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## The Coming Federalism Battle in the War over the Death Penalty

Michael J. Zydney Mannheimer

*From the founding of the Republic until 2002, it appears that only a single person was ever sentenced to death by the federal government for criminal conduct occurring in a state that did not authorize the death penalty for the same conduct. However, in the last twenty-three years, the federal government has sought the death penalty dozens of times in non-death penalty states. Such cases virtually always involve offenses historically thought of as being best dealt with at the state level. And since 2002, eleven people have been sentenced to death by the federal government for criminal conduct occurring in non-death penalty states. While some federal capital defendants in non-death penalty states have raised constitutional objections in their cases based on federalism principles, these objections have uniformly been rejected at the district court level. However, no federal courts of appeals have yet addressed these objections.*

*Currently, thirty-one states authorize capital punishment while nineteen do not. The category of non-death penalty states includes some of the Nation's most populous, such as New York, Illinois, and Michigan. In the coming decades, it is likely that other large states, such as California and Pennsylvania, and perhaps even Texas, will abandon the death penalty. It is also likely that capital punishment will be retained in many states, particularly in the South and West, and at the federal level. Given these premises, the use of the federal death penalty in non-death states, which is now mostly a side issue in the death penalty debate, may take on more prominence. As the demand for retribution against the very worst murderers in these states*

*continues, future pro-death penalty Attorneys General will likely bring more of these cases in federal court. Moreover, Congress may continue to expand federal jurisdiction over murders that have tenuous connections to interstate commerce. In short, we may soon see a federalism battle in the war over the death penalty.*

## I. INTRODUCTION

Lurking in the debate over the death penalty lies an issue that has received little attention in the public mind: the federal death penalty in non-death-penalty states.<sup>1</sup> Read any newspaper article about a case involving this phenomenon and, buried toward the end of the piece, it will briefly remind the reader that although the state has no death penalty, the defendant is subject to execution because he is being prosecuted in federal court. This it will present matter-of-factly, ignoring the substantial federalism implications of the case.<sup>2</sup>

By contrast, this issue has garnered outsized attention in legal scholarship given the tiny proportion of federal capital cases in non-death states as compared with death penalty cases overall.<sup>3</sup> As early as 2001, scholars have noted the problematics of the federal government's pursuit of a punishment for crimes

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1. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347, 357 (1999) ("Significant federalism and state sovereignty issues lurk beneath the surface of a nationally uniform federal death penalty.").

2. Denise Lavoie, *Jury Sentences Massachusetts Carjacking Killer of 2 to Death*, AP NEWS, Jan. 10, 2017, <https://apnews.com/feba8faa48494d32aa5222be56cfd24b> [<https://perma.cc/QXJ5-ET7D>] (last paragraph out of thirteen: "Massachusetts abolished its state death penalty in 1984, but Sampson was prosecuted under federal law, which allows prosecutors to seek the death penalty when a murder is committed during a carjacking.").

3. See Michele M. Campbell, *Federalism and Capital Punishment: New England Stories*, 36 *VT. L. REV.* 81, 81 (2011) ("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.").

committed in states that do not authorize that punishment.<sup>4</sup> Federal capital defendants have begun to raise this as a constitutional issue and district courts have begun to address it. Yet, as of now, no federal appeals court has addressed it head on.

This Article predicts that, as the death penalty recedes from some states but remains in force at the federal level, this issue will become more prominent in the coming decades. The federal death penalty is sometimes used as a device for addressing truly heinous crimes that cannot be punished capitally by state law. As more states, and especially more populous states with more murders, abandon the death penalty, the federal government will step in more and more in order to exact retribution in cases that seem to cry out for it. They will likely do so through expansive use of federal kidnapping and robbery laws, and might very well enact new statutes to bring more mine-run murders within federal jurisdiction. Part I discusses the past. It starts with the 1937 *Chebatoris* case, the only case in U.S. history before 1993 (so it appears) in which the

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4. See Sean M. Morton, Comment, *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, 1437-38 (2001) (arguing that the federal death penalty should be considered cruel and unusual punishment in any state that has barred the death penalty by virtue of its own constitution); see also John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL'Y 195, 214 (2004) (suggesting "a 'state-based, relativist interpretation to [sic] the Eighth Amendment's ban against 'cruel and unusual' punishments'"); Eileen M. Connor, *The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States*, 100 J. CRIM. L. & CRIMINOLOGY 149, 197-99 (2010) (arguing on policy grounds that federal government should not seek death penalty in non-death states); 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, 1715 (2003) (recommending deference by Attorney General to local U.S. Attorneys in deciding when to seek the death penalty, as a way of addressing the federalism issue); Michael J.Z. Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 819 (2006) (arguing on originalist grounds that Eighth Amendment bars federal death penalty in non-death-penalty states); Jonathan Ross, *The Marriage of State Law and Individual Rights and a New Limit on the Federal Death Penalty*, 63 CLEV. ST. L. REV. 101, 101 (2014) (asserting that federal death penalty in non-death states constitutes unconstitutional federal interference with fundamental state right not to be executed); cf. Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historic Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CON. L. 57, 63 (2009) (describing change in federal death penalty policy under Attorneys General Ashcroft, Gonzalez, and Mukasey).

U.S. sought the death penalty for a crime in a non-death-penalty state. It turns to the spate of such cases in the past twenty-four years and identifies some trends in those cases. Part II makes some predictions about the relatively near future: that the federal government and some states will retain the death penalty even as some states abandon it, and that the federal death penalty will likely be used to reach fairly typical murders. This Part will show that the already expansive federal kidnapping and robbery statutes might be utilized for these purposes and predicts that even more expansive federal statutes are possible to bring even more murder cases within federal jurisdiction.

## II. THE HISTORY OF THE FEDERAL DEATH PENALTY IN NON-DEATH STATES

Federal death penalty prosecutions in non-death penalty states have been exceedingly rare. It appears that in only one case prior to 1993 did the federal government seek the death penalty for a crime that could not be punished by death in the state where it occurred. Since 1993, however, cases have been brought against sixty-nine such defendants, resulting in eleven persons having been sentenced to death for crimes in non-death states.

### A. The Past: The Chebatoris Case

It appears that for over two centuries, from 1791 until 1993, only once did the federal government seek the death penalty for a crime committed in a state that did not authorize capital punishment for the same offense. Of course, until 1846, when Michigan mostly abandoned capital punishment,<sup>5</sup> there were no non-death-penalty states. But given that there were ten states with essentially no death penalty by the end of World War I,<sup>6</sup> the virtual absence of any such a case for over 200 years is striking.

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5. See RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 9 (1991).

6. See *Furman v. Georgia*, 408 U.S. 238, 372 (1972) (Marshall, J., concurring). The ten states were: Arizona, Kansas, Maine, Michigan, Minnesota, Missouri, Oregon, South Dakota, Washington, and Wisconsin. *Id.* Six of these—Arizona, Kansas, Missouri, Oregon, South Dakota, and Washington—later restored the death penalty. *Id.*

The outlier was Anthony Chebatoris. On September 29, 1937, Chebatoris and an accomplice, Jack Gracey, attempted to rob the Chemical State Savings Bank in Midland, Michigan.<sup>7</sup> The robbery was foiled in large part by the bank president, Clarence H. Macomber, who grabbed Gracey's shotgun.<sup>8</sup> Chebatoris then shot both Macomber and bank cashier Paul Bywater before he and Gracey beat a hasty retreat.<sup>9</sup> As they attempted their escape from the bank, a dentist with an office above the bank began shooting at them, eventually killing Gracey.<sup>10</sup> Henry Porter had the double misfortune of standing in the vicinity of the bank and being dressed in a chauffeur's cap with a visor, which Chebatoris apparently mistook for a police cap.<sup>11</sup> Chebatoris shot Porter with his rifle.<sup>12</sup> Although Macomber and Bywater recovered, Porter succumbed to his injuries twelve days later.<sup>13</sup>

Chebatoris was tried in federal court for attempted bank robbery and murder under the then-new federal Bank Robbery Act of 1934.<sup>14</sup> On October 28, 1937, he was convicted and sentenced by the jury to death.<sup>15</sup> Although Michigan still treated treason as a capital crime,<sup>16</sup> it had abandoned the death penalty for murder almost a century earlier, in 1846.<sup>17</sup> There was no

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7. Trial Tr., *United States v. Chebatoris*, No.3977 (E.D. Mich. [Oct. 26, 1937]) [hereinafter *Chebatoris Trial Tr.*] at 27; *see also* DAVID G. CHARDAVOYNE, *THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN: PEOPLE, LAW, AND POLITICS* 212 (2012).

8. *Chebatoris Trial Tr.*, *supra* note 7, at 24, 27-28.

9. *Id.* at 26, 28-30, 32, 36-37, 92, 94, 132-33.

10. *Id.* at 62, 98, 103, 110-12, 121, 128-29, 143, 150, 158-61, 175-76, 189-90, 202, 235, 251; *see* Ray J. Kuhn, "Bank Gunmen Linked with Other Crimes," *Bay City Times*, Sept. 30, 1937, at 1.

