2001

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Source: Federal Sentencing Reporter

Citation: 14 Fed. Sent. R. 7 (2001).

Title: *Good Enough For Government Work? The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty*

Good Enough for Government Work?

The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty

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Thanks to my colleagues Aaron Rappaport and Bill Wang, and to Douglas Berman and Adam Thurschwell, for their helpful thoughts, and to Steve Shin (Hastings '03) and Beverly Taylor for research and clerical assistance.

Uniformity. Individualized fairness. Community values. These three concerns are in tension in any criminal sentencing regime. When the modern federal death penalty regime is studied, we find this to be no less true.

Although in tension, the concerns of uniformity and individualized fairness are addressed in the context of capital punishment by federal statutory and case law. The 1994 Federal Death Penalty Act (FDPA)[1] applies uniformly across the 94 federal districts that comprise the 50 states and various federal territories.[2] At the same time, individualized consideration of offenders is constitutionally mandated within this uniform procedural structure by *Furman, Gregg and Lockett,* and it is statutorily assured in § 3592 of the FDPA.[3]

But what role, if any, should localized community values that differ across geographic regions play in the nationwide federal capital sentencing regime? Should similar offenders committing similar federal murders nevertheless be treated differently sometimes, in order to take into account differing community views about the death penalty across the country?

I. Questions Posed by a Nation Divided

As a matter of both doctrine and practice, the United States is regionally divided about capital punishment: a quarter of the states do not authorize the use of capital punishment, and another quarter do not apply it very often although it remains on their statute books. On the other hand, most of the Southern and Border states vigorously implement their death penalty laws.[4]

Differing community views about the death penalty do not, of course, turn solely on the States' statutory structures. They can and do also depend on the character of local communities. It can be argued that the tortuous killing of a guard at a bank (federally insured, of course) in a small town where there has not been a murder in five years tears at the fabric of the community far more than does a similar killing committed in Brooklyn or Miami.[5] Perhaps the small-town community might wish to sanction the bank-guard killer more harshly than would an urban community in which murders are, sadly, more common. However, even if this can be said, is it appropriate to allow such community differences to play a distinguishing role in federal sentencing?

More specifically, in the context of the federal death penalty, should the differing community values of our States, expressed in statutes that either do or do not permit capital punishment, be given a *dispositive* voice in a federal capital sentencing regime when a death penalty could be sought for a murder committed within that state? Or, in other words, should the federal death penalty be prohibited, even for heinous federal crimes, in federal districts that lie within States that prohibit capital punishment?

This suggestion was presented by Senator Patrick Leahy (now Judiciary Committee Chair) in S.2690 in the last Congress (although a more recent version of this bill removes it). Section 401 of S.2690 (June 7, 2000) would have prohibited the federal government from seeking a death penalty in a district within a State that does not permit capital punishment, absent certain specified certifications made by the Attorney General.[6] Thus disuniformity in federal death penalty prosecutions would have been expressly endorsed by statute, a virtually unprecedented event in federal criminal law.

II. Nationwide Penalty Uniformity: A Basic Premise of Federal Criminal Sentencing

Broad "federalization" of capital punishment in 1994 has placed the issue of federal uniformity in sentencing versus diverse State values in unprecedentedly stark relief.[7] Since the founding of our present federal government, it has gone without saying that federal criminal statutes should carry sentences that are uniformly available throughout the Union, undifferentiated by geography. Thus, beginning on July 31, 1789, false oaths in customs matters were punishable by up to 12 months imprisonment, regardless of where in the thirteen new States (or elsewhere) the crime was committed.[8] Consistently over the next 200 years and through today, federal false statement statutes (e.g., 18 U.S.C. § 1001) carry penalties which are uniform in their availability across the nation.

In April 1790, the first federal crime bill was enacted, defining for the first time a number of federal crimes and again setting penalties that would be available uniformly throughout the Union.[9] In that bill, federal capital punishment was immediately endorsed (as was common at the time for most common law felonies). Thus willful murder committed on federal territory was punishable by death, as was federal piracy and forgery, without distinction as to where, within the Union, the crimes were committed.[10]

Thus what I will call statutory "penalty uniformity" – that is, uniform availability of the same potential sentence – has long been a formal premise of federal criminal statutes. Perhaps this is so basic, and so unspoken, that its obviousness takes a moment to sink in. Federal statutes that define federal crimes and set

penalties for their violation have never set different penalties for different parts of the country. Instead, the unspoken presumption has been that the penalties *available* for a particular federal crime should be the same everywhere that federal jurisdiction reigns. Of course, the exercise of sentencing discretion in particular cases might lead to different sentences when the statue is applied, depending on factors unique to particular offenders or the facts of their particular offenses. But the clear assumption was in 1790, and remains today, that a federal pirate, or robber, or murderer, could be sentenced to the same imprisonment term – or to death – regardless of wherever within the federal polity he committed his crime.

