Clause principles adopted in the cases described in the previous section leave courts no choice but to reject federalism-based arguments in favor of allowing the federal government to choose sentencing law in its criminal cases. As has been noted, “the supremacy of federal law make[s] it impossible to stop capital prosecutions in non-death penalty states.”¹⁷⁴ Inevitably, as defendants facing the death penalty in abolitionist states continue to advance federalism-based arguments, they will continue to lose in the courts. This Article takes the view that there are positive aspects to this unavoidable truth from the perspective of reforming and seeking fairer application of capital-sentencing laws and that even abolitionists should recognize these benefits. The centralized review mandated by the Review Committee and the DPP provides the best mechanism for identifying and combating racial injustice in capital sentencing. Moreover, the availability of federal capital sentencing in the small number of particularly heinous murders that truly incite public outrage can give states the cover they need to reduce or eliminate capital prosecutions in more mundane cases.

The following two case studies involve particularly brutal murders, including the rape and murder of children, taking place in New England states in the past few years. Both cases attracted overwhelming media coverage in their respective communities and incited public outrage. Thus, they are just the type of crime that Professor Mello identified as the most likely to challenge abolitionist public sentiment.¹⁷⁵ In fact, the polls discussed below indicate that both cases significantly increased support for the death penalty in their states. This is especially notable since New England “is decidedly less death-prone than the nation as a whole. Four of the six New England States do not have capital punishment. . . . New England . . . is the region of the United States with the fewest executions.”¹⁷⁶ These two cases have had distinctive impacts on the capital punishment schemes of their respective states. These impacts take on additional significance when viewed against the strong regional tendency to disfavor the death penalty.

174. Tirschwell & Hertzberg, *supra* note 89, at 86.

175. Mello, *supra* note 1.

176. Brigham, *supra* note 35, at 218.

A. A Connecticut Murder Stops Abolition in Its Tracks

The Petit family murders in Connecticut in 2007 were the type of crime that convinces many people that the death penalty should remain an option for the most heinous murders, challenging the views of even ardent abolitionists. These murders also demonstrate what can happen when federal prosecutors do not step in with capital charges in cases that incite widespread public outrage. The Petit murders were in the public eye at the same time as Connecticut was considering abolishing capital punishment and played a documented role in preventing abolition in that state. The question thus arises: Would the substitution of a federal capital charge for state capital charges in that case have reduced political pressures on state officials and allowed abolition to proceed at the state level? The facts suggest this is a real possibility.

The Petit case is so extreme among modern homicides that it has evoked “frequent references” to the slaughter of an entire family by two hardened convicts immortalized in Truman Capote’s *In Cold Blood*.¹⁷⁷ The Petit family—father, William, a doctor and renowned diabetes expert, mother Jennifer, a school nurse, and daughters Hayley and Michaela, ages 17 and 11, respectively—lived in a pretty colonial on a corner lot in the quiet suburb of Cheshire, Connecticut, “a community of clapboard homes, big lawns and weekly Rotary Club meetings.”¹⁷⁸ On Sunday evening, July 22, 2007, Mrs. Petit and Michaela—both pretty and blonde—were leaving a Stop & Shop a few miles from their home when they had the terrible misfortune of attracting the attention of two career criminals who were out cruising for victims.¹⁷⁹ Steven Hayes, 44, and Joshua Komisarjevsky, 26, had criminal histories of mind-boggling dimensions.¹⁸⁰ “Komisarjevsky had been breaking into houses since the age of [fourteen] . . . wearing latex gloves and military night-vision goggles.”¹⁸¹ Hayes “had spent his whole adult life in and out of prison for burglary.”¹⁸² Indeed, the pair had committed at least three other residential burglaries in Cheshire that very weekend, part of a horrific crime spree that began when the two met in a halfway house after being released on parole.¹⁸³

177. William Glaberson, *Prison Books Bring Plot Twist to Cheshire Killings*, N.Y. TIMES, July 22, 2010, <http://www.nytimes.com/2010/07/22/nyregion/22cheshire.html>.

178. Manny Fernandez & Allison Leigh Cowan, *When Horror Came to a Connecticut Family*, N.Y. TIMES, Mar. 10, 2011, <http://www.nytimes.com/2011/03/10/us/10illinois.html>.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

That Sunday night, Hayes and Komisarjevsky followed Mrs. Petit and her daughter home from the supermarket to determine where they lived, then drove to a nearby Wal-Mart to buy rope and an air rifle.¹⁸⁴ At about 3:00 a.m., they broke into the Petit home and found Dr. Petit asleep in a chair on the first floor. They beat him over the head with a baseball bat and tied him up in the basement. Then Hayes left, went to a gas station, and bought four cans of gasoline.¹⁸⁵ He returned to join Komisarjevsky in inflicting a night of unimaginable horror on Jennifer Petit and her two girls. The next morning, Hayes drove Mrs. Petit to a local Bank of America branch and waited outside as she withdrew \$15,000 under threat that her family would be killed if she did not.¹⁸⁶ She told the bank teller what was happening, and the teller called the police.¹⁸⁷ Mrs. Petit withdrew the money and returned, under Hayes's control, to her home.

While they were gone, Komisarjevsky had raped eleven-year-old Michaela and photographed himself doing it. Upon Hayes's return, he later told the police, Komisarjevsky ordered Hayes to rape Mrs. Petit in order to "square things up" so they were both equally complicit in the "dirty work" of the crime.¹⁸⁸ Hayes not only complied, but strangled her to death,¹⁸⁹ though not before trophy photos of the rape were taken using Komisarjevsky's cell phone.¹⁹⁰ Hayes and Komisarjevsky tied both girls to their beds, doused them with gasoline, set them on fire and left them to burn, fleeing in the family's SUV.¹⁹¹ Both girls died in the fire, which was "so ferocious" that no rescues were possible.¹⁹² Dr. William Petit had managed to escape right before the fire began, fleeing to a neighbor's house shortly after the police had arrived.¹⁹³ Hayes and Komisarjevsky were captured as they fled, crashing into a police SWAT team cordon that had been set up around the Petit house in response to the call from the bank teller.¹⁹⁴

184. *Id.*

185. *Id.*

186. *Id.* See *supra* text accompanying note 11 for a discussion of how this incident implicated use of an interstate commerce facility.

187. *Id.*

188. Laura Italiano, *Fire Marshall Testimony Reveals Horrifying Traces of Petit-Family Slaying*, N.Y. POST, Sept. 25, 2010, http://www.nypost.com/p/news/local/horrifying_family_slay_fire_traces_0tedLtCQstMaEu7Vix7MaL.

189. Laura Italiano, *Petit Killer Claims He Was Told to Rape Mom*, N.Y. POST, Sept. 23, 2010, http://www.nypost.com/p/news/local/sick_rape_excuse_B9b07tRLqGEvXogECFCzNJ.

190. Kaitlyn Folmer, *Jury Finds Steven Hayes Guilty in Connecticut Triple Murder*, ABC NEWS, Oct. 5, 2010, <http://abcnews.go.com/US/TheLaw/jury-finds-steven-hayes-guilty-deadly-petit-home/story?id=11793886>.