11. *Chebatoris Trial Tr.*, *supra* note 7, at 66, 99, 145, 229, 352. *See also* Associated Press, *Dentist Shoots from His Office Window, Felling Bandits After Raid on Bank*, *N.Y. Times* (Sept. 10, 1937), at 10 (*Chebatoris* shot Porter "apparently in the belief that [Porter] was the one who shot at them.")

12. *Chebatoris Trial Tr.*, *supra* note 7, at 66, 99, 145, 193, 198, 199, 209.

13. *Id.* at 223-24, 228.

14. 48 Stat. 783, § 2 (May 18, 1934).

15. *Chebatoris Trial Tr.*, *supra* note 7, at 355-56.

16. *See* *Midland Daily News*, Dec. 1, 1937, at 1; CHARDAVOYNE, *supra* note 7, at 219.

17. *See* CHARDAVOYNE, *supra* note 7, at 215.

appeal.<sup>18</sup> Chebatoris was hanged less than a year later on July 8, 1938.<sup>19</sup>

### B. The Upward Trend Since 1993

No other federal capital prosecutions took place in non-death penalty states until after the U.S. Supreme Court's decision in *Furman v. Georgia*<sup>20</sup> placed capital prosecutions temporarily on hold nationwide. In *Furman v. Georgia*, the Court held that the imposition of the death penalty through the unbounded discretion of a judge or jury violates the Eighth Amendment's bar on "cruel and unusual punishments," as incorporated by the Fourteenth Amendment's guarantee of due process.<sup>21</sup> In *Gregg v. Georgia*, the Court approved a statutory scheme that allowed for imposition of the death penalty by a jury after "guided discretion."<sup>22</sup> For a time, with no congressional action, federal capital provisions were left in limbo: they authorized the death penalty but did not allow for the kind of guided discretion that would render them in compliance with the procedures mandated by *Furman* and *Gregg*.<sup>23</sup> That would come only in 1988 with the passage of the Anti-Drug Abuse Act, colloquially known as the Drug Kingpin Act.<sup>24</sup> This Act authorized the death penalty for a small number

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18. JACK HOBAY, LAWLESS YEARS—THE TONY CHEBATORIS AND JACK GRACEY STORY 223 (2012); JAMES L. HOPP, EXECUTION 94 (2009); e-mail from Dell H. Thomson to author, dated Nov. 29, 2014 (on file with author). Dell H. Thompson is the grandson of one of Chebatoris's defense attorneys, also named Dell Thompson.

19. See Letter from Richard F. Doyle, Chief U.S. Probation Officer, to Hon. Arthur J. Tuttle, U.S. District Court, Eastern District of Michigan (July 9, 1938), at 2 (on file with author). Several years later, Max Stephan of Detroit was convicted of treason in the same court and before the same judge, and sentenced to hang. See JAMES R. WILSON, NO ORDINARY CRIME: AN AUTHENTIC TALE OF JUSTICE INFLUENCED BY WAR HYSTERIA 139-40, 149 (1989). His crime was to give aid and comfort to a German airman who had escaped from a Canadian prisoner of war camp during World War II. *Id.* at 97. But, again, Michigan had retained capital punishment for treason. And, in any event, Stephan's life was spared by an eleventh-hour commutation by President Franklin D. Roosevelt. *Id.* at 178.

20. 408 U.S. 238 (1972) (per curiam).

21. *Id.* at 239-40.

22. *Gregg v. Georgia*, 428 U.S. 153, 192 (1976).

23. See Mannheimer, *supra* note 4, at 824.

24. Anti-Drug Abuse Act of 1988, 21 U.S.C. § 1501 (2012); Mannheimer, *supra* note 4, at 824.

of drug-related offenses and provided procedures for the implementation of the federal death penalty.<sup>25</sup> Still, prior to 1994, only five defendants were prosecuted capitally by the federal government in non-death penalty states.<sup>26</sup> Then the door to federal capital prosecutions flew wide open with the Federal Death Penalty Act in 1994.<sup>27</sup> By creating new crimes punishable by death and by authorizing the death penalty for some pre-existing federal crimes, the FDPA created about sixty capital crimes.<sup>28</sup>

Since 1993, federal capital prosecutions have been brought against sixty-nine defendants in non-death penalty states, resulting in eleven sentences of death.<sup>29</sup> Excluding one currently pending case, the federal government has obtained death verdicts in eleven of sixty-eight, or 16.18%, of cases.<sup>30</sup> The eleven death sentences represent 30.56% of the thirty-six cases that went to juries, including one acquittal.<sup>31</sup> As of this writing, six people are under sentence of death for crimes committed in non-death penalty states.<sup>32</sup>

Some trends are notable among the federal death penalty cases brought in the modern era in non-death penalty states.

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25. Mannheimer, *supra* note 4, at 824.

26. *See infra* Appendix.

27. *See* Mannheimer, *supra* note 4, at 824.

28. *See id.*

29. *See infra* Appendix. The information in the Appendix was taken from data compiled by the Capital Defense Network [hereinafter CDN]. I began with their document entitled "Authorized Federal Capital Prosecutions Arising in Non Death Penalty States," [https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu\\_id=92&folder\\_id=6086](https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=92&folder_id=6086) (last updated June 2016) [<https://perma.cc/KW6W-9JZM>]. I excluded federal capital prosecutions in the District of Columbia and Puerto Rico. This yielded cases against sixty defendants. In addition, I culled from CDN's other documentation on authorized federal capital cases nine additional cases where either (1) the death penalty was not authorized by the state at the time the crime occurred but the death penalty was later adopted by the State; or (2) the death penalty was not authorized by the state at the time a sentence of death was imposed, even if the death penalty had been authorized by the state at the time the crime occurred. I did not include cases which were instituted at a time when the state authorized the death penalty but concluded after the state had abolished capital punishment, so long as the death penalty was not actually imposed. I also did not include cases in which the death penalty was imposed prior to the state's abolition of the death penalty, on the theory that a state could reasonably decide to abandon capital punishment only prospectively.

30. *See id.*

31. *Id.*

32. *Id.*



First, it is worth noting that twenty notices of intent were filed during the eight years of the Clinton administration (Jan. 20, 1993, to Jan. 20, 2001), thirty-nine during the George W. Bush administration (Jan. 20, 2001, to Jan. 20, 2009), and only ten during the Obama administration (Jan. 20, 2009, to Jan. 20, 2017).<sup>33</sup> Thus, more were filed during the eight years of a Republican administration (thirty-nine) than during nearly sixteen years of Democratic administrations (thirty).

As Table 1 demonstrates, the two federal districts that have seen the greatest number of these cases are the Eastern District of Michigan and the Eastern District of New York, with sixteen and thirteen, respectively. However, no Eastern District of Michigan jury has yet sentenced a defendant to death in the modern era, and only one jury in the Eastern District of New York has sentenced a defendant to death.<sup>34</sup> Two federal districts, the District of Massachusetts and the Northern District of West Virginia, have each seen five federal capital defendants, with two death sentences in the former and none in the latter. The Western District of Michigan, the District of Vermont, and the Southern District of West Virginia have each had three capital defendants, resulting in one death sentence in the former two districts and two in the last. Eight districts have had two capital defendants each: the District of Alaska (no death sentences), the District of Hawai'i (no death sentences), the Northern District of Iowa (two death sentences), the Southern District of Iowa (no death sentences), the Northern, Southern, and Western Districts of New York (no death sentences in any), and the District of North Dakota (one death sentence). Finally, five districts have had one capital defendant each: the District of Connecticut, the Southern District of Illinois, the District of New Jersey, the District of New Mexico, and the District of Rhode Island. Of these, only the District of Connecticut has handed down a death sentence, while the case in the District of New Jersey is still pending.

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33. *Id.* As of this writing, it does not appear that any have been filed during the Trump administration.

34. *United States v. Wilson*, 493 F. Supp. 2d 537, 538 (E.D.N.Y. 2007).