Such statutory penalty uniformity is not unusual within geographic regimes. State legislatures similarly enact uniform penalties for state offenses without regard to where, within the state, the crime is committed. Of course, there may be variation within a state from county to county, in terms of actual sentencing results.[11] Differing community views and values are thus given voice *in the application* of statutes uniform on their face. *De jure* sentence uniformity in statutory regimes almost always gives way to *de facto* differences in actual sentencing results. Nevertheless, the formal presumption is that violators of a particular criminal statute within the geographical compass of the enacting political unit (state, federal) are all subject to the same possible penalty without regard to geography.

I am aware of only one exception to geographic uniformity of penalty availability in the federal system: the Assimilative Crimes Act.[12] The ACA expressly adopts for federal courts not only the crimes of the State in which a particular piece of federal property is located, but also the state's "like punishment." While the Assimilative Crimes Act applies only when criminal conduct has "not [been] made punishable by any enactment of Congress," and is thus of limited applicability, it nevertheless represents Congressional endorsement of differing penalty structures – insofar as various states' penalties for the same criminal conduct may differ – for the same criminal conduct, depending upon geography (that is, the state in which the crime was committed).

The ACA, however, tends to apply only to crimes of a minor character, and it would be a mistake to attribute a conscious Congressional "intent" to geographically distinguish available penalties to the ACA structure. Adopting local state crimes, including their associated penalties, is done in the ACA simply for convenience: the crimes are viewed as minor and the easiest solution is simply to adopt neighboring states' regimes. The ACA certainly does not represent any considered legislative decision that geographic location properly ought to make a difference in federal criminal sentencing as a general matter.

III. The Federal Death Penalty: Goodbye to All That?

Congress's decision in 1994 to make the death penalty broadly available in federal courts across the country has led some observers to question the basic premise of geographic penalty uniformity for federal criminal sentencing. This is because 12 states, as well as the District of Columbia and the Commonwealth of Puerto Rico, do not currently authorize the death penalty as a possible punishment, even for the most heinous murder. Some of these states go so far as to affirmatively prohibit the death penalty in their state constitutions.[13] In Puerto Rico the strength of this prohibition is arguably even stronger, in that Puerto Rico's constitutional prohibition of capital punishment was necessarily approved by Congress when it approved Puerto Rico's status as a Commonwealth.[14]

Thus, roughly a quarter of all jurisdictions that comprise our federal polity are formally opposed to capital punishment. Yet the federal statutes that make capital punishment available apply across the nation, including of course within the 14 jurisdictions that forbid such a penalty in their own criminal prosecutions.

The "federalism" implications of this situation are now starkly apparent (although interestingly they seem to have escaped the attention of congressional legislators in 1994). As the Supreme Court has often noted, death is a punishment that is different in kind, not just in severity. The debate regarding the national applicability of the federal death penalty is not simply a disagreement about how long a term of imprisonment drug dealers should serve, but rather whether a penalty of an entirely different kind may be imposed by the federal government, even over the objections of a State. May the federal government direct that citizens of a State that does not authorize death may nevertheless be killed for criminal conduct committed within that same state?[15]

The simple answer under the Constitution is yes: the Supremacy Clause plainly means that Congress may authorize its own lawful punishments for criminal conduct within its jurisdictional reach, regardless of state or local objections. As a unanimous Supreme Court concluded almost a century ago, "[i]f the statute be a valid exercise of [federal] power, how it may affect persons or States is not material to be considered. It is the supreme law of the land and persons and States are subject to it."[16]