191. Fernandez & Cowan, *supra* note 178.

192. Folmer, *supra* note 190.

193. Fernandez & Cowan, *supra* note 178.

194. *Id.*

Dr. Petit survived the horrific murders of his family. He wanted Hayes and Komisarjevsky to receive the death penalty they had imposed on his wife and daughters.¹⁹⁵ In a state where prosecutors only rarely sought the death penalty,¹⁹⁶ this case was the exception: capital charges were filed against both defendants.¹⁹⁷ Prosecutors cited the extraordinarily brutal and horrific nature of the crime in explaining their decision. “I seek capital charges when they are warranted. It’s as simple as that,” the prosecutor told the *New York Times*.¹⁹⁸ Another prosecutor defending the decision to seek death called the case “the most horrendous murder in the state of Connecticut in the last 30 years.”¹⁹⁹

In the wake of the crime, public sentiment in Connecticut overwhelmingly favored death sentences for the Petit family’s killers, with 76% favoring capital punishment versus 18% opposing it.²⁰⁰ The percentage of Connecticut voters who favored death in the Petit case was significantly greater than that favoring the death penalty over life imprisonment in general, which usually “hovered at about 60 percent.”²⁰¹ The Quinnipiac poll release noted that this is a common phenomenon: “[S]upport for the death penalty in a specific case can be higher than support in general. This is because some voters who oppose the death penalty in general support it for a particularly heinous crime.”²⁰²

When such a large majority of the public favors the death penalty in a specific heinous case, this inevitably affects capital punishment policy-making. The coincidence of events in Connecticut is a remarkable example of this phenomenon in action. Public outrage over the Petit murders factored into death penalty policy-making in Connecticut at a level that cannot be overstated. Simply put, Connecticut would very likely have abolished capital punishment if not for the Petit murders.

This conclusion is supported by a number of facts. On May 13, 2009, the Connecticut legislature passed H.B. 6578, which repealed the death

195. William Glaberson, *Death Penalty Advocate Is a Challenge for the Defense*, N.Y. TIMES, Sept. 3, 2010, <http://www.nytimes.com/2010/09/03/nyregion/03cheshire.html>.

196. There were only nine other inmates on death row in Connecticut at the time Steven Hayes was convicted of the Petit murders and sentenced to death. Christopher Reinhart, *Death Row Inmates*, CONN. GEN. ASSEMBLY OFFICE OF LEGIS. RES. (Apr. 11, 2011), <http://www.cga.ct.gov/2011/rpt/2011-R-0170.htm>.

197. Stacey Stowe, *Death Penalty Bid in 3 Killings Draws Critics*, N.Y. TIMES, July 28, 2007, <http://www.nytimes.com/2007/07/28/nyregion/28slay.html>.

198. *Id.*

199. *Id.* (quoting John A. Connelly, State’s Attorney for Waterbury, Connecticut).

200. *Connecticut Voters Back Death for Cheshire Killer 4-1*, QUINNIPIAC UNIV. (Oct. 13, 2010), <http://www.quinnipiac.edu/x1296.xml?ReleaseID=1517>.

201. *Id.*

202. *Id.* (quoting Douglas Schwartz, Ph.D., Quinnipiac University Poll Director).

penalty for crimes committed after its effective date.²⁰³ This step happened when it did because it was undertaken by a Democratic majority of the state legislature that had taken years to build.²⁰⁴ At the time, however, Steven Hayes's trial was fast approaching, and the death penalty debate in Connecticut was overwhelmingly influenced by the Petit murders, coverage of which flooded local media outlets.²⁰⁵ Dr. Petit had become "the most passionate and visible advocate for the death penalty in Connecticut," and his poignant cries for justice for his murdered family utterly changed the nature of the debate.²⁰⁶ Shortly after the bill's passage, he wrote an open letter condemning the legislators' actions. "I am deeply saddened that the legislators of the state of [Connecticut] have walked away from justice," he wrote in a letter published in the *Cheshire Herald*.²⁰⁷ "For certain murders and other crimes there is no other penalty that will serve justice . . ."²⁰⁸ Though the anti-death penalty Democratic majority in the state legislature had grown in previous years, the *Petit* case had made capital punishment into a major campaign issue in the upcoming gubernatorial election.²⁰⁹ When the legislature's repeal of the death penalty landed on the desk of Governor M. Jodi Rell, she vetoed it. The veto message issued in connection with that act not only cited the *Petit* case but also specifically quoted Dr. William Petit's statement that only the death penalty provides sufficient punishment for the most outrageous murders.²¹⁰

The *Petit* murders have continued to curb efforts to abolish the death penalty in Connecticut. On April 12, 2011, the Connecticut Senate Judiciary Committee once again passed a bill repealing the death penalty for capital murder and replacing it with a maximum sentence of life imprisonment

203. An Act Concerning the Penalty for a Capital Felony, H.B. 6578, 2009 Gen. Assemb., Reg. Sess. (Conn. 2009). Because the law would apply only to crimes committed after its enactment, it would not have prevented prosecutors from seeking death against Hayes and Komisarjevsky. However, the capital punishment debate in Connecticut never focused on this point, presumably because once the penalty was eliminated it would not be available for future similarly horrific crimes. Had federal charges been initiated, however, those favoring state repeal could point to the limited availability of the federal option for such heinous cases.

204. Pazniokas, *supra* note 9.

205. *Id.*

206. Glaberson, *supra* note 195.

207. *A Letter from Dr. William Petit*, CHESHIRE HERALD, May 29, 2009, <http://www.cheshireherald.com/node/927>.

208. *Id.*

209. Paul Bass, *Letter from Connecticut: As Murder Trial Rivets States, Death Penalty Becomes Campaign Issue*, N.Y. TIMES, Oct. 21, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9C02E3DB1339F932A15753C1A9669D8B63&pagewanted=print>.

210. *See Governor Rell Vetoes Death Penalty Bill*, CONN. STATE LIBRARY (June 5, 2009), <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204>.

without possibility of parole.²¹¹ Current governor Dannel P. Malloy, a Democrat, vowed to sign the bill into law if it passed the General Assembly.²¹² Death penalty proponents, including Dr. William Petit, lobbied against passage of the bill. They argued that even though it would only abolish the death penalty for future cases, it could result in successful appeals by inmates already on death row, including Hayes and—assuming he is sentenced to death—Komisarjevsky.²¹³ Dr. Petit's personal lobbying on this issue persuaded two key state senators to vote against the repeal bill if it was brought up in 2011, before the conclusion of Komisarjevsky's trial.²¹⁴ The loss of these two votes doomed passage of the repeal bill and it has not been presented to the General Assembly for a vote.