TABLE 1: FEDERAL CAPITAL CASES IN NON-DEATH PENALTY STATES BY DISTRICT

| Federal District | Total defendants | Total defendants going to juries | # of death sentences | % death sentences | % death sentences of those that went to jury |
|------------------|------------------|----------------------------------|----------------------|-------------------|--|
| E.D. Mich.       | 16               | 5                                | 0                    | 0                 | 0  |
| E.D.N.Y.         | 13               | 9                                | 1                    | 7.69              | 11.11  |
| D.Mass.          | 5                | 5                                | 2                    | 20                | 20   |
| N.D. W. Va.      | 5                | 1                                | 0                    | 0                 | 0  |
| W.D. Mich.       | 3                | 3                                | 1                    | 33.33             | 33.33  |
| D.Vt.            | 3                | 1                                | 1                    | 33.33             | 100  |
| S.D. W. Va.      | 3                | 2                                | 2                    | 66.67             | 100  |
| D. Alaska        | 2                | 0                                | 0                    | 0                 | 0  |
| D.Haw.           | 2                | 1                                | 0                    | 0                 | 0  |
| N.D. Iowa        | 2                | 2                                | 2                    | 100               | 100  |
| S.D. Iowa        | 2                | 0                                | 0                    | 0                 | 0  |
| N.D.N.Y.         | 2                | 2                                | 0                    | 0                 | 0  |
| S.D.N.Y.         | 2                | 1                                | 0                    | 0                 | 0  |
| W.D.N.Y.         | 2                | 0                                | 0                    | 0                 | 0  |
| D.N.D.           | 2                | 1                                | 1                    | 50                | 100  |
| D.Conn.          | 1                | 1                                | 1                    | 100               | 100  |
| S.D. Ill.        | 1                | 0                                | 0                    | 0                 | 0  |
| D.N.J.           | 1                | —                                | —                    | —                 | —  |
| D.N.M.           | 1                | 1                                | 0                    | 0                 | 0  |
| D.R.I.           | 1                | 0                                | 0                    | 0                 | 0  |
| <b>TOTALS</b>    | 69               | 36                               | 11                   | 16.42             | 30.56  |

· Includes one acquittal.

As demonstrated in Table 2, a majority—forty-three out of sixty-nine—of these defendants were charged with murders in furtherance of either racketeering or drug trafficking, or both, although four were also charged with other capital offenses.

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The next most represented category of federal offense is carjacking with death resulting, with seven defendants, three of whom also were charged other capital offenses. Six defendants were charged with murders on federal land, and five each were charged with murder of a federal witness or person aiding in a federal investigation, and bank robbery or attempted bank robbery with death resulting, though some of these were charged with multiple offenses. Four each were charged with interstate kidnapping with death resulting and Hobbs Act robbery with death resulting, though, again, some of these were charged with multiple offenses. Three were charged with arson affecting interstate commerce with death resulting, and one each was charged with interstate murder for hire, mailing an explosive device with death resulting, and use of a weapon of mass destruction with death resulting.

Of the eleven defendants actually sentenced to death, six were charged with murder related to racketeering or drug trafficking, four with murder of a person aiding in a federal investigation, three with carjacking resulting in death, two with kidnapping resulting in death, one with murder on federal land, and one with death resulting from use of a weapon of mass destruction.<sup>35</sup> Thus, the charges most likely to result in a death sentence have been use of a weapon of mass destruction with death resulting (one out of one, or 100%); murder of a federal witness or person aiding in a federal investigation (four out of six, or 66.67%); interstate kidnapping with death resulting (two out of four, or 50%); and carjacking with death resulting (three out of seven, or 42.86%). While murder in relation to drug trafficking or racketeering represent 53.75% of all federal capital counts in non-death states since 1993, death sentences have been rendered in only six of forty-three (3.95%) of these cases. Moreover, five of those six defendants were charged with other capital offenses as well: four with murder of federal witness or person aiding in a federal investigation and one with carjacking.

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35. These numbers add up to more than eleven because some defendants were charged with multiple capital offenses.

TABLE 2: FEDERAL CAPITAL CASES IN NON-DEATH PENALTY STATES BY STATUTE

| Federal Capital Offense   | Total defendants | Total defendants going to juries | # of death sentences | % death sentences | % death sentences of those that went to jury |
|---|------------------|----------------------------------|----------------------|-------------------|--|
| Murder relating to drug trafficking and/or racketeering               | 43               | 23                               | 6                    | 13.95             | 26.1   |
| Carjacking, death resulting   | 7                | 4                                | 3                    | 42.86             | 75   |
| Murder of federal witness or person aiding in a federal investigation | 6                | 5                                | 4                    | 66.67             | 80   |
| Murder on federal land  | 5                | 4                                | 1                    | 20                | 25   |
| Bank robbery, death resulting   | 5                | 3                                | 0                    | 0                 | 0  |
| Interstate kidnapping, death resulting                                | 4                | 2                                | 2                    | 50                | 100  |
| Hobbs Act robbery, death resulting                                    | 4                | 3                                | 0                    | 0                 | 0  |
| Arson affecting commerce, death resulting                             | 3                | 0                                | 0                    | 0                 | 0  |
| Interstate murder for hire  | 1                | 0                                | 0                    | 0                 | 0  |
| Mailing an explosive device, death resulting                          | 1                | 0                                | 0                    | 0                 | 0  |
| Use of weapons of mass destruction, death resulting                   | 1                | 1                                | 1                    | 100               | 100  |
| <b>TOTALS</b>   | 80**             | 45**                             | 17**                 | 21.25             | 37.78  |

\*\* Defendants charged with multiple capital offenses are counted more than once.

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### C. Some Representative Cases

A look at some representative cases of federal capital prosecutions in non-death states—some having resulted in a death sentence and some not—demonstrates some commonalities. Unsurprisingly, it appears that the federal government is likely to bring such cases, and is more likely to obtain a death sentence, in cases involving victims perceived to be innocent. Moreover, two such cases, neither of which ultimately resulted in a death sentence, demonstrate the potential for an even more expansive use of the federal death penalty in non-death states.

#### 1. *Drug Trafficking/Racketeering Cases*

The federal government's rather poor record in obtaining death sentences in the Eastern District of Michigan (zero for sixteen)<sup>36</sup> and the Eastern District of New York (one for thirteen)<sup>37</sup> can be attributed at least in part to the fact that twenty-four of these twenty-nine cases involved murders in furtherance of drug trafficking or racketeering.<sup>38</sup> This is not surprising, as these districts encompass the mean streets of Detroit and Brooklyn.<sup>39</sup> Such cases typically involve victims who themselves are active in the drug trade or other illegal activities.<sup>40</sup>

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36. See *supra* Table 1.

37. See *supra* Table 1.

38. See *infra* Appendix.

39. Eastern District of Michigan Court Locations and Hours, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, <https://www.mied.uscourts.gov/index.cfm?pageFunction=courtLocations&locationID=> (last visited Feb. 15, 2017) [<https://perma.cc/VY6D-PTMJ>]; *Crime Rate in Detroit, Michigan (MI): Murders, Rapes, Robberies, Assaults, Burglaries, Thefts, Auto Thefts, Arson, Law Enforcement Employees, Police Officers, Crime Map*, CITY-DATA.COM, <http://www.city-data.com/crime/crime-Detroit-Michigan.html> (last visited Feb. 15, 2017) [<https://perma.cc/5X2Q-XJZZ>]; Brooklyn, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, <https://www.nyed.uscourts.gov/court-info/court-locations/brooklyn>; *Crime Rate in New York, New York (NY): Murders, Rapes, Robberies, Assaults, Burglaries, Thefts, Auto Thefts, Arson, Law Enforcement Employees, Police Officers, Crime Map*, CITY-DATA.COM, <http://www.city-data.com/crime/crime-New-York-New-York.html> (last visited Feb. 15, 2017) [<https://perma.cc/D9RX-DWX9>].

40. ROBERT M. REGOLI ET AL., DELINQUENCY IN SOCIETY: THE ESSENTIALS 324 (2011).

The only one of these twenty-nine defendants who was sentenced to death was Ronell Wilson in the Eastern District of New York.<sup>41</sup> But Wilson was also convicted of carjacking with death resulting.<sup>42</sup> More importantly, Wilson's victims were not fellow drug traffickers. They were two undercover police officers.<sup>43</sup> Wilson was involved in a transaction to sell guns to the two officers as part of a sting operation.<sup>44</sup> However, Wilson planned to rob them of the buy money instead, and he was also concerned that the buyers might actually be undercover officers.<sup>45</sup> He shot each one to death and stole their car.<sup>46</sup>

After New York authorities indicted Wilson and filed a notice of intent to seek the death penalty, the New York Court of Appeals held that the state's death penalty statute violated the state constitution.<sup>47</sup> Wilson was then prosecuted capitally by the federal government.<sup>48</sup> Wilson ultimately was sentenced to death not once but twice.<sup>49</sup> His first death sentence was overturned on appeal based on a comment made by the prosecutor in summation at the penalty phase that violated his Fifth Amendment right not to testify.<sup>50</sup> After remand for a new sentencing hearing, he was again sentenced to death.<sup>51</sup>

Of the five remaining death sentences rendered in drug trafficking or racketeering cases, all but one were convicted of "witness elimination" murder as well. George Lecco and

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41. *United States v. Whitten*, 610 F.3d 168, 168 (2d Cir. 2010).

42. *Id.*

43. *Id.*

44. *Id.* at 174.

45. *Id.*

46. *Whitten*, 610 F.3d at 175.

47. *Id.*; *People v. LaValle*, 817 N.E.2d 341, 356-59 (N.Y. 2004).

48. *Whitten*, 610 F.3d at 175.

49. *Id.* at 177; *United States v. Wilson*, 967 F. Supp. 2d 673, 677 (E.D.N.Y. 2013).

50. *Whitten*, 610 F.3d at 177, 194-96.