Most recently, the Supreme Court again unanimously endorsed the simple supremacy of federal criminal laws in its *Cannabis Buyers Club* decision.[17] Despite California's preference to decriminalize the distribution of marijuana for medical uses, a preference forcefully expressed by a 1996 state constitutional amendment, federal narcotics laws that make marijuana distribution a criminal offense remain fully applicable in California. Similarly, in June 2001 the first Circuit

made short work of the argument that the federal death penalty does not apply in Puerto Rico, concluding that Congress "retains federal power over federal crimes," regardless of a state's "moral and cultural sentiment against the death penalty."[18]

But this legal, constitutional answer does not resolve the policy question: should Congress force states that are opposed to capital punishment to accept its imposition by federal courts within their borders? This question raises deep issues well beyond the somewhat narrow context of the death penalty. It seems likely that there are many differences between communities and regions within the United States regarding appropriate punishments for the same federal crimes, particularly when the crimes themselves are controversial. Gambling, the use and distribution of certain narcotic drugs, and sexual conduct such as adultery or same-sex unions come immediately to mind.[19] Should federal criminal sentencing take into account, and seek to accommodate, differing geographic or community opinions regarding the appropriate punishments for federal crimes? Or is the national applicability and formal uniformity of available federal criminal punishments (like the uniform *definition* of federal crimes) a tenet so basic to the concept of "federal criminal law" that it ought not be tampered with?[20]

IV. Federal Uniformity in Capital Punishment: An Unachieved (Unachievable?) Goal.

Despite – or perhaps because of – the broad and uniform availability of the federal death penalty across the nation since 1994, there is now evidence which leave no doubt that it is not uniformly applied. In March 1999, I published an analysis of the statistical information then available, demonstrating not just apparent racial disparity but also *geographic* disparity in the prosecution and imposition of the federal death penalty.[21] At that time, roughly one-third of the 94 federal districts (31 total) had never even *submitted* a potential capital case for review at Main Justice.[22] As I wrote then, "it is difficult to believe that not a single murder in those eleven states since 1994 was a possible candidate for federal prosecution." Moreover, of the 102 defendants who had then been authorized for federal capital prosecution, half of these defendants (51 total) came from districts in the fifteen Southern or Border States which traditionally favor the death penalty. In fact, in terms of federal death penalties actually imposed, fully 80% came from these states (16 of the 20 federal death sentences at that time).

In September 2000, the Reno Justice Department issued its own comprehensive statistical survey, together with some analysis, which confirmed my findings of geographic as well as racial disparity.[23] At that time, 45 of the 94 federal districts still had never submitted a recommendation in favor of capital prosecution to Main Justice. Meanwhile, 10 districts had submitted a disproportionate 17 percent (31 of 183) of the pro-death recommendations,[24] and eight of these 10 districts were, again, in Southern or Border states.[25]

Finally, in December 2000 I published further data showing that as of February 2000, only five districts had submitted over 30 percent (267 of 633) of all the cases reviewed by Main Justice for capital prosecution.[26] Twenty-five federal districts still had never submitted a single case for potential capital prosecution review. There appears to be no serious doubt that, due to the exercise of discretion by 93 U.S. Attorneys around the country, the federal death penalty is disparately administered, roughly along geographic lines.

Most significantly for present purposes, my December 2000 article made a comparison of capital review submissions from the federal districts in the 12 states that do not permit capital punishment versus the federal districts in the 12 states that execute the most defendants stateside (put bluntly, "anti" versus "vigorous" death penalty states). This comparison showed dramatic geographic disparity. U.S. Attorneys in the "anti" states had submitted only 74 cases for review, and only 11 of these (15 percent) were authorized.[27] In the same time period, U.S. Attorneys in the "vigorous" states had submitted 190 cases for review (over 2 times as many cases), and 67 were authorized. This represented a 30 percent approval rate, fully *double* that for cases from "anti-death penalty" states.

In fact, perhaps the most revealing statistic is that no defendant currently on federal death row was prosecuted in a federal district within a state that does not have the death penalty. The fact is that, *de facto* if not *de jure*, we have a federal capital punishment system which already reflects differing community values in its sentencing results.

Is it surprising that U.S. Attorneys within states that do not permit the death penalty do not prosecute capital cases as often, or recommend them, as do U.S. Attorneys in states that vigorously pursue the death penalty? I don't think so. "All politics is local," it has been noted, and in practice U.S. Attorneys are usually selected by state-based politicians (Senators and U.S. Representatives) from among lawyers local to the district. It should not be surprising that U.S. Attorneys selected in this manner reflect, unconsciously and in good faith, the community values of their community and State.[28] In addition, U.S. Attorneys likely attempt to incorporate the views of their local jury pool when deciding whether and when to pursue a death penalty. And for cases that go to trial (a relatively small number), local juries obviously get to "impose" their own community values directly on the federal case.