On October 5, 2010, Steven Hayes was convicted of sixteen charges, including six that carried the death penalty.²¹⁵ On November 8, 2010, the jury that convicted him recommended a death sentence,²¹⁶ which was formally imposed by the court on December 2, 2010.²¹⁷ One juror stated that she generally opposed the death penalty because she believed it was imposed disproportionately on poor and minority defendants, but that she had voted for it because of the horrific facts of the Petit case.²¹⁸ Another juror stated, "if this wasn't the case to use [the death penalty] on, then we never really had a case" because the crimes were "so over the top."²¹⁹ Both Dr. Petit and Governor Rell issued statements hailing the jury's recommendation of death.²²⁰ Hayes has appealed his conviction and sentence.²²¹

211. *Special Announcements: The Judiciary Committee Passes Repeal Bill 27-17!*, CONN. NETWORK TO ABOLISH THE DEATH PENALTY, <http://www.cnadp.org/> (last visited Nov. 27, 2011).

212. Kenton Robinson, *Death Penalty Repeal Likely Would Have Unintended Consequence*, THE DAY, Mar. 8, 2011, <http://www.theday.com/article/20110308/NWS12/303089928/1017>.

213. *Id.*

214. Mark Pazniokas, *Petit Lobbies Senators, Changes Minds About Death Penalty Repeal*, CONN. MIRROR, May 11, 2011, <http://www.yourpublicmedia.org/content/connecticut-mirror/petit-lobbies-senators-changes-minds-about-death-penalty-repeal>.

215. *Man Convicted of Capital Murder in Connecticut Home Invasion Case*, CNN, Oct. 05, 2010, http://articles.cnn.com/2010-10-05/justice/connecticut.murder.trial_1_jennifer-hawke-petit-michaela-petit-petit-family?_s=PM:CRIME.

216. Emily Friedman, *Steven Hayes Smiles When Sentenced to Death for Deadly Home Invasion*, ABC NEWS, Nov. 8, 2010, <http://abcnews.go.com/US/steven-hayes-sentenced-death-role-connecticut-home-invasion/story?id=12087221>.

217. *Conn. Horror Killer Steven Hayes Sentenced to Death*, N.Y. POST, Dec. 2, 2010, http://www.nypost.com/p/news/local/conn_horror_killer_steven_hayes_ANqkStUJ0iSKaqSp3jHNwM.

218. Katie Rohner, *A Petit Juror, Death Penalty Foe, Voted for It*, NEW HAVEN INDEP., Nov. 9, 2010, http://www.newhavenindependent.org/index.php/archives/entry/interview_with_betsy_burbank/.

219. Sarah Netter et al., *Death Penalty in Connecticut Home Invasion Case Brought Family "Huge Sense of Relief,"* ABC NEWS, Nov. 9, 2010, <http://abcnews.go.com/US/death-penalty-connecticut-home-invasion-case-brought-family/story?id=12095310>.

220. Friedman, *supra* note 216.

221. *Criminal/Motor Vehicle Conviction Case Detail*, CONN. JUDICIAL BRANCH,

Komisarjevsky was tried separately and ultimately convicted on October 13, 2011, of seventeen charges including capital felony murder, kidnapping, and sexual assault.²²² As of the writing of this Article, Komisarjevsky has not yet been sentenced. The penalty phase of the proceedings against Komisarjevsky is scheduled to begin on October 25, 2011, and is expected to last five to six weeks.²²³

B. Federal Capital Charges Upheld in an Abolitionist State: A Vermont Case Study

Michael Jacques is currently awaiting trial on federal charges of kidnapping resulting in death under 18 U.S.C. § 1201(a) in the murder of Brooke Bennett.²²⁴ Federal prosecutors from the U.S. Attorney's Office for the District of Vermont have filed a Notice of Intent to Seek the Death Penalty.²²⁵ The physical acts constituting this crime took place entirely within the borders of Vermont. Because Vermont is an abolitionist state, the *Jacques* prosecution raises key issues of federalism and capital punishment.

Jacques filed motions challenging both Congress's authority under the Commerce Clause to criminalize his conduct and the constitutionality of the FDPA. Among numerous other arguments, Jacques's motion seeking to strike down the FDPA specifically challenged the application of the federal death penalty in abolitionist Vermont. Both motions—the challenge to federal jurisdiction and the challenge to the FDPA—were recently denied by the federal district court in Vermont in rulings that have significant implications for the ongoing federalism and capital punishment debate.

<http://www.jud2.ct.gov/crdockets/CaseDetailDisp.aspx?source=Pending&Key=25ecb35f-d599-4f13-814d-918cbd243917> (last visited Nov. 27, 2011).

222. *Second Defendant is Convicted in Connecticut Triple Murder*, N.Y. TIMES, Oct. 13, 2011, <http://www.nytimes.com/2011/10/14/nyregion/komisarjevsky-convicted-of-triple-murder-in-cheshire-conn.html>.

223. Randall Beach, *Komisarjevsky Might Address Jurors During Penalty Phase of Cheshire Triple Murder Trial*, REGISTER CITIZEN, Oct. 21, 2011, <http://www.registercitizen.com/articles/2011/10/21/news/doc4ea182a5616fa994408205.txt?viewmode=default>.

224. Indictment at 2, *United States v. Jacques*, No. 2:08-cr-117 (D. Vt. Oct. 1, 2008), ECF No. 59. Count One of the Indictment reads:

On or about and between June 20-25, 2008, in the District of Vermont, JACQUES unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, and carried away Brooke Bennett, and held her for his own benefit and purpose, and used means, facilities, and instrumentalities of interstate commerce, namely, cell phone text messages, internet email messages, and an internet MySpace posting, in committing or in furtherance of the commission of the offense, which resulted in the death of Brooke Bennett.

Id. (quoting 18 U.S.C. § 1201(a)(1)) (emphasis added). Jacques is also charged in the same indictment with several counts of producing and possessing child pornography in violation of 18 U.S.C. § 2251(a). *Id.* at 2. Those charges are not at issue in this Article and will not be discussed.

225. Notice of Intent to Seek a Sentence of Death, *supra* note 18, at 1.

1. A Crime Challenges Abolitionist Sentiment in Vermont

The power of a single horrific murder to change state sentencing laws is just as apparent on the facts of the Brooke Bennett murder as it was in Connecticut in the Petit case. Michael Jacques is a repeat sex offender who had been released early from probation at the time he allegedly kidnapped and raped seventh-grader Brooke Bennett, suffocated her by tying a plastic bag over her face, and buried her in a shallow grave in the woods a mile from his house.²²⁶ Like the Petit murders, the murder of Brooke Bennett challenged the views of citizens who otherwise supported abolition of the death penalty. A poll taken in the wake of the Brooke Bennett murder showed a dramatic increase in support for the death penalty among Vermonters, despite the fact that Vermont is one of the sixteen states that has abolished capital punishment.²²⁷ “Thanks to Michael Jacques, many Vermonters have been re-examining [their views on capital punishment],” stated a news article reporting the poll results.²²⁸ A poll in 2001 indicated that 46% of Vermonters opposed capital punishment for murder and 45% favored it. A few months after the Bennett murder, however, a poll taken in October 2008 showed that only 29% of Vermonters opposed the death penalty while 66% favored it.²²⁹