51. *Wilson*, 967 F. Supp. 2d at 677; *United States v. Wilson*, 170 F. Supp. 3d 347, 391-92 (E.D.N.Y. 2013). More recently, the district court vacated his death sentence on the ground that Wilson was exempt from the death penalty based on intellectual disability. *See United States v. Wilson*, 04-CR-1016 (NGG), 2016 WL 1060245, at \*36 (E.D.N.Y. Mar. 15, 2016). The United States has decided not to appeal this determination. *See John Riley, Cop-killer Ronell Wilson Won't Face Death Penalty After Appeal Dropped*, NEWSDAY (June 26, 2017), <http://www.newsday.com/news/new-york/cop-killer-ronell-wilson-won-t-face-death-penalty-after-u-s-drops-appeal-1.13765398> [<https://perma.cc/JA25-ZF5P>].

Valerie Friend were sentenced to death for the murder of a cooperating witness in a federal drug prosecution.<sup>52</sup> Dustin Honken and Angela Johnson were sentenced to death for the murders of a potential drug dealer witness in a drug conspiracy case, as well as his girlfriend (also a drug dealer) and the girlfriend's ten- and six-year-old daughters.<sup>53</sup> Undoubtedly, the murders of the latter two victims weighed heavily in the Government's decision to pursue, and the jury's decision to impose, the death penalty in these two instances.

## 2. Kidnapping Cases

Although the federal government has brought only four capital cases involving kidnapping, it has shown some success in obtaining death sentences in these cases as well. These, too, tend to involve innocent victims. Of the four defendants, two were sentenced to death. Alfonso Rodriguez was sentenced to death for abducting a young woman from the parking lot of a North Dakota shopping mall, and raping and killing her, at some point forcibly taking her into Minnesota.<sup>54</sup> Neither state has the death penalty;<sup>55</sup> Rodriguez was prosecuted in the District of North Dakota.<sup>56</sup> Donald Fell similarly abducted a woman from a Vermont parking lot, stole her car, and transported her into New

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52. *United States v. Lecco*, 634 F. Supp. 2d 633, 643 (S.D. W.Va. 2009). Their convictions and death sentences were later vacated on grounds of juror misconduct. *Id.* at 663. They were each later sentenced to prison terms. Press Release, *West Virginia Drug Dealer Sentenced to Life for His Role in the Murder of a Federal Informant*, THE UNITED STATES ATTORNEY'S OFFICE, SOUTHERN DISTRICT OF WEST VIRGINIA (May 3, 2010), [https://www.justice.gov/archive/usao/wvs/press\\_releases/May%202010/attachments/050310%20WV%20Drug%20Dealer%20Sentenced%20to%20Life.html](https://www.justice.gov/archive/usao/wvs/press_releases/May%202010/attachments/050310%20WV%20Drug%20Dealer%20Sentenced%20to%20Life.html) [<https://perma.cc/XZ6Z-PX55>]; The Associated Press, *Woman Gets 35 Years for Role in Informant's Murder*, THE HERALD-DISPATCH (Jul. 27, 2010), [http://www.herald-dispatch.com/news/recent\\_news/woman-gets-years-for-role-in-informant-s-murder/article\\_545265fa-0996-59bc-a0e9-d8a080bf8989.html](http://www.herald-dispatch.com/news/recent_news/woman-gets-years-for-role-in-informant-s-murder/article_545265fa-0996-59bc-a0e9-d8a080bf8989.html) [<https://perma.cc/K4GJ-7FJP>].

53. See *United States v. Honken*, 541 F.3d 1146, 1148-49 (8th Cir. 2008); *United States v. Johnson*, 495 F.3d 951, 957 (8th Cir. 2007); Notice of Intent to Seek the Death Penalty at 1-2, *United States v. Johnson*, 196 F. Supp. 2d 795 (N.D. Iowa 2002) (No. CR 00-3034 MWB).

54. See *United States v. Rodriguez*, 581 F.3d 775, 783-84 (8th Cir. 2009).

55. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (Feb. 2, 2017), <https://deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/6G5Z-XJY9>].

56. *Rodriguez*, 581 F.3d at 784.

York before killing her.<sup>57</sup> Again, neither state authorizes capital punishment, although New York did at the time of the offense.<sup>58</sup> Fell was convicted and sentenced to death in the District of Vermont.<sup>59</sup>

That only four such cases have been brought is probably indicative of how rarely a kidnapping resulting in death occurs in which the victim is brought across state lines. Yet the most recent case demonstrates how potentially broad this category of cases can be. In 2008, Michael Jacques kidnapped, raped, and killed his twelve-year-old niece, Brooke Bennett.<sup>60</sup> To accomplish these crimes, he enlisted the aid of another youth (identified as J1 in court documents) he had been sexually abusing since she was nine years old.<sup>61</sup> At Jacques' instance, he had J1 send Bennett four text messages inviting her to a pool party at the Jacques residence.<sup>62</sup> Jacques had Bennett spend the night before the would-be pool party at his residence.<sup>63</sup> The next day, he drove her to a convenience store and dropped her off there in order to create the impression that that was the last time he saw her.<sup>64</sup> Before leaving, he told Bennett to walk back toward town.<sup>65</sup> He then picked her up again.<sup>66</sup> After this, he drove her back to his house, and drugged, raped, and killed her, later burying her body not far from his home.<sup>67</sup> Jacques

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57. See *United States v. Fell*, 531 F.3d 197, 205-06 (2d Cir. 2008).

58. See *People v. LaValle*, 817 N.E.2d 341, 356-59 (N.Y. 2004) (holding New York's death penalty deadlock instruction unconstitutional).

59. Fell's death sentence was later vacated on grounds of juror misconduct. *United States v. Fell*, No. 2:01-cr-12, 2014 WL 3697810 (D. Vt. July 24, 2014). His re-sentencing has been delayed indefinitely pending an appeal by the United States of a pretrial ruling. See Alan J. Keays, *Judge: New Trial in Fell Death Penalty Case May Be Delayed More Than a Year*, <https://vtdigger.org/2017/07/28/judge-new-trial-fell-death-penalty-case-delayed-year/#.WZ3RGT594nQ> [<https://perma.cc/YT6R-5ZVS>]. The author has appeared in this case and filed an amicus brief arguing that the federal death penalty cannot be imposed for crimes committed in Vermont and New York.

60. Michael J. Zydney Mannheimer, *Self-Government, the Federal Death Penalty, and the Unusual Case of Michael Jacques*, 36 VT. L. REV. 131, 134 (2011).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Mannheimer, *supra* note 60, at 134.

66. *Id.*

67. *Id.* at 134-35.



attempted to throw authorities off his trail by posting a statement on a social media platform under Bennett's profile claiming that she was planning to run away to meet a boy or man she had met on the internet.<sup>68</sup> Jacques also had a friend send a series of e-mails to JI, law enforcement, and the media to cast blame for Bennett's disappearance on a fictitious organization called "Breckenridge."<sup>69</sup>

Jacques was indicted by a federal grand jury, as relevant here, on one count of violating the Federal Kidnapping Act.<sup>70</sup> Prior to passage of the Adam Walsh Child Protection and Safety Act of 2006,<sup>71</sup> kidnapping was a federal crime only when the victim (whether alive or dead) was taken across a state or international boundary.<sup>72</sup> However, the Adam Walsh Act also made it a federal kidnapping if "the offender . . . uses the mail or any means, facility, or instrumentality of interstate . . . commerce in committing or in furtherance of the commission of the offense."<sup>73</sup> Jacques, of course, used text messaging to lure Bennett to his home with the promise of a pool party;<sup>74</sup> sent e-mails to JI, his innocent instrumentality;<sup>75</sup> used the internet to create the false messages on Bennett's social media page;<sup>76</sup> communicated with an accomplice by electronic means to help throw the authorities off the trail;<sup>77</sup> and had that accomplice himself send e-mails to do just that.<sup>78</sup> Each of these methods of communication involves the "use[] [of] any means, facility, or instrumentality of interstate . . . commerce."<sup>79</sup> At least two courts of appeals have also written that an automobile, which

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68. *Id.* at 135.

69. *Id.* at 134-35.

70. Mannheim, *supra* note 60, at 135.

71. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, § 213, 120 Stat. 587, 616.

72. *See* Mannheim, *supra* note 60, at 135 & n.22.

73. 18 U.S.C. § 1201(a)(1) (2012).

74. Mannheim, *supra* note 60, at 134.

75. *Id.*

76. *Id.* at 135.

77. *Id.*

78. *Id.*

79. 18 U.S.C. § 1201(a)(1) (2012); *see also* United States v. Halloran, 821 F.3d 321, 342 (2d Cir. 2016) (observing that one uses a "facility in interstate commerce" when one uses a "telephone or the internet").