Many federal observers would say not only that this is so, but that it *properly* is so: U.S. Attorneys *should* reflect the general community values of their surround-

ing milieu. Thus, a *Supplemental Report* on the federal death penalty issued by the Department of Justice on June 6, 2001, stated that "geographic 'disparities' are neither avoidable nor undesirable."[29] This report did not, of course, explicitly endorse the implementation of substantively-differing views about capital punishment in U.S. Attorneys' prosecution decisions. Such an explicit endorsement of substantive non-uniformity in the application of federal criminal law would be unprecedented. Rather, the *Supplemental Report* endorsed geographic disparities as a matter of *jurisdictional,* resource-allocation decisions. But it did so in dramatically strong terms, describing any contrary view as a "dereliction of duty":

> "There is nothing illegitimate about a district focusing on the actual needs of the geographic area for which it is responsible in decisions about the exercise of federal jurisdiction. Rather, a U.S. Attorney who failed to do so would be derelict in his or her responsibilities. To the extent that this results in varying numbers of federal capital cases among the districts, it is no different than, *nor any more objectionable than, the 'disparities'* among the districts *which occur equally in non- capital cases.*"[30]

This apparent official recognition, and acceptance, of geographic disparity in application of federal criminal law is, I would submit, unprecedented and rather breathtaking.

V. Geographic Disparity Based on Disparate Community Views: A Federalism-Based Idea Whose Time Has Come?

Of course, to say (as the Ashcroft *Supplemental Report* does) that disparity in federal capital cases is not "more objectionable" than in other non-capital federal criminal cases simply finesses the question whether geographic disparity in federal criminal punishments should be endorsed at all. Is such disparity, if based on sincerely and widely held community values within various states, "objectionable" as a matter of federal criminal law? Or should we battle against "disparity" in federal sentencings for all federal crimes where it is noticed? The federal sentencing guidelines are, to some large extent, premised on this latter view. But the guidelines do not resolve or even address whether we should endorse an official system of non-uniform federal capital punishment, as Senator Leahy and others have proposed, based on geography and differing community values.

In the 106th Congress, Senator Leahy and nine colleagues proposed an amendment to the FDPA to limit the availability of the federal death penalty in most cases to districts that are within states that permit capital punishment. If a state does not authorize the death penalty in stateside prosecutions, then this legislation would have forbidden most federal death penalty prosecutions within that State.

This proposed "federalism exception" to the FDPA (my words, not Senator Leahy's) would not have been absolute: in cases where (a) the state lacked jurisdiction, (b) the state requested federal prosecution, or (c) the federal crime involved was one of 13 listed, federal capital prosecutions would have been permitted regardless of the state's position on the death penalty (for the 13 listed crimes, presumably because these crimes are viewed as extremely serious and quintessentially "federal" (whatever that means)[31]). Nevertheless, the proposal to formally endorse federal penalty disuniformity, based on regionally differing values, for the capital sanction was dramatic, and unprecedented in more than two centuries of legislation addressing serious federal crimes.

How should we evaluate this proposal? I must admit to great struggle and day-to-day vacillation on this question. For a former "Main Justice" prosecutor, the concept of a uniform federal criminal law regime is deeply ingrained. Moreover, national statutory uniformity would seem to be almost a definitional component of *federal* criminal law—or else why have a largely duplicative body of criminal offenses at all? (Of course, one response to this concern might be that we do not need, and ought not have, a *federal* death penalty at all. Leave it to the States. I must admit a particular attraction to this overarching view.)[32] Finally, the strong federal effort in the sentencing guidelines to eliminate "unwarranted sentencing disparities"—to treat similar offenders who commit similar crimes similarly, on a nationwide basis—seems at war with a concept of a balkanized federal death penalty. And let's be clear: under the S.2690 amendment, a federal bank-robber or car-jacker who kills a victim while committing his crime in Putnam Station, New York, could receive the death penalty, while an identical robber—indeed, we can even hypothesize a robber with a much more serious and violent criminal record—could not if he simply acted a half-mile away in Benson Landing, Vermont.