Public outrage over Brooke Bennett’s murder led to rallies demanding tougher sentences for sex crimes against children, including calls for reinstatement of capital punishment in Vermont.²³⁰ Sentiment was heated enough to result in significant legislative action. Public hearings led to the passage of “Brooke’s Law,” which contained, among a variety of provisions, a possible twenty-five-year minimum sentence for sexual assaults against minors, which—while not mandatory—could be sought at prosecutors’ discretion. Brooke’s Law also increased funding for investigations and education relating to sex crimes against children.²³¹ What it did not include was reinstatement of capital punishment in Vermont. One possible explanation for this omission is that federal prosecutors in

226. Jacques had previous convictions for sexually assaulting a minor female in 1985, leading to her pregnancy, and for the 1992 kidnapping and sexual assault of another teenaged girl. *Brooke’s Law Signed by Governor Wednesday*, WPTZ, Mar. 4, 2009, <http://anonymouse.org/cgi-bin/anon-www.cgi/http://www.wptz.com/news/18853079/detail.html>. While Jacques should have been under parole supervision at the time he kidnapped and murdered Brooke Bennett, he had been removed from supervision seven years early by a state-court judge. *Id.*

227. Bryan Joyce, *Do Vermonters Support the Death Penalty?*, WCAX, Oct. 31, 2008, <http://www.wcax.com/story/9275396/do-vermonters-support-the-death-penalty?nav=4QcS&redirected=true>.

228. *Id.*

229. *Id.*

230. WPTZ, *supra* note 226.

231. Kristin Carlson, *Governor Signs Brooke’s Law*, WCAX, Mar. 4, 2009, <http://www.wcax.com/story/9948776/governor-signs-brookes-law>.

Vermont had already stepped in to charge Jacques with a capital crime, so those citizens particularly outraged by the Brooke Bennett murder had no cause to seek redress. While the internal deliberations of the Review Committee are not made public, as described above, the DPP specifically calls for consideration of state authorities' ability to "obtain an appropriate punishment upon conviction" in determining whether to bring federal charges.²³² The facts of this case, especially as contrasted with what happened in Connecticut with the Petit case, strongly suggest that federal capital charges can blunt public outrage, leaving states like Vermont freer to pursue abolitionist policies.

2. The *Jacques* Court Sustains Federal Jurisdiction

The defense in the *Jacques* case, obviously more concerned with Michael Jacques's own fate than with the future of capital punishment in Vermont, sought to block application of the death penalty in two ways. The first was to challenge the jurisdiction of the U.S. Attorney's Office to prosecute him at all by arguing that the federal statute he was charged under was unconstitutional both on its face and as applied to his case.²³³ If Jacques's lawyers could get the federal charges against him dismissed and move the case to Vermont state court, then he would face Vermont murder and sex-assault charges that carried only prison sentences, which are significantly lower than would apply in many other states.²³⁴

Jacques challenged the constitutionality of an amendment to the Federal Kidnapping Act that had allowed him to be charged based on his use of the Internet and text messaging in kidnapping and murdering Brooke Bennett.²³⁵ The AWA,²³⁶ which enacted the amendment at issue, was intended to address public concern with Internet child predation.²³⁷ Among many other provisions, the AWA amended the Federal Kidnapping Act to expand federal jurisdiction to reach kidnappings in which the offender used

232. USAM, *supra* note 31, § 9-10.090.

233. Defendant's Motion to Dismiss Count One of the Indictment at 1–3, *United States v. Jacques*, No. 2:08-cr-117 (D. Vt. Jan. 8, 2010), ECF No. 125.

234. The penalty for first-degree murder in Vermont is thirty-five years to life. VT. STAT. ANN. tit. 13, § 2303. The penalty for sexual assault is three years to life imprisonment. *Id.* § 3252(f). However, asked in 2008 during the Jacques trial, 72% of Vermonters agreed that they wanted a twenty-five-year mandatory minimum sentence for aggravated sexual assault. Joyce, *supra* note 227.

235. Defendant's Motion to Dismiss Count One of the Indictment, *supra* note 233, at 13.

236. AWA, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

237. In the Preamble to the AWA, Congress described it as, "[a]n Act to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, [and] to promote Internet safety." *Id.* at Preamble (emphasis added). It contained a variety of new provisions as well as amendments to existing federal laws intended specifically to address online sexual predation of children.

channels or facilities of interstate commerce to commit the crime, even if the physical kidnapping occurred within the borders of a single state.²³⁸ Prior to this amendment, Jacques could not have been charged federally with the kidnapping because he did not move Brooke Bennett across state lines. The *Jacques* case is one of the first in the nation to be prosecuted under the amendment based on use of interstate commerce facilities.²³⁹ Its facts make it an ideal fit for the amended statute given Jacques's heavy reliance on cell-phone text messaging and the Internet—both of which meet the definition of “facilities of interstate commerce”—to commit the crime.²⁴⁰

Jacques engaged in a bizarre, complex plot to use text messaging and the Internet to pressure another minor female—whom he had been sexually abusing since she was eight years old—to lure Brooke Bennett to her kidnapping and death.²⁴¹ Jacques used a variety of email addresses to convince this young girl, identified in court documents as J1, that a criminal organization known as “Breckenridge” was stalking her²⁴² and that Breckenridge members would kill her if she did not comply with demands to lure Brooke into three-way sex with Jacques and J1.²⁴³ In May and June 2008, Jacques sent numerous emails and text messages to J1, purportedly from Breckenridge members, ordering J1 to assist in killing Brooke in order to prevent her from going to the police and accusing Jacques of rape.²⁴⁴

238. Prior to the 2006 AWA amendment to the Federal Kidnapping Act, Jacques could not have been charged federally because the victim did not travel across a state border. Instead, he would have been charged with kidnapping under Vermont law and would not be facing the death penalty.

239. Only two other cases were reported prior to *United States v. Jacques* in which the 2006 AWA amendment to section 1201(a) was used to reach intrastate kidnappings based on the defendant's use of a facility of interstate commerce to commit the crime. See *United States v. Augustin*, No. 1:09-cr-187, 2010 WL 2639966, at *3 (E.D. Tenn. June 28, 2010); *United States v. Ochoa*, No. 8-cr-1980, 2009 WL 3878520, at *4 (D.N.M. Nov. 12, 2009). In both cases, defendants challenged federal jurisdiction, attacking the amended § 1201(a) as unconstitutional both on its face and as applied as in excess of Congress's authority under the Commerce Clause to criminalize intra-state conduct. In both cases, the district courts denied these motions and upheld the amended statute. For a complete discussion of Commerce Clause jurisprudence and the amended § 1201(a), see Michele Martinez Campbell, *The Kids Are Online: The Internet, the Commerce Clause and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. (forthcoming 2011) (manuscript at 28–42), available at <http://ssrn.com/abstract=1837631>.

240. 18 U.S.C. § 1201(a)(1).

241. See Memorandum in Opposition, *supra* note 15, at 2–3.

242. *Id.* at 4–8.

243. *Id.* at 6.