Jacques also used, constitutes an “instrumentality of interstate . . . commerce.”<sup>80</sup>

Thus, despite the fact that neither Jacques nor his victim ever crossed state lines—indeed, it appears that this crime transpired entirely within the confines of Randolph and Randolph Center, Vermont<sup>81</sup>—he was indicted for federal kidnapping and the United States sought the death penalty. Ultimately, Jacques was permitted to plead guilty in exchange for a promise to recommend a sentence of life in prison without parole.<sup>82</sup>

### 3. *Hobbs Act* Cases

The United States has sought the death penalty in non-death states in only four instances involving Hobbs Act robbery with death resulting.<sup>83</sup> A Hobbs Act robbery is one that affects interstate commerce.<sup>84</sup> Use of a firearm during such a robbery

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80. *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (“Instrumentalities of interstate commerce . . . are the people and things themselves moving in commerce, including automobiles . . .”); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir.1995) (agreeing with Government’s position that “motor vehicles are the quintessential instrumentalities of modern interstate commerce” (internal quotation marks omitted)).

81. Mannheim, *supra* note 60, at 135.

82. See Sam Hemingway, “*Family Confronts Jacques as Killer Sentenced to Life*,” BURLINGTON FREE PRESS (May 21, 2014), <http://www.burlingtonfreepress.com/story/news/local/2014/05/20/jacques-sentencing-niece-murder/9319095/> [https://perma.cc/3L3K-7SBP].

83. See *supra* Table 2. see also *United States v. Ostrander*, 411 F.3d 684, 685 (6th Cir. 2005); Third Superseding Indictment at 1, *United States v. McCluskey*, No. 1:10-cr-02734-JCH, 2012 WL 6704922, at \*1 (D.N.M. Jan. 24, 2012); Indictment at 1, *United States v. Pleau*, No. 1:10-cr-00184-S, 2010 WL 7326847, at \*1 (D.R.I. Dec. 14, 2010).

84. See 18 U.S.C. § 1951(a) (2012) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . shall be fined under this title or imprisoned not more than twenty years, or both.”).

that results in death is a federal capital offense.<sup>85</sup> Three of the four defendants prosecuted capitally for Hobbs Act robberies with death resulting were also charged with other capital offenses.<sup>86</sup>

The one case involving a Hobbs Act robbery where no other capital crimes were charged resulted from a botched robbery of the proceeds from a gas station in Rhode Island. Jason Pleau and two confederates plotted to rob David Main, the manager of a gas station in Woonsocket, Rhode Island. Waiting until Main entered the parking lot of a bank to deposit the day's proceeds, Pleau confronted him with a gun. When Main ran away, Pleau gave chase and shot Main in the head, killing him. Pleau was charged in federal court.<sup>87</sup> After protracted legal wrangling which witnessed the Governor of Rhode Island initially refusing a request to turn Pleau over to federal authorities,<sup>88</sup> the United States sought the death penalty against Pleau.<sup>89</sup> Ultimately, however, Pleau was permitted to plead guilty in exchange for a promise to recommend a sentence of life in prison without possibility of parole.<sup>90</sup>

Cases like *Jacques*, *Pleau*, and *Wilson* show the potential for the federal government to seek the death penalty in cases of heinous murders that have traditionally been prosecuted by the

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85. See 18 U.S.C. § 924(c)(1)(A)(iii) (2012) (“[A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.”); 18 U.S.C. § 924(j)(1) (“A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall if the killing is a murder . . . be punished by death or by imprisonment for any term of years or for life . . . .”); 18 U.S.C. § 924(j)(1) (2012) (“A person who, in the course of a violation of a subsection (c) causes the death of a person through the use of a firearm, shall—if the killing is a murder . . . be punished by death or imprisonment for any term of years or for life . . . .”).

86. See *infra* Appendix; see also *Ostrander*, 411 F.3d at 685; Third Superseding Indictment, *supra* note 83, at 1; Indictment, *supra* note 83, at 1.

87. *United States v. Pleau*, 680 F.3d 1, 3 (1st Cir. 2012) (en banc).

88. See *id.*

89. Notice of Intention to Seek the Death Penalty, *United States v. Pleau*, 10-184-1 S, 2011 WL 2605301, at \*1 (D.R.I. June 30, 2011).

90. See Mike Stanton, *Jason Pleau to Plead Guilty in Killing, Feds Won't Seek Death Penalty*, PROVIDENCE JOURNAL (Jul. 26, 2013), <http://www.providencejournal.com/breaking-news/content/20130726-jason-pleau-to-plead-guilty-in-killing-feds-won-t-see-death-penalty.ece> [https://perma.cc/LR29-D55P].

states. These cases have been few and far between. Still, cases such as these might represent in some sense a testing of the waters for more extensive incursions by the federal death penalty into non-death states. One might expect such incursions if the death penalty continues to recede from states with large populations while remaining available at the federal level.

### III. THE FUTURE OF THE FEDERAL DEATH PENALTY IN NON-DEATH STATES

Will the death penalty still be with us twenty, thirty, or fifty years from now? Some trends, abolitionists like to tell us, indicate that the death penalty is on its way out. Yet other trends indicate retention by at least some of the states. In the next few decades, more states are likely to abandon the death penalty. But, absent some *Furman*-like shift in the constitutional firmament,<sup>91</sup> capital punishment will likely remain a fixture in about half the states and at the federal level as well. Moreover, federal jurisdiction will continue to be used expansively to reach cases such as *Jacques*, *Pleau*, and *Wilson*. It is quite likely, then, that we will see even more extensive use of the federal death penalty as a means of seeking retribution for the most heinous killings in non-death states.

#### A. The Death Penalty in the States: Political and Demographic Trends

Death penalty abolitionists see a trend toward elimination of the death penalty from our criminal justice systems in the not-too-distant future. They point to a large number of states, relatively speaking, that have eliminated the death penalty, public opinion polls that increasingly seem to favor abolition,

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91. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (declaring capital punishment as then practiced was a violation of the Eighth and Fourteenth Amendments). Two sitting Justices recently strongly suggested that they would take the position in an appropriate case that the death penalty as currently practiced violates the U.S. Constitution. *See generally* *Glossip v. Gross*, 576 U.S. 1 (2015) (Breyer, J., joined by Ginsburg, J., dissenting). However, given the appointment of Justice Gorsuch to replace Justice Scalia, prospects for such a position being adopted by a majority of the Court anytime soon appear dim.

and growing demographic shifts that may augur the end of the death penalty in more states. On the other hand, there is reason to be skeptical that the death penalty will vanish from American life any time soon. More likely, capital punishment will likely continue to be rolled back in some portions of the country while persisting in large parts of the South and West, as well as at the federal level.

Of the nineteen states that have eliminated the death penalty, seven have done so since 2004: New York in 2004,<sup>92</sup> New Jersey in 2007,<sup>93</sup> New Mexico in 2009,<sup>94</sup> Illinois in 2011,<sup>95</sup> Connecticut in 2012,<sup>96</sup> Maryland in 2013,<sup>97</sup> and Delaware in 2016.<sup>98</sup> A poll released by the Pew Research Center on Sept. 29, 2016, indicated that 49% of Americans favor the death penalty and 42% oppose it.<sup>99</sup> Although those who favor capital punishment still outnumber those who oppose it, this is the first time in forty years that the percentage in favor has dipped below 50%.<sup>100</sup> This in and of itself could indicate a trend toward abolition.

Furthermore, in some death penalty states, public support seems to be waning. A recent poll in California determined that

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92. Some date New York's abandonment of the death penalty to 2007. Death Penalty Information Center, *States with and Without the Death Penalty (as of November 9, 2016)*, <https://deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/P2Q2-RS9B]. However, the New York Court of Appeals struck down the state's death penalty law as violative of the state constitution in 2004. *See* *People v. LaValle*, 817 N.E.2d 341, 356-59 (N.Y. 2004). Although the constitutional difficulty could be fixed legislatively, there has been no serious legislative initiative to revive the law.

93. *States With and Without the Death Penalty*, *supra* note 92.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *States With and Without the Death Penalty*, *supra* note 92.

99. Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CTR. (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/> [https://perma.cc/HLY7-DRTU].

100. *Id.*

47% of respondents favored eliminating the death penalty.<sup>101</sup> Importantly, this position was favored by at least half of those aged eighteen to forty-nine.<sup>102</sup> As older voters, who are more likely to favor the death penalty,<sup>103</sup> die and are replaced by younger voters, support for the death penalty can be expected to diminish.

The ambivalence in some states toward the death penalty can be seen in their outsized death row populations, compared with the number of condemned inmates actually executed. California, which leads the Nation in number of people on death row with 741 as of July 2016,<sup>104</sup> has executed only thirteen people since 1976.<sup>105</sup> Execution is only the third leading cause of death for death row inmates in California, behind natural causes and suicide.<sup>106</sup> Pennsylvania, number five on the list of highest death-row populations,<sup>107</sup> has executed only three people in the last forty years<sup>108</sup> and currently has a moratorium on executions in place.<sup>109</sup>

Moreover, as the country becomes more racially and ethnically diverse, one might expect support for the death penalty to diminish. According to the Pew poll, white

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101. Mark DiCamillo, *Californians Sharply Divided About What to Do with the State's Death Penalty Law* 1, THE FIELD POLL (Jan. 15, 2016), <https://www.scribd.com/document/295638776/Field-Poll-CALIFORNIANS-SHARPLY-DIVIDED-ABOUT-WHAT-TO-DO-WITH-THE-STATE-S-DEATH-PENALTY-LAW> [https://perma.cc/RP3K-6YK5].