Nevertheless, it may well be that "death is different," so different that it should be excepted from the normal rule of federal penalty uniformity. As noted before, there is some small precedent for such statutory geographic disuniformity from the Assimilative Crimes Act, which expressly leaves the penalty to the laws of the State from which the offense has been assimilated, and thus has federal judges applying non-uniform state penalty structures.[33]

In addition, the Sentencing Reform Act also noted the possibility of community or regional values playing a role in federal sentencing, although it did not mandate any particular resolution. Thus, as U.S. District Judge Charles Sifton noted in a prescient article for the *Federal Sentencing Reporter,* the Sentencing Reform

Act directed the Sentencing Commission to "consider" the "*community view* of the gravity of the offense . . . and the current incidence of the offense *in the community* and the nation as a whole."[34] The accompanying Senate Report noted that "[t]he community . . . might be national or it might be regional," and that "in some circumstances, the Commission may find it appropriate to draft the guidelines to take account of considerations based on *pertinent regional differences.*"[35]

The trick, as Judge Sifton noted, is in identifying "pertinent" regional differences; that is, differences in community values that ought, legitimately, to be permitted to influence federal sentences under laws of national applicability.[36] Perhaps the inscrutability of this question is one reason the Commission has never expressly endorsed allowing regional differences in community values to influence guidelines sentencing. And as Judge Sifton noted in 1993, the few cases that have imposed federal sentences based expressly on a local community view have been vacated on appeal. So far as I know, that result has not changed recently.[37]

Of course, the Sentencing Commission long ago decided that it ought not enter the field of death penalty sentencing.[38] The solution regarding our regional differences of opinion about capital punishment does not lie there – legislation is and ought to be required. But still: how should it come out?

VI. Statutory Uniformity Still Permits Regionally Different Results: The System Ain't Broke.

Debates about the death penalty suggest that the issue of capital punishment is much like other issues of great national division. In the late 20th century, abortion and obscenity come to mind.[39] People's views on such issues are shaped and held as much emotionally as intellectually, "in the gut" more so than in the brain. "Passionate," rather than intellectual, often describes the character of views on all sides of these issues. Perhaps as a consequence, I have never seen anyone who holds a passionate view on these issues have their minds changed as a result of "rational, logical" legal argument.

Historically, how have we as a national polity, resolved the intensely differing views on abortion and obscenity? How has our legal system addressed these sensitive, passionate, and seemingly intractable issues – a category into which I would also place capital punishment? In each area, it can be argued that we have allowed significant regional differences to be recognized. Perhaps the United States is simply too large and too diverse a country for uniform nationwide solutions to work on passionate policy issues. Perhaps the appropriate federal sentencing solution would be to likewise recognize regional differences, at least in the unique area of the death penalty.

Thus, after struggling with the legal, criminal, and constitutional status of obscenity for decades, the U.S. Supreme Court finally ruled that as a matter of federal, constitutional law, "contemporary community standards" should govern.[40] Now, the First Amendment does not expressly admit to recognition of such regional differences, and for this reason one might argue with the interpretive niceties of the Court's resolution. But as a matter of policy the "community standards" standard of *Miller* seems to have "worked": we are no longer plagued by obscenity cases played out on the national stage; instead, regional and community values are applied to resolve cases on a more palatable, local basis.

The abortion question has played out somewhat differently, because of course in *Roe v. Wade* in 1973, the Supreme Court found that a uniform national standard is constitutionally required, recognizing a federal right to abortion. Yet it is clear that, even in the wake of Roe, the Court has found much room for regional variation within this national framework.[41] Unlike obscenity, the abortion controversy is far from resolved. Yet we appear to have found some degree of national comfort by allowing regional and community values to produce significantly different structures for regulating abortion in different states.

Perhaps, in the interest of avoiding uniform constraints on a passionately divided nationwide policy question, this is an appropriate direction for the federal capital punishment regime to take. Of course, regional diversity is already the solution at the constitutional level: the Eighth Amendment permits but does not require States to have a death penalty. As a result, the States are divided into three rough groups on the question: those that do not permit capital punishment; those that statutorily permit it but do not actually implement it very often; and states that "vigorously" implement the death penalty.[42] The question is whether *federal* law should expressly endorse this regional diversity, and provide states with a "veto power" over the applicability of the federal death penalty within their borders.