244. *Id.* at 6–8. A letter written on June 6, purporting to be from Breckenridge to J1, recovered from Jacques's laptop, stated:

[W]e have recently come to an agreement with Charles, Eric and [Jacques] regarding what will be done. To put it bluntly, Miss Bennett will cease to exist. . . . You will not be required to participate in the actual termination, but you will participate in events leading up to it. We expect your full and enthusiastic participation.

Jacques and J1 continued to exchange voluminous, detailed emails and text messages planning Brooke's abduction and murder.²⁴⁵ J1 lured Brooke to Jacques's house (which, it is clear from court documents, was also J1's house) using the ruse that J1 was hosting a pool party which would be attended by a local boy Brooke liked.²⁴⁶ Jacques created phony text messages that appeared to be from this boy and forwarded them to J1, who then forwarded them to Brooke.²⁴⁷ The ruse was successful; Brooke agreed to attend the pool party and secured her mother's permission to do so based on text messages from J1.²⁴⁸

The physical aspects of the crime were both planned and documented by voluminous text messages between Jacques and J1. On June 20, 2008, J1 texted Jacques that she would "help out . . . with the tie down."²⁴⁹ On the morning of June 25, 2008, when Brooke was already in Jacques's house expecting that the pool party would begin, Jacques and J1 texted back and forth, unbeknownst to Brooke, to arrange for the actual moment that she would be sexually attacked. Jacques instructed J1 to tell Brooke that he wanted to show her a "magic trick."²⁵⁰ Jacques came downstairs to where the two girls were and took Brooke upstairs to his bedroom.²⁵¹ Shortly thereafter, Jacques came down again and instructed J1 to leave the house, telling her that the taser was not working.²⁵² Even as Jacques raped Brooke upstairs and suffocated her with a plastic bag, J1—demonstrating the degree to which she had been brainwashed by Jacques's phony text messages from "Breckenridge" members—continued to text the fictional Breckenridge members to keep them apprised of the progress of the crime. In one such message, J1 wrote, "The tazor (sic) didn't work and I'm leaving Now get here now now now," because Jacques needed help disposing of the body.²⁵³

Jacques further used the Internet and text messaging in attempts to divert suspicion onto other suspects before, during, and after his crime. Prior to the kidnapping, Jacques sent J1 a text purportedly from a Breckenridge member ordering her to have sex with a local boy in order to obtain a semen sample in a handkerchief; he later left this handkerchief

Id. at 8.

245. *Id.* at 8–11.

246. *Id.* at 8–9.

247. *Id.* at 10–11.

248. *Id.* at 11.

249. *Id.*

250. *Id.* at 16.

251. *Id.*

252. *Id.*

253. *Id.* (alteration in original).

beside Brooke's body in the shallow grave where he buried her.²⁵⁴ Jacques had also planned to use Brooke's cell phone after her murder to send text messages to J1, making it look like she was still alive and had run off with the local boy.²⁵⁵ When it turned out that Brooke had left her cell phone at home, Jacques and J1 exchanged panic-stricken text messages—while Brooke was right there in Jacques's house—looking for an alternate way to cover their tracks.²⁵⁶ Through repeated texts, Jacques and J1 developed another plan: J1 would get Brooke to reveal her MySpace password so Jacques could access Brooke's MySpace page to plant a decoy story about Brooke running away with the boy.²⁵⁷ Before he murdered and buried Brooke, Jacques accessed the account and posted this phony entry to explain her disappearance.²⁵⁸ The next day, after Brooke was dead, Jacques pretended to discover this evidence.²⁵⁹ In sum, text messaging and the Internet were central to the kidnapping and murder of Brooke Bennett and created the basis for federal prosecutors to charge Jacques.

Jacques moved to dismiss the indictment filed against him, arguing that the 2006 AWA amendment to the Federal Kidnapping Act was unconstitutional because Congress lacked authority under the Commerce Clause to criminalize conduct that took place entirely within the borders of a single state.²⁶⁰ In a May 2011 ruling, the Vermont federal district court denied Jacques's motion to dismiss the Federal Kidnapping Act charge as unconstitutional.²⁶¹ The district court relied on well-established precedent under the Commerce Clause to hold that Congress has the power to regulate intrastate criminal conduct so long as it falls into one of "three broad categories" of activity.²⁶² As the Supreme Court stated in *United States v. Lopez*, "Congress is empowered to regulate and protect *the instrumentalities of interstate commerce*, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."²⁶³ The *Jacques* court was persuaded by the reasoning in two prior federal district court opinions—*United States v. Augustin*²⁶⁴ and

254. *Id.* at 3–4, 11, 18.

255. *Id.* at 12.

256. *Id.* at 12–13.

257. *Id.* at 13.

258. *Id.* at 14. The entry read in part, "I do want to see you in the morning so please meet me . . . u know where. I think I have a good plan to sneak around this. My mom will kill me but then I'm going 2 Texas and she will get over it. . . . OMG if only people knew me 4 real! See you there!" *Id.*

259. *Id.* at 17.

260. *United States v. Jacques*, No. 2:08-cr-117, 2011 WL 1706765, at *12 (D. Vt. May 4, 2011) (opinion and order denying motion to dismiss count one).

261. *Id.*

262. *Id.* at *9 (quoting *United States v. Marek*, 238 F.3d 310, 317 (5th Cir. 2001)).

263. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (emphasis added).

264. *United States v. Augustin*, No 1:09-cr-187, 2010 WL 2639966 (E.D. Tenn. June 28, 2010)

*United States v. Ochoa*²⁶⁵—that kidnappings committed using the Internet, telephones, or other interstate commerce facilities were properly subject to federal charges under *Lopez*'s "Second Category" even if the physical acts at issue took place entirely within the borders of a single state.²⁶⁶ The court wrote:

[Section] 1201(a) is an unremarkable and facially valid exercise of Congress's long-established power to regulate the channels and instrumentalities of interstate commerce under the Commerce Clause, regardless of whether the underlying conduct is also amenable to proscription under a state's police power. . . . As the 11th Circuit stated: "Plainly, congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature."²⁶⁷

Jacques challenged the 2006 AWA amendment to the Federal Kidnapping Act not only on its face, but also as it applied to his conduct, arguing that his use of cell-phone text messaging and the Internet was "too attenuated" from his crime to sustain a conviction.²⁶⁸ The court also rejected the as-applied argument. Though the defense admitted that interstate commerce facilities were used to lure Brooke to Jacques's house prior to her rape and murder, Jacques argued that this was not the same as kidnapping her; the luring and the kidnapping must be viewed as two separate, unrelated events.²⁶⁹ Examining the definition of kidnapping under § 1201(a)(1), the court found that the language defining the crime prohibited "inveigling" or "decoying" the victim just as it did kidnapping her or carrying her away.²⁷⁰ The court wrote:

A kidnapping that begins with an inveiglement and evolves into a confinement by force is one offense, not two Because, at a minimum, cell phone text messaging was allegedly used to convince Brooke Bennett that she was assisting in the

(sustaining an intrastate kidnapping charge sustained under § 1210(a) based on a defendant forcing a victim to make repeated cell phone calls to arrange for the delivery of money).