102. *Id.* at 3.

103. *See, e.g., id.* (indicating that 42% and 45% of Californians aged 50-64 and 65 and older, respectively, opposed the death penalty); Oliphant, *supra* note 99 (indicating that 54% of respondents aged 50-64 favored the death penalty while only 42% of those aged 18 to 29 favored it).

104. *Death Row Inmates by State and Size of Death Row by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Feb. 16, 2017) [https://perma.cc/C4E7-UUFK].

105. *State by State Database*, DEATH PENALTY INFO. CTR., [https://deathpenaltyinfo.org/state\\_by\\_state](https://deathpenaltyinfo.org/state_by_state) (last visited Feb. 16, 2017) [https://perma.cc/HGP9-2HU5].

106. CAROL S. STEIKER AND JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 120 (2016).

107. *Death Row Inmates by State and Size of Death Row by Year*, *supra* note 104.

108. *State by State Database*, *supra* note 105.

109. Memorandum from Governor Tom Wolf (Feb. 13, 2015), <https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration> [https://perma.cc/8YH9-QLMU]; *Commonwealth v. Williams*, 129 A.3d 1199, 1217 (Pa. 2015).

Americans support the death penalty by a margin of 57% to 35%.<sup>110</sup> Hispanics, however, support the death penalty by a smaller margin: 50% to 36%.<sup>111</sup> And Black Americans *oppose* the death penalty by a margin of 63% to 29%.<sup>112</sup> As some death penalty states grow in their proportion of non-white citizens, we might see a shift away from the death penalty. California, for example, has both the largest population<sup>113</sup> and the largest death row population in the Union.<sup>114</sup> As of 2010, close to half (44.8%) of its population was either black or Hispanic.<sup>115</sup> Even Texas, number two in population<sup>116</sup> and number three in death row population,<sup>117</sup> could abandon the death penalty in our lifetimes, given that its population is now 50.2% black or Hispanic.<sup>118</sup>

Death penalty abolitionists have taken to arguing that the death penalty is exceedingly rare, given that only a small handful of American counties (or parishes) are responsible for a very large proportion of death sentences. Typical is a 2013 report from the Death Penalty Information Center (“DPIC”), an anti-death penalty organization, observing that “[o]nly 2% of the counties in the U.S. have been responsible for the majority of cases leading to executions [and] for the majority of today’s death row population and recent death sentences.”<sup>119</sup>

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110. Oliphant, *supra* note 99.

111. *Id.*

112. *Id.*

113. U.S. Census Bureau, Guide to State and Local Census Geography 4 tbl.1, [https://www2.census.gov/geo/pdfs/reference/guidestloc/All\\_GSLCG.pdf](https://www2.census.gov/geo/pdfs/reference/guidestloc/All_GSLCG.pdf) (last visited Feb. 16, 2017) [<https://perma.cc/5HG7-5964>].

114. *Death Row Inmates by State and Size of Death Row by Year*, *supra* note 104.

115. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 8, tbl.5 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<https://perma.cc/8S9P-KDZW>] (indicating that California’s population was 7.2% black); SHARON R. ENNIS ET AL., U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010, at 6, tbl.2, <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> [<https://perma.cc/XN27-EZ5K>] (indicating that California’s population was 37.6% Hispanic).

116. U.S. CENSUS BUREAU, *supra* note 113, at 5 tbl.1.

117. *Death Row Inmates by State and Size of Death Row by Year*, *supra* note 104.

118. RASTOGI ET AL., *supra* note 115 (indicating that Texas’s population was 12.6% black); ENNIS ET AL., *supra* note 115 (indicating that Texas’s population was 37.6% Hispanic).

119. Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Cost to All 1*, DEATH PENALTY INFO. CTR. (Oct. 2013).

Yet the situation for the death penalty is not as stark as abolitionists claim it to be. For one thing, polls on the death penalty continue to show strong support for the practice. An October 2015 Gallup poll indicated that a clear majority (61%) of American adults favor the death penalty and only 37% oppose it.<sup>120</sup> True, these numbers represent a decline in support from the historic high of 80% in favor in 1994.<sup>121</sup> But the 61% figure is comparable to the level of support in the early- to mid-1970s and the late-1930s.<sup>122</sup> If anything, polling data suggest support for the death penalty is cyclical, and there is little reason to think support for the death penalty will sustainably run below 50%, as it did briefly in the late-1960s.<sup>123</sup>

Support is still particularly strong in the places one might expect: the South and the West. For example, an October 2015 poll conducted by *The Oklahoman* newspaper indicated that 67% of Oklahomans favored the death penalty.<sup>124</sup> This is particularly significant given that the poll was conducted only eighteen months after the problematic execution in that state of Clayton Lockett.<sup>125</sup> Strikingly similar numbers appear in Utah, where a November 2015 poll indicated that 67% supported the death penalty for those convicted of aggravated murder and only 26% opposed capital punishment.<sup>126</sup> Even California has twice in the last five years affirmatively decided to retain the death penalty. Referenda to end the death penalty there were defeated

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120. Andrew Dugan, *Solid Majority Continue to Support Death Penalty*, GALLUP (Oct. 15, 2015), <http://www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx> [https://perma.cc/7YRC-SGMW].

121. *Id.*

122. *Id.*

123. *Id.*

124. Graham Lee Brewer, *Oklahomans Give Overwhelming Support to Death Penalty, Poll Finds*, THE OKLAHOMAN (Oct. 26, 2015), <http://newsok.com/article/5456005> [https://perma.cc/YZ2U-DZSC].

125. Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC, (June 2015), <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> [https://perma.cc/Z6PN-9P9F].

126. Bob Bernick, *Poll Shows Majority of Utahns Support the Death Penalty*, UTAH POLICY (Dec. 15, 2015), <http://utahpolicy.com/index.php/features/today-at-utah-policy/7964-poll-shows-majority-of-utahns-support-the-death-penalty> [https://perma.cc/DW95-H5N2].



in both 2012<sup>127</sup> and 2016.<sup>128</sup> Significantly, the margin of victory was two points higher in 2016 than in 2012.

Moreover, even in those states that have recently de-commissioned the death penalty, there is some amount of buyer's remorse. In Nebraska, Legislative Bill 268, passed over the Governor's veto on May 27, 2015, would have eliminated the death penalty in that state.<sup>129</sup> However, that repeal was stalled by a successful campaign to put the issue to a referendum in November 2016.<sup>130</sup> On Nov. 8, 2016, the death penalty was restored to Nebraska when 60.73% voted to repeal Legislative Bill 268.<sup>131</sup> Meanwhile, New Mexico Governor Lisa Martinez has asked the state legislature to pass a bill during the 2017 legislative session reinstating the death penalty in that state.<sup>132</sup> And Delaware's judicial invalidation of the law,<sup>133</sup> based largely on the U.S. Supreme Court's decision in *Hurst v. Florida*,<sup>134</sup> is susceptible to a legislative fix and it is too soon to rule out restoration.

127. See Ian Lovett, *California—Election 2012*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/states/california> (last visited Feb. 7, 2017) [<https://perma.cc/Q2VH-2RLA>] (indicating measure was defeated 52.6% to 47.4%).

128. Jim Miller, *California Votes to Keep Death Penalty*, THE SACRAMENTO BEE (Nov. 9, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article113661704.html> [<https://perma.cc/4MZD-FNQN>] (indicating measure was defeated 53.6% to 46.4%).

129. <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB268.pdf> [<https://perma.cc/S9JQ-METE>]; see also Joe Duggan, *Hours of Suspense, Emotion Lead Up to a Landmark Vote for Legislators on Repealing Death Penalty*, OMAHA WORLD-HERALD (May 28, 2015), [http://www.omaha.com/news/legislature/hours-of-suspense-emotion-lead-up-to-a-landmark-vote/article\\_32726c27-0ef4-5415-9d07-f90f08707602.html](http://www.omaha.com/news/legislature/hours-of-suspense-emotion-lead-up-to-a-landmark-vote/article_32726c27-0ef4-5415-9d07-f90f08707602.html) [<https://perma.cc/DUW6-EU6A>].

130. Julie Bosman, *Nebraska to Vote on Abolishing Death Penalty After Petition Drive Succeeds*, N.Y. TIMES (Oct. 16, 2015), <http://www.nytimes.com/2015/10/17/us/politics/nebraska-to-vote-on-abolishing-death-penalty-after-petition-drive-succeeds.html> [<https://perma.cc/Z2NH-ZUD2>].

131. See *Unofficial Results: General Election—November 8, 2016*, NEBRASKA SEC. OF STATE ELECTION RESULTS, <http://www.electionresults.sos.ne.gov/resultsSW.aspx?text=Race&type=SW&map=CTY> (last visited Feb. 7, 2017) [<https://perma.cc/S2M6-CH84>].