My final reflection is that perhaps such explicit statutory endorsement is unnecessary. The discretionary enforcement of the FDPA already produces a roughly equivalent differentiation: no one currently on federal death row comes from a district within an anti-death penalty state. In fact, we may not want to give states absolute veto power – surely an assassination of the President should be prosecuted under uniform federal standards? We might even say the same about all crimes in which "federal interests" (however difficult this term may be to define) are paramount. Indeed, even S.2690 recognized a need for federal uniformity in some areas, by the listed exclusions from its "state veto" proposal. Meanwhile, 93 different U.S. Attorneys, and their local jury pools, are producing non-uniform "localized" results in a manner that the Department of Justice is, at least for now, content to endorse.

At bottom, statutorily endorsing non-uniform federal

penalties, even in the death penalty context, seems unnecessary, as well as too great a departure from settled norms of federal criminal sentencing. Since localized results are being produced *de facto*, the real question is whether it is too great a hypocrisy not to formally endorse it *de jure*. *De facto* localization may actually be the more efficient way to capture "just" results in individual cases, while permitting the national congressional will to be expressed by statute. Perhaps the precedent that statutorily-endorsed disuniformity would set would lead to the brink of undesired slippery slopes regarding other federal crimes. Difficulties of administration—what about changes of venue? crimes committed extraterritorially? continuing offenses committed across a number of states and federal districts?—also counsel against expressly endorsing regional vetoes in the federal death penalty statute.

The community-based discretion of locally chosen U.S. Attorneys and their jury pools appears already to reflect the same regional diversity that S.2690 would have endorsed. As a result of discretionary decisions made by the 93 U.S. Attorneys at various prosecution stages, the federal death penalty is disparately administered, largely in accordance with regional community values. In its June 2001 *Supplemental Report*, the Ashcroft Justice Department expressly endorsed such discretion-based differences. In sum, the federal death penalty system currently works about as the Framers envisioned more generally for their Federalism two centuries ago: regional differences are respected while essential federal interests are protected. Even if death is so different, and so intractably passionate, that we will never agree on a uniform national policy, express endorsement of death penalty disparity is unnecessary. Rather, as Justice Jackson so famously said over 60 years ago (and I am paraphrasing), we must at bottom depend on the good faith and wise discretion of federal prosecutors, acting within the crucible of competing community interests, to produce the best system of justice humanly achievable.[43] We should measure the success of the system by its results rather than its formal structure. The federal death penalty system, as currently functioning, does not appear to be broken. Efforts to "fix" it should be tempered by this view.

Notes

1 18 U.S.C. §§ 3591–3598.

2 Non-state territories include Washington D.C., Puerto Rico, the Virgin Islands, and Guam and the Northern Mariana Islands.

3 18 U.S.C. § 3592 (setting forth "Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified" and providing that "mitigating factors *shall* be considered").

4 See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L. J. 347, 450–452 (1999). The Southern and Border States are generally said to be the 11 states that comprised the Confederacy in the Civil War, plus the four states (Delaware, Kentucky, Maryland and Missouri) that had slavery although they remained in the Union. See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 51, 101, 284 (1988).

5 *Cf. United States v. Sanchez-Rodriguez*, 161 F.3d 556, 565 (9th Cir. 1998) (en banc) (Trott, J., dissenting) (noting that federal judges, "some of whom will be in New York City, others in Pocatello, Idaho," might disagree about the seriousness of "a $20 heroin sale").

6 The proposed language of S.2690 (106th Cong. 2d Sess.), § 401, entitled "Accommodation of State interests; certification requirement" was that "Notwithstanding any other provision of law, the Government shall not seek the death penalty in any case initially brought before a district court of the United States that sits in a State that does not . . . permit the imposition of such penalty for the alleged conduct, except. . . ." The newer version, S.486 (March 17, 2001) would simply require a written certification by the AG "that the Federal interest in the prosecution is more substantial than the interests of the State or local authorities," as well as "the basis . . . and reasons" for the certification. § 303.