265. *United States v. Ochoa*, No. 8-cr-1980, 2009 WL 3878520 (D.N.M. Nov. 12, 2009) (sustaining an intrastate kidnapping charge sustained under § 1210(a) based on a defendant's use of emails and telephone calls to lure a victim to the scene of a kidnapping).

266. *Jacques*, 2011 WL 1706765, at *10 (order denying motion to dismiss count one).

267. *Id.* at *11 (quoting *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005)).

268. *Id.*

269. *Id.*

270. *Id.*

preparations for a pool party . . . there is probable cause to believe that an instrumentality of interstate commerce was used to commit or to facilitate the commission of a kidnapping. The application of § 1201(a) to Jacques's conduct as alleged in Count 1 of the indictment is constitutional.²⁷¹

Federal prosecutors had applied a relatively new and untested statute in order to charge Michael Jacques federally, allowing them to seek the death penalty. The court had upheld that statute and found that federal jurisdiction in Jacques's case was proper. That still left the court to resolve a major constitutional question central to this Article: whether federalism concerns should prevent the U.S. Attorney's Office from seeking the death penalty against Jacques for a crime committed within the borders of abolitionist Vermont.

3. The Court Rejects a Federalism-Based Challenge to the Application of the FDPA in Abolitionist Vermont

Jacques moved to strike the government's Notice of Intent to Seek the Death Penalty by arguing that the FDPA was unconstitutional on a variety of grounds.²⁷² Jacques's lawyers may have expected a more sympathetic hearing, given that the judge in his case was the same one who had declared the FDPA unconstitutional several years earlier in *United States v. Fell* based on concerns regarding the evidentiary procedures applied in determining aggravating factors.²⁷³ That ruling had been reversed by the Second Circuit, however, and the arguments advanced in Jacques's motion to strike were largely rehashes of theories previously rejected by the Supreme Court, the Second Circuit, and other courts.²⁷⁴ Yet buried in

271. *Id.* (citations omitted).

272. Motion, With Incorporated Memorandum, to Strike or Modify the Notice of Intent to Seek the Death Penalty at i–ii, *United States v. Jacques*, No. 2:08-cr-117 (D. Vt. Mar. 29, 2010), ECF No. 146. In the same motion, Jacques moved in the alternative to modify the Notice of Intent to Seek the Death Penalty, arguing that some of the aggravating factors alleged by the government should be subject to additional offers of proof or should be struck. *Id.* This motion was granted in part but will not be further discussed herein because it is not relevant to the subject of this Article. *Id.*

273. *See Fell I*, 217 F. Supp. 2d 469, 489 (D. Vt. 2002), *vacated*, 360 F.3d 135 (2d Cir. 2004).

274. *See United States v. Jacques*, No. 2:08-cr-117, 2011 WL 1675417, at *15 (D. Vt. May 4, 2011) (opinion and order regarding defendant's motion to strike or modify notice of intent to seek the death penalty). The arguments made by Jacques attacking the constitutionality of the FDPA and rejected by the court as largely foreclosed by precedent included the following: (1) that the FDPA violates the Fifth and Eighth Amendments because it is applied in an arbitrary, capricious, and discriminatory manner; (2) that the FDPA is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), because it vests in prosecutors rather than the grand jury the authority to charge aggravating factors; (3) that the indictment against Jacques violated the Fifth Amendment in not presenting certain information to the grand jury; (4) that the capital decision-making process mandated by the FDPA is too confusing to

Jacques's motion, and winning meaningful, if brief, consideration by the district court in its opinion, was a discussion of the federalism-based argument for striking the death penalty given that Jacques had committed his crime in a state without capital punishment. Despite its brevity, Judge Sessions's ruling is a significant new contribution to the case law on federalism and capital punishment and deserves careful examination.

Unfortunately, rather than briefing the issue independently and thoroughly in a manner that might have drawn more extensive consideration from the court, Jacques's lawyers simply "adopted by reference"²⁷⁵ the argument made by Professor Michael Mannheimer in his article "When the Federal Death Penalty Is 'Cruel and Unusual.'"²⁷⁶ While Professor Mannheimer relies on the Eighth Amendment to challenge application of federal capital punishment to crimes committed within abolitionist states, his argument is more nuanced, and more historically rooted, than the simple assertion made in other articles that whether a punishment is "cruel and unusual" must be determined with reference to local law or custom. Instead, he posits—as Judge Sessions summarizes in his opinion—that, "because one of the original and central purposes of the Bill of Rights was to prevent federal encroachment on state sovereignty and local values, the Eighth Amendment should be read to prohibit the federal government from imposing the death penalty in states that do not authorize capital punishment."²⁷⁷ Professor Mannheimer delves into the history of the adoption of the Bill of Rights and of the Eighth Amendment in particular, arguing that the "anti-federalists"²⁷⁸ intended the proscription on cruel and unusual punishments "not to ensure the general fairness and reliability of the federal criminal process, but instead to create obstacles to the investigation, prosecution, conviction, and punishment of persons for federal crimes."²⁷⁹ This reading of the Eighth Amendment and the criminal

permit juries to make reasoned choices; (5) that the use of non-statutory aggravating factors under the FDPA is unconstitutional both on its face and as applied to his case; and (6) that the death penalty per se violates the Eighth Amendment's prohibition on cruel and unusual punishment as well as the Due Process Clause. *Id.* at *3–5, *9, *11–13, *15 & *17.

275. Motion, With Incorporated Memorandum, to Strike or Modify the Notice of Intent to Seek the Death Penalty, *supra* note 272, at 169.

276. Michael Mannheimer, *When the Federal Death Penalty Is 'Cruel and Unusual,'* 74 U. CIN. L. REV. 819 (2006).

277. *Jacques*, 2011 WL 1675417 at *15.

278. While current usage refers to those who favor a states' rights viewpoint as "federalists," Professor Mannheimer adopts the legal historical term "anti-federalist" to refer to those among the Framers "who fought for a Bill of Rights that would impose an important constraint on the central government and would repose ultimate authority in the people of the several States to decide whether a particular mode of punishment is acceptable within their respective borders." Mannheimer, *supra* note 276, at 821.

279. *Id.* at 822.

procedure amendments in the Bill of Rights, while not followed in case law, has some adherents among scholars.²⁸⁰

The limited briefing provided on this theory, however, failed to persuade the district court. Instead, the court relied on Judge Raggi's concurrence in the denial of rehearing *en banc* in *United States v. Fell* to argue that, if the proscription on cruel and unusual punishment were to be read differently depending on varying state capital punishment laws, "serious problems" would arise with uniformity of application.²⁸¹ Judge Sessions cited Judge Raggi's concern that, "constraining the federal government's ability to impose the death penalty in certain states could create equal protection problems."²⁸² Judge Sessions may have left the door open a crack by rooting his rejection of Jacques's federalism argument in the defense's inadequate briefing and failure to meet the burden of persuasion.²⁸³ Nevertheless, he quoted at length Judge Raggi's firm pronouncement that there is no support in Eighth Amendment jurisprudence for Professor Mannheim's arguments: "The Eighth Amendment, no less than other provisions of the Constitution, must apply equally throughout the states. Nothing in the Court's jurisprudence has ever suggested that federalism warrants re-tailoring the Eighth Amendment in each state . . . to test federal death sentences by reference to local practices."²⁸⁴

Judge Sessions ended by stating that the question of federalism and capital punishment Jacques raised "appears to remain an open one in this circuit."²⁸⁵ But this statement should not be read as more than it is—an acknowledgement that Judge Raggi's *Fell* opinion was only a concurrence in a denial of rehearing *en banc* and does not have the force of precedent.