132. Andrew Oxford and Daniel J. Chacón, *Martinez to Pursue Death Penalty During 2017 Legislative Session*, SANTA FE NEW MEXICAN (Aug. 17, 2016), [http://www.santafenewmexican.com/news/local\\_news/martinez-to-pursue-death-penalty-during-legislative-session/article\\_b62c5970-64cf-11e6-acb5-47aeffbf2c8.html](http://www.santafenewmexican.com/news/local_news/martinez-to-pursue-death-penalty-during-legislative-session/article_b62c5970-64cf-11e6-acb5-47aeffbf2c8.html) [<https://perma.cc/N3PW-U3AP>].

133. *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016).

134. 136 S. Ct. 616, 619 (2016).

It is also worth observing that even in non-death penalty states, support for the practice remains high. For example, in Wisconsin, which eliminated the death penalty over 150 years ago, 46.6% of voters still supported the practice as of 2013.<sup>135</sup> About a year before Connecticut eliminated its death penalty, voters in that state still favored capital punishment by 48% to 43%.<sup>136</sup> Likewise, just before it abolished its death penalty, a poll conducted by the Washington Post indicated that 60% of adult Marylanders favored its retention.<sup>137</sup>

Additionally, the statistics on the supposed rarity of the death penalty are not as stark as they might first appear. Take for instance, the DPIC's technically correct claim that only two percent of U.S. counties account for most of the inmates currently on death row.<sup>138</sup> It is not until seven pages after that claim is made that the DPIC acknowledges that those two percent of counties "represent . . . 24.7% of the U.S. population."<sup>139</sup> That over half of death row comes from counties representing about a quarter of the total U.S. population may be somewhat off-putting, but it is nowhere near the "two percent" claim. Moreover, even the 24.7% figure is skewed, as it takes into account the entire country, even the nineteen states with no death penalty. But of course no one currently on death row was sent there from counties within those states. When only the population of death penalty states is used as the denominator,

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135. See *State Polls and Studies*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-polls-and-studies?scid=23&did=210#wis> (last visited Feb. 7, 2017) [<https://perma.cc/C8YJ-FEMN>].

136. Mark Pazniokas, *Quinnipiac: Death Penalty Support Inches Higher*, CT MIRROR (Mar. 10, 2011), <http://ctmirror.org/2011/03/10/quinnipiac-death-penalty-support-inches-higher/> [<https://perma.cc/AT9V-ZHQU>].

137. See *Majority Supports Death Penalty in Maryland, Despite Skepticism of Deterrence and Fairness*, WASH. POST (Mar. 2, 2013), [https://www.washingtonpost.com/politics/polling/majority-supports-death-penalty-maryland-despite/2013/02/26/f87c059c-8048-11e2-a671-0307392de8de\\_page.html](https://www.washingtonpost.com/politics/polling/majority-supports-death-penalty-maryland-despite/2013/02/26/f87c059c-8048-11e2-a671-0307392de8de_page.html) [<https://perma.cc/AV83-SDM6>].

138. Dieter, *supra* note 119, at 6.

139. *Id.*

the figure rises to a bit over 36%.<sup>140</sup> That is to say, counties that are home to 36% percent of the total population of the death penalty states are responsible for 56% of the population of death row.<sup>141</sup> This is still somewhat disproportionate but it is hardly shocking.

Given these data, some informed conclusions, speculative as they might be, are in order. First, the death penalty might be eliminated in several more states in the coming decades. Second, however, barring some unexpected decree from the Supreme Court that capital punishment has become unconstitutional, it will continue to live on in a good part of the country. Third, given the popularity of capital punishment at the national level, and given the disproportionate representation of smaller Southern and Western states in the U.S. Senate, the federal government will likely retain it for some time to come. And finally, even where it has been eliminated, support for the death penalty remains high.

## B. Existing and Potential Federal Capital Crimes

Given the support for the death penalty nationally, it is unlikely that the federal government will decommission the death penalty at the national level. It is more likely that more states, including some of the biggest, such as California, Pennsylvania, and perhaps even Texas, will abandon capital punishment in the coming decades. Given this, there is a real likelihood of the expanded use of the federal death penalty as a sort of “safety valve”: the de facto retention of the death penalty in ostensibly non-death-penalty states for the most heinous of

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140. This figure was derived by dividing the population of those counties and parishes by the sum of the populations of all the death penalty States as of 2010. See U.S. Census Bureau, Guide to State and Local Census Geography 4 tbl.1, [https://www2.census.gov/geo/pdfs/reference/guidestloc/All\\_GSLCG.pdf](https://www2.census.gov/geo/pdfs/reference/guidestloc/All_GSLCG.pdf) (last visited Aug. 20, 2017) [<https://perma.cc/9GBL-6EXS>].

141. *States with and Without the Death Penalty*, *supra* note 92; U.S. CENSUS BUREAU, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1 to July 1, 2016*, Tbl.1, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/ZS3H-7GH4>]; Dieter, *supra* note 119, at 29-30.

killings.<sup>142</sup> This is what seems to have occurred in the *Jacques*, *Pleau*, and *Wilson* cases, discussed above.<sup>143</sup>

The expansion of the federal kidnapping statute in 2006 turns even the most local of kidnappings, as in *Jacques*, into a federal case.<sup>144</sup> Indeed, it is difficult to conceive of too many kidnappings that are now not federal crimes. After all, it will be the rare kidnapping that does not involve some “means, facility, or instrumentality of interstate . . . commerce in committing or in furtherance of the commission of the offense.”<sup>145</sup> Perhaps a spur-of-the-moment kidnapping would not fall into this category. But any abduction that involves the least bit of planning would likely involve the use of a phone, text, e-mail, instant message, or social media site. In addition, even a spur-of-the-moment kidnapping becomes a federal crime when the perpetrator uses one of these means to cover-up the crime, because that would be “in furtherance of the commission of the offense.”<sup>146</sup> And if federal courts continue to agree that an automobile is an instrumentality of interstate commerce,<sup>147</sup> this would bring virtually every kidnapping within the ambit of the federal statute.<sup>148</sup>

Murders in relation to robbery, too, can now be charged as federal capital crimes in virtually every instance involving use of a firearm. This is thanks to the Hobbs Act as recently interpreted in the little-noticed case of *Taylor v. United States*.<sup>149</sup> *Taylor*, decided in the last month of the October 2015 Term, addressed whether robbery of a drug dealer of drugs and

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142. See Campbell, *supra* note 3, at 126-27 (advocating use of federal death penalty in non-death states for this purpose).

143. See *supra* Part I.C.

144. See *supra* Part I.C.2.

145. 18 U.S.C. § 1201(a)(1).; see Colin v. Ram, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What is Truly National and What is Truly Local*, 65 WASH. & LEE L. REV. 767, 769-70 (2008).

146. 18 U.S.C. § 1201(a)(1) (2012).

147. See *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir.1995).

148. See Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What is Truly National and What is Truly Local*, 65 WASH. & LEE L. REV. 767, 794 (2008) (asserting that “federal jurisdiction now extends to all kidnappings, except those transpiring exclusively on private property”).

149. 136 S.Ct. 2074 (2016).

proceeds from the drug trade violate the Hobbs Act, even if the prosecutor could not show that the drugs ever crossed state lines.<sup>150</sup> The Court held seven to one that the Hobbs Act was violated under those circumstances.<sup>151</sup> It observed that the Hobbs Act includes within its ambit “all . . . commerce over which the United States has jurisdiction.”<sup>152</sup> It also noted that it had already held in *Gonzalez v. Raich*<sup>153</sup> that Congress may, pursuant to the Constitution’s Commerce<sup>154</sup> and Necessary and Proper Clauses,<sup>155</sup> regulate even the purely intrastate sale or use of narcotics, because even a purely intrastate activity involving drugs can have a substantial effect on the interstate market for drugs if all such intrastate activities were to be aggregated.<sup>156</sup> The Court proceeded syllogistically: if Congress may regulate purely intrastate use or sale of narcotics as commerce, and if the Hobbs Act covers robbery that affects any “commerce over which the United States has jurisdiction,” then the Hobbs Act criminalizes robbery of drugs that have never crossed state lines or the proceeds from their sale.<sup>157</sup>

As straightforwardly as *Taylor*’s holding flows from *Raich*, it is also deeply troubling. While *Taylor* itself involved robbery of ill-gotten gains—drugs and the proceeds from their sale—the Hobbs Act, of course, is not so limited. The Hobbs Act covers robbery of the proceeds of activities of any sort, licit or illicit, that affect interstate commerce.<sup>158</sup> *Taylor* holds that this extends to the proceeds of even purely intrastate activities that might, in

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150. *See id.* at 2077-78.

151. *See id.*

152. *Id.*

153. 545 U.S. 1, 22 (2005).

154. *See* U.S. CONST., art. I, § 8, cl. 3 (“The Congress shall have Power [t]o regulate Commerce . . . among the several States . . .”).

155. *See* U.S. CONST., art. I, § 8, cl.3 (“The Congress shall have Power [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”).

156. *See Taylor*, 136 S.Ct. at 2080.