7 Until the FDPA of 1994, capital punishment had been the exclusive province of the States since at least 1963. Until Timothy McVeigh and Raul Garza's executions in the summer of 2001, no federal prisoner had been executed since 1963. Indeed, after *Furman* declared existing capital punishment regimes unconstitutional in 1972, no new federal death penalty statute was enacted until 1988. That law, 21 U.S.C. § 848 (e)–(r), applied only to one, relatively rare federal crime ("continuing criminal enterprise"). But the 1994 FDPA extended capital punishment to a broad spectrum of offenses, included a dozen federal crimes in some form. *See generally* Little, *supra* note 4, at 372–85.

8 *See* 1 Stat. 46–47, Sess. I Ch. V, Sec. 35 (July 31, 1789). I believe this to be the first federal imprisonment crime dened for the "United" States by statute, contained in the fifth statute ever passed under our current Constitution. Three pages earlier, in section 25 of the same statute, a federal crime of knowing concealment of seizeable goods is stated, but the stated punishment was only a fine.

9 *See* 1 Stat. 112–119, Sess. II, Ch. IX, Sec. 1–33 (April 30, 1790).

10 *See id.*, Sec. 3, 8, 9 and 14. As was the custom at that time, the death penalty was stated in mandatory terms (if "convicted, every such person shall suffer death"), although statistics from the nation's first 36 years suggest that executive clemency strongly mitigated the mandatory nature of the federal death penalty. *See* Little, *supra* note 4, at 366 (noting that a 1829 report showed 138 federal capital trials since 1790 producing 118 convictions (and thus mandatory death penalties), but resulted in only 42 executions and 64 pardons). Interestingly, two federal capital defendants were reported "escaped" and six were simply "unaccounted for." *See* H. R. Exec., No. 20–146 (1829), *reprinted in* H. R.. Rep. No. 53–545, app. at 6, table 1 (1894).

11 *See* Richard Willing, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at A1 (showing substantial county-by-county differences in capital sentencing results within the same state).

12 18 U.S.C. § 13. Congress has also enacted "Special Provision for Indian Country," 18 U.S.C. § 3598, giving Indian tribal governments "opt in" discretion over the federal death penalty. Indian country jurisdiction, however, is premised on a status more akin to international sovereignty than federalism, and is not analogizable to the status of States within the federal union. *See generally* Ken

Murray & Jon M. Sands, *Race and Reservations: The Federal Death Penalty and Indian Jurisdiction*, 14 FED. SENT. REP. 28 (2001).

[13] *See, e.g.*, MICH. CONST., Art. IV, § 46.

[14] Puerto Rico's constitution provides that "the right to life . . . is recognized as a fundamental right of man. The death penalty shall not exist . . . " P.R. CONST. Art. II 67. Congress approved the entire Constitution in 1952, *see* 48 U.S.C. § 731. Nevertheless, the first Circuit recently made short work of the argument that the federal death penalty should not apply in Puerto Rico. *See United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001) (reversing district court's ruling that the federal death penalty may not be applied in Puerto Rico).

[15] See Michael Ponsor, *Life Death and Uncertainty*, reprinted 14 FED. SENT. REP. 61 (2001) (pondering about these issues). Of course, sometimes the actor, or the victim, or both, may not be citizens of the State in which the crime is committed. The most stark presentation of the federalism issue arises, however, when it is a non-death-penalty State's own citizen that the federal government seeks to put to death.

[16] *Hoke and Economides v. United States*, 227 U.S. 308, 320 (1913).

[17] *United States v. Oakland Cannabis Buyers Club*, 121 S. Ct. 1711 (2001).

[18] *Acosta-Martinez*, 252 F.3d at 19–20.

[19] But federal criminal jurisdiction does not extend, you might say, to sexual conduct. Not so fast. Consider 18 U.S.C. § 2421, which defines a four-year felony for transporting a person across state lines to "engage in . . . *any* sexual activity for which any person can be charged with a criminal offense" (emphasis added). States are, of course, diverse in the types of sexual conduct they criminalize. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986).

[20] I briefly considered the constitutional Equal Protection implications of this question in my *History* article, *see* Little, *supra* note 4, at 439 n. 449, and do not further pursue that avenue here.

[21] *See* Little, *supra* note 4, at 453–55 (geographic disparity); *id.* at 478–81 (racial disparity). It is important to note that "disparity" refers simply to an apparent statistical imbalance, and does not at all indicate improper *bias*, which is a subjective claim of bad faith that statistics alone generally cannot prove or disprove. "Disparity" is a statement of fact, and may occur for benign reasons. "Bias" is a statement of opinion or accusation, which my analyses of the federal death penalty have never purported to support. *See* Rory K. Little, *Why a Federal Moratorium?*, 33 CONN. L. REV. 791, 809 (2001).