Jacques subsequently moved for reconsideration of this ruling, presenting additional briefing on the federalism issue.²⁸⁶ Jacques argued that the Eighth Amendment's prohibition on cruel and unusual punishment

280. See, e.g., George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 160 (2001). "The principal concern in the Bill of Rights was not to protect innocent defendants. The Framers instead intended to create formidable obstacles to federal investigation and prosecution of crime." *Id.*

281. *Jacques*, 2011 WL 1675417 at *16.

282. *Id.*

283. "[T]his court is unable to conclude that Jacques has met his burden on the basis of the one paragraph he devotes to the federalism argument. . . ." *Id.*

284. *Id.* (quoting *Fell IV*, 571 F.3d 264, 274 (2d Cir. 2009) (*en banc*) (Raggi, J., concurring)).

285. *Id.*

286. *United States v. Jacques*, No. 2:08-cr-117, 2011 WL 3881033, at *1–2 (D. Vt. Sept. 2, 2011) (opinion and order denying defendant's motion to reconsider point eight in favor of striking the death penalty).

was intended to ban any punishment “not authorized by law.”²⁸⁷ Because Vermont had abolished capital punishment, he asserted, imposition of the death penalty in Vermont violated the Eighth Amendment.²⁸⁸ Jacques also argued that imposing a penalty under federal law greater than that authorized by Vermont state law violated the Tenth Amendment.²⁸⁹

Once again, Judge Sessions denied Jacques’s motion, refusing to prohibit the government from seeking the death penalty.²⁹⁰ The court thoroughly rejected the idea that the Eighth Amendment should be interpreted to apply differently to different states depending on whether or not a state had abolished the death penalty.²⁹¹ Judge Sessions reviewed Eighth Amendment jurisprudence and found that no case had ever countenanced such uneven application.²⁹² He wrote:

[E]ven if this Court were willing to make the dramatic break from the existing Eighth Amendment jurisprudence suggested by Jacques, such a move would raise constitutional concerns far more troubling than the one it would be meant to address. . . . [T]he Court would effectively be sanctioning and contributing to geographic disparities in application of the federal death penalty.²⁹³

The court relied on *United States v. Tuck Chong*, discussed above in Section II(C), in rejecting the Tenth Amendment argument.²⁹⁴ The court reasoned that because the federal government is entitled to determine punishment for crimes committed against the United States, imposing the death penalty in a federal criminal case does not intrude upon state sovereignty.²⁹⁵

Judge Sessions’s opinions in *Jacques* make an important contribution to the growing body of precedent holding that federal authorities with proper jurisdiction over a criminal case do not violate the Eighth Amendment or any other constitutional rule when they seek the death penalty for a crime committed within an abolitionist state.

287. *Id.* at *2 (quoting Defendant’s Motion to Reconsider Point Eight in Favor of Striking the Notice of Intent to Seek the Death Penalty at 3, *United States v. Jacques*, No. 2:08-cr-117 (D. Vt. June 15, 2011), ECF No. 290).

288. *Id.*

289. *Id.*

290. *Id.* at *6

291. *Id.* at *5.

292. *Id.* at *4.

293. *Id.*

294. *Id.* at *3.

295. *Id.*

IV. BENEFITS OF GREATER POLITICAL FLEXIBILITY FOR STATES AND UNIFORMITY OF APPLICATION OUTWEIGH FEDERALISM CONCERNS

The few cases in which criminal defendants have been charged federally with capital crimes in abolitionist states may have generated intriguing dialogue on federalism, but scholarly and defense arguments against application of the FDPA in abolitionist states have failed to find favor in the courts. As a matter of doctrine, the courts have it right. Varying the application of federal law to comport with state capital punishment statutes might satisfy some theoretical notion of federalism, but it would fly in the face of well-established Eighth Amendment and Supremacy Clause doctrine. Beyond the question of doctrine, however, is that of policy and values. It may be clear as a matter of law that federal prosecutors have the right to step in with federal capital charges in crimes committed in abolitionist states so long as federal jurisdiction is properly established. But should they? This Article takes a contrary view as a matter of public policy and argues that federal prosecutorial discretion exercised with restraint can play a salutary role in (i) preserving state sentencing diversity and (ii) providing for uniformity of enforcement through the centralized DPP review process that can and should be used to address longstanding, valid concerns with race- and ethnicity-based disuniformity of application.

A. Federal Capital Punishment Allows State Abolitionism to Prosper

The federal death penalty can play a salutary role in preserving state abolitionism in the face of political pressure and should be viewed as a help rather than a hindrance to robust federalism. The Petit and Jacques case studies, read together, suggest that state diversity in sentencing policy is more resilient where federal capital charges are available to address those rare murder cases that generate political backlash. Federal capital punishment, rather than squelching states' freedom of choice in capital sentencing, can preserve the ability of the states to function as "laboratories"²⁹⁶ of criminal justice policy. Polls demonstrate that sentiment in favor of abolishing capital punishment is lukewarm at best.²⁹⁷ Even in states with no death penalty, abolitionism hangs by a thread and a high-profile, particularly shocking murder can pose a serious threat to a state

296. "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

297. GALLUP, *supra* note 44.

abolitionist sentencing regime. The availability of the federal death penalty in those cases can blunt public outrage sufficiently to protect state abolitionism.

As described above, since 2001, the DPP has permitted federal prosecutors to consider the lack of a state death penalty in determining whether to prosecute on capital charges in instances where there is concurrent jurisdiction. Scholarly opinion has been uniform in viewing this policy as an attack on state sovereignty—an attempt to prevent states from pursuing their own sentencing policies. But a pragmatic examination of the facts, stripped of any ideological spin, demonstrates that this is simply not true. First, federal policy commands consultation with, rather than defiance of, state authorities. Indeed, though information on negotiations between federal and state prosecutors in these cases is difficult to come by, there are documented instances in which federal authorities have stepped in only *at the request of* state authorities.²⁹⁸ Second, the miniscule number of federal capital prosecutions brought in abolitionist states proves the falsity of the idea that the Department of Justice pursues cases in order to undermine state sentencing choices. As one commentator has noted, “If . . . the Department of Justice were using the federal death penalty to impose a death penalty on states that chose not to have a state death penalty, the incidence of capital federal prosecutions in the fifteen states that do not have a state death penalty would be far higher”²⁹⁹ In short, a pragmatic look at the numbers suggests that federal prosecutors make charging decisions based on the facts of individual cases rather than in an attempt to undermine state abolitionism.