[22] The U.S. Attorneys Manual has required submission of federal death penalty prosecutions for Attorney General approval since the federal death penalty was revived in 1988. *See* USAM § 9–10.020.

[23] U. S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000) *available at* <www.usdoj.gov/dag/pubdoc/dpsurvey.html> (Sept. 12, 2000) (last visited on August 31, 2001), *and excerpts reprinted infra* 14 FED. SENT. REP. 35 (2001).

[24] *Id.* at 15.

[25] *Id.* at T–14 to 17, Table 5A. The 10 districts were in Alabama, Arkansas, Florida, Illinois (Southern District, 3 defendants), Mississippi, Missouri, and North Dakota (1 defendant).

[26] *See* Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N. U. L. REV. 529, 560 (2000).

[27] *Id.* at 560–61.

[28] *See* Little, *supra* note 4, at 467. Of course the real world is more complex than this simplified caricature, and the correlation is not 100%. *See id.* at 467–68. But as a general observation, I think it holds true.

[29] U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW 21 (June 6, 2001), *available at* <www.usddoj.gov/dag/pubdoc/deathpenalty study.htm> (last visited on August 31, 2001), *and excerpts reprinted infra* 14 FED. SENT. REP. 40 (2001).

[30] *Id.* at 22 (emphasis supplied).

[31] The listed crimes included treason (18 U.S.C. § 2381), foreign espionage (§ 794), and assassination of federal officials (§§ 351, 1114, 1751).

[32] There is no doubt that the panoply of federal crimes for which the federal death penalty is available largely duplicates already-existing state criminal jurisdiction. Thus bank robbery, car-jacking, drug distribution, and murder (even of federal officials) might all be prosecuted in state courts, unless the conduct occurred on federal property beyond the jurisdictional reach of the states. In fact, as I have previously demonstrated, "all of the 26 federal defendants that have been sentenced to death" federally "could have been prosecuted [for the death penalty] by the states where the crimes were committed." Little, *supra* note 26, at 542. Thus the question "why have a federal death penalty at all?" is not an idle one.

[33] However, even the very little caselaw that addresses this arcane aspect of the ACA holds that ACA sentences need be only "similar, not identical" to state sentences for the same offense. For example, although State statutory maximum and minimum sentences do apply, federal courts hold that the federal sentencing guidelines govern within state ranges; moreover, it is said that federal courts "will not assimilate a state sentencing provision which conflicts with federal sentencing policy." *See United States v. Pierce*, 75 F.3d 173, 176 (4th Cir. 1996). Thus there is nationalizing "federal" aspect even to ACA sentencing.

[34] 28 U.S.C. § 994 (c) (4), (7) (emphasis added), discussed in Charles P. Sifton, *Theme and Variations: The Relationship Between National Sentencing Standards and Local Conditions*, 5 FED. SENT. REP. 303 (1993).

[35] S. Rep. 98–225 at 170 (emphasis added).

[36] "What is the distinction between local variations that are valid, and those that are invalid as expressing local bias, prejudice or a parochial narrowness of view?" Sifton, *supra* note 34, at 310.

[37] *See, e.g., United States v. Banuelos-Rodriguez*, 215 F.3d 969, 973 (9th Cir. 2000) (en banc) (rejecting sentencing guidelines departures based on differing immigration offense plea bargain policies in different federal districts within California).

[38] *See Gubensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1256 (9th Cir. 1988) (describing the controversy around the Sentencing Commission's decision not to promulgate death penalty guidelines).

[39] Earlier, one might consider Prohibition, which was finally resolved by allowing state non-uniformity, after an unhappy attempt at constitutional uniformity via the Eighteenth amendment. Slavery comes to mind in the Eighteenth century, although we resolved that issue by Civil War, not a solution I advocate today.

[40] *Miller v. California*, 413 U.S. 15, 23–24 (1973) (after reciting decades of difficulty that the Court had experienced in evaluating obscenity cases).

[41] *See, e.g, Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990).

[42] *See* Little, *supra* note 4, at 451.

[43] Robert Jackson, *The Federal Prosecutor*, 31 J. AMER. INST. CRIM. L. & CRIMINOLOGY 3 (1940).