But rather than focusing on what the Department of Justice *intends* to accomplish when it brings federal capital charges for crimes committed in abolitionist states, we must assess what it *actually* accomplishes. The Connecticut and Vermont case studies, read together, suggest that by bringing capital charges in a rare, extreme case, federal prosecutors preserve the ability of states to decide not to allow the death penalty in a much greater number of other cases. While this assertion cannot be proved with certainty, common sense strongly suggests that it is the case. Thus, the rare federal capital prosecution that answers public calls for justice in the

298. For example, Ronnell Wilson had been charged by the Richmond County, New York District Attorney’s Office with two counts of capital murder in the shooting of two New York Police Department detectives during the course of an undercover narcotics deal. The New York Court of Appeals overturned the state’s capital punishment statute while Wilson’s case was pending. The Richmond County District Attorney then met with the United States Attorney’s Office for the Eastern District of New York and formally requested that the federal government take over the case so that the death penalty could be pursued. The federal prosecutors ultimately took the case, and Wilson was sentenced to death by a federal jury in 2006. See Mysliwiec, *supra* note 7, at 264–65.

299. *Id.* at 275.

face of a particularly heinous crime should be viewed as preserving state abolitionism rather than destroying it.

B. DPP Procedures Provide Potential for Uniformity of Enforcement that Can Address Longstanding Constitutional Concerns

A federalism approach to capital punishment values difference and opposes uniformity. As Professor Mannheimer asserts in arguing that federal capital punishment in abolitionist states violates the Eighth Amendment, “dis-uniformity is the price we pay for our federal system.”³⁰⁰ Professor Little notes that “[u]niformity” and “[c]ommunity values . . . are in tension in any criminal sentencing regime.”³⁰¹ When federalists oppose uniformity in the death penalty context, they are concerned with the ability of states to maintain sovereignty over criminal sentencing within their borders. They view federal sentencing policies that seek to impose uniform sentences across geographic jurisdictions as unconstitutional because of the potential for intrusion upon state sovereignty.³⁰² But there are different kinds of uniformity. In the death penalty context, *dis*-uniformity of application has historically meant something different, and more sinister, than the diversity of state policies that federalism values: It has meant racial inequity in punishment. As Justice Douglas wrote in his concurrence in *Furman v. Georgia*:

[I]t is ‘cruel and unusual’ to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.³⁰³

This Article posits that the more centralized federal capital punishment system is better suited than state systems to address the persistent, egregious problem with unequal application of capital punishment and that this should weigh into the federalism and capital punishment debate. By requiring strict centralized decision-making in capital cases, the Department of Justice’s DPP creates a mechanism for addressing longstanding issues of

300. Mannheimer, *supra* note 276, at 877.

301. Rory K. Little, *Good Enough for Government Work? The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty*, 14 FED. SENT. R. 7 (2001).

302. Of course, as Professor Little points out, this type of geographical uniformity is the norm not only for all federal criminal sentencing, including terms of years, but for state sentencing regimes as well. *Id.* at 7–8. In other words, the federalist viewpoint taken to its logical conclusion would result in pegging federal sentences to state sentences for all crimes, including those for which jail terms apply.

303. *Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring).

racial injustice in application of capital sentencing. It also addresses clear problems with regional differences in application that some have argued are race-related.³⁰⁴

Whether that mechanism can achieve the goal of reducing racial disparity in capital sentencing remains to be seen. Certainly, available statistics speak to the persistence of racial disparities. The Department of Justice's June 6, 2001 Report (Report) found that the percentage of minority defendants prosecuted in federal capital cases exceeded their representation in the general public.³⁰⁵ The Department of Justice has explained that this disparity exists because federal capital prosecutions have focused primarily on murders associated with drug trafficking, a type of crime that statistically occurs with greater frequency in minority communities.³⁰⁶ The Report asserts that the statistical disparity does not reflect intentional discrimination but rather "the differing incidences of crimes in different demographic groups."³⁰⁷ Indeed, the Department of Justice has pointed to a different statistic of racial disparity to counter charges of intentional discrimination: the differing rate at which defendants of various races were approved for capital prosecution during the period studied. The Report states that 38% of white defendants were approved for capital prosecution as compared to 25% of black defendants and 20% of Hispanic defendants.³⁰⁸

A full consideration of the reasons for persistent racial disparities in capital sentencing is beyond the scope of this Article, and no position is taken on the merit of the Department of Justice's explanation. This Article certainly does not argue that federal authorities have succeeded in eliminating racial disparities in capital sentencing; quite the contrary. Obviously, whatever the reason or intent, racial disparities in federal capital sentencing continue to raise concerns of constitutional dimension and must be combated aggressively. But in evaluating the policy merits of allowing

304. See G. Ben Cohen and Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 445–61 (2010) (arguing that federal districts with the highest death-sentencing rates tend to be composed of a largely black county surrounded by largely white counties, meaning that geographical differences in application result from racial differences between jurors and defendants).

305. SUPPLEMENTARY DATA, *supra* note 58.

306. *Id.*

307. *Id.*

308. *Id.* White defendants have begun to argue that this means they are being targeted for capital prosecution in order to address concerns about discrimination against minority defendants. For example, in the case of a nurse charged with federal capital crimes for murders of patients in Veterans Affairs hospitals, it was argued that, "a relative dearth of women and Caucasians on federal death row raised suspicion that the government felt intense pressure to prosecute . . . a white female." John P. Cunningham, *An Uninvited Guest: The Federal Death Penalty and the Massachusetts Prosecution of Nurse Kristen Gilbert*, 41 U. RICH. L. REV. 969, 983 (2007).

federal capital punishment in those rare, heinous cases that might prompt a public outcry in abolitionist states, it is worth considering the federal government's significant efforts to document, analyze, and combat racial disparity in capital prosecutions. While Review Committee members are not told the defendant's race or ethnicity, paralegals within the Capital Case Unit at the Department of Justice are directed to collect and maintain a wide variety of statistics related to race and ethnicity and capital-case decision-making.³⁰⁹ The DPP specifically prohibits consideration of racial characteristics in capital-case decision-making. The fact that the Department of Justice gathers and reports the type of statistics that make it possible to meaningfully assess this problem is a factor that should be considered in weighing the costs and benefits of those rare federal capital prosecutions in abolitionist states.

CONCLUSION

Application of the federal death penalty for crimes committed in abolitionist states has concerned federalists, who argue that imposition of federal sentencing law intrudes upon state sovereignty. But scholarly opposition to this extremely rare practice does not measure up in the face of clear and growing judicial precedent affirming federal power to determine sentences in federal criminal cases. Federal courts are correct as a matter of law when they reject federalism-based challenges to the FDPA. Equally important, as a matter of policy, the judicious and rare assertion of federal capital charges can help preserve, rather than attack, states' abolitionist sentencing regimes. Additionally, centralized review of federal capital cases can promote uniformity and create conditions for better tracking and assessment of—and thus ultimately better policies to combat—racial injustice in capital sentencing.

309. DOJ STATISTICAL SURVEY, *supra* note 30, at 2–3.