157. *See id.* (“The case now before us requires no more than that we graft our holding in *Raich* onto the commerce element of the Hobbs Act.”).

158. *See id.* at 2087 (Thomas, J., dissenting) (“Although the Court maintains that its holding ‘is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds,’ its reasoning allows for unbounded regulation.”) (quoting *id.* at 2082 (majority opinion)).

the aggregate, substantially affect interstate commerce.<sup>159</sup> But one might justifiably wonder what types of proceeds do not fall within this description. Virtually all goods and currency represent the products of having engaged in commerce; the typical robbery victim almost invariably will have acquired the contents of her wallet from engaging in some trade or profession. The mine-run gunpoint mugging of a city denizen for ten dollars is now, according to *Taylor*, a federal crime.<sup>160</sup> And if the victim is killed, in Boston or Brooklyn, Milwaukee or Minneapolis, Providence or Peoria, Detroit or Des Moines, the federal government can seek the death penalty.

One can also imagine other potential federal capital crimes in the not-too-distant future. For example, in the wake of the killings of five police officers in Dallas, Texas in the summer of 2016, U.S. Senators from Texas John Cornyn and Ted Cruz have proposed the Back the Blue Act, which would impose federal criminal liability, including the death penalty, for the killing of any federal law enforcement officer or any law enforcement officer of any agency that receives federal funding.<sup>161</sup> Because federal aid to state and local law enforcement is so widespread,<sup>162</sup> the Back the Blue Act, if passed, could virtually capitalize the murder of any police officer in the country.

Even more broadly sweeping would be a federal crime prohibiting any murder that utilizes any “means, facility, or instrumentality of interstate commerce” in the commission or in furtherance of the commission of the offense. In addition to federalizing most murders for the same reasons that most kidnappings are federal,<sup>163</sup> a killing would be a federal crime so

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159. *Id.* at 2077.

160. *See id.* at 2087 (Thomas, J., dissenting) (opining that pursuant to the Court’s approach, “Congress could, under its commerce power, regulate *any* robbery: In the aggregate, any type of robbery could be deemed to substantially affect interstate commerce.”).

161. *See* Back the Blue Act of 2017, S. 1134, 115th Cong. § 2(a) (May 16, 2017). As of this writing, the bill has been referred to the Senate Judiciary Committee.

162. *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 876-88 (2015) (discussing history and extent of federal financial and in-kind aid to local and state law enforcement).

163. *See supra* text accompanying notes 142-48.

long as the murder weapon crossed state lines. Indeed, federal prohibitions on the possession of such items as guns,<sup>164</sup> ammunition,<sup>165</sup> and body armor<sup>166</sup> now rest on this very tenuous connection to interstate commerce.<sup>167</sup> In fact, the U.S. Senate in 1991 approved a provision that would have made it a federal crime, subject to the death penalty, to commit murder using a firearm that had “moved at any time in interstate or foreign commerce.”<sup>168</sup> Though this provision never became law, this move would have dramatically increased the number of murders that violate federal law. As the amendment’s primary sponsor, Sen. Alphonse D’Amato of New York, put it, it would have applied to “most gun-related murders.”<sup>169</sup> Sen. D’Amato said that the measure “was aimed primarily at letting federal prosecutors seek the death penalty in 14 states where capital punishment is not on the books.”<sup>170</sup>

#### IV. CONCLUSION: THE COMING FEDERALISM BATTLE

In both the short term and the long term, we can expect more federal capital prosecutions in non-death penalty states. We can also expect more federalism based arguments by federal capital defendants against this application of the death penalty. We have already begun to see these arguments in federal district

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164. See 18 U.S.C. § 922(g) (2012) (forbidding for nine categories of persons reception of “any firearm or ammunition which has been shipped or transported in interstate or foreign commerce”).

165. See *id.*

166. See 18 U.S.C. § 931(a) (forbidding possession by former felons of “body armor”); 18 U.S.C. § 921(a)(35) (defining “body armor” as “any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire”).

167. See *Scarborough v. United States*, 431 U.S. 563, 569-72 (1977) (holding that proof that possessed firearm had at one time traveled in interstate commerce is sufficient for conviction); *United States v. Alderman*, 565 F.3d 641, 645-48 (9th Cir. 2009) (holding body-armor statute constitutional).

168. See 137 CONG. REC. S8814 (June 26, 1991); Paul Houston, *Senate OKs Death Penalty in Case Where Gun Was Transported Across State Lines*, L.A. Times, June 27, 1991.

169. See Houston, *supra* note 168.

170. *Id.*

courts and at some point, federal appeals courts and perhaps the Supreme Court will have to weigh in.

As discussed above, in the long-term, the federal death penalty will likely grow as capital punishment recedes in the states. Short-term prospects for application of the federal death penalty in non-death states appear similar. Recall that Attorneys General in the George W. Bush administration sought the death penalty in non-death states nearly four times as often as those in the Obama administration: thirty-nine versus ten. The very fact that the Justice Department is in Republican hands for at least the next four years indicates that the numbers may again spike very soon.

Moreover, President Trump famously took out full page advertisements in the four major New York newspapers in 1989 calling for New York to bring back the death penalty after five teenagers were accused (and later convicted) of raping and nearly killing a woman in Central Park.<sup>171</sup> In October 2016, despite virtually conclusive evidence that the five had been wrongly convicted,<sup>172</sup> Trump continued to assert that they were guilty.<sup>173</sup> Attorney General Jeff Sessions has pointed to Trump's position in that case as evidence that he "believes in law and order."<sup>174</sup> These sentiments perhaps signal that the use of the federal death penalty will increase across the board in the next four years.

Federal capital defendants, however, have begun to raise arguments that the Constitution forbids the imposition of the federal death penalty in non-death penalty states. Sometimes,

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171. See Lisa W. Foderaro, *Angered by Attack, Trump Urges Return Of the Death Penalty*, N.Y. TIMES (May 1, 1989), <http://www.nytimes.com/1989/05/01/nyregion/angered-by-attack-trump-urges-return-of-the-death-penalty.html> [https://perma.cc/PDS3-9KRZ].

172. See *People v. Wise*, 194 Misc.2d 481, 493-96 (Sup. Ct. N.Y. Cty. 2002).

173. See Benjy Sarlin, *Donald Trump Says Central Park Five Are Guilty, Despite DNA Evidence*, NBC NEWS (Oct. 7, 2016), <http://www.nbcnews.com/politics/2016-election/donald-trump-says-central-park-five-are-guilty-despite-dna-n661941> [https://perma.cc/LMJ2-BHAC].

174. See Gregory Krieg, *Sessions: Case of Central Park 5, Later Exonerated, Shows Trump's Dedication to 'Law and Order,'* CNN (Nov. 18, 2016), <http://www.cnn.com/2016/08/18/politics/jeff-sessions-donald-trump-central-park-five-death-penalty/> [https://perma.cc/RE8V-WWKK].



the argument relies solely or primarily on the notion that such use of federal capital punishment constitutes “cruel and unusual punishment” in violation of the Eighth Amendment.<sup>175</sup> Sometimes, the defendant makes a more generalized argument based on the Tenth Amendment or general federalism principles.<sup>176</sup> District courts that have addressed these arguments have thus far uniformly rejected them.<sup>177</sup>

One can certainly understand the hesitancy that district courts have shown in embracing the argument that federalism principles embedded in the Constitution prohibit the federal government from imposing the death penalty in some states but not others. It is, to be sure, a novel argument. But the argument is novel precisely because the practice of seeking the federal death penalty in non-death penalty states is itself novel—at least by reference to the long sweep of American history. One can only hope that, if and when the issue reaches the Supreme Court, the Justices will display the same sort of skepticism over the

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175. See, e.g., Memorandum in Sup. of Gary Sampson’s Mot. to Strike the Death Notice Because the Cruel And Unusual Punishment Clause Prohibits a Severe Penalty That is Rarely or Never Imposed in the State and Region Where the Offense was Committed, *United States v. Sampson*, 1:01-cr-10384 (D.Mass.) (filed Aug. 1, 2014), *passim*; Motion to Preserve Constitutional Challenges to the Federal Death Penalty Act, *United States v. Tsarnaev*, Crim. No. 13-10200-GAO (D.Mass) (filed May 7, 2014), at 3-4; Mot. To Strike United States’ Not. of Intent to Seek the Death Penalty, *United States v. Andrews*, No. 1:12CR-100, (N.D. W. Va.) (filed Dec. 13, 2013), at 125-26; (Corrected) Def’s Omnibus Mot. to Dismiss the Special Findings from the Third Superseding Ind. and to Strike the Not. of Intent to Seek the Death Penalty, *United States v. McCluskey*, No. 10-CR-2734 (JCH) (D.N.M.) (filed Apr. 1, 2012), at 121-31; Def’s Mot. to Reconsider Point Eighth in Favor of Striking the Death Penalty, *United States v. Jacques*, 2:08-CR-117 (D.Vt.) (filed June 15, 2011), *passim*.

176. See, e.g., Mem. of Law in Support of Def. Farad Roland’s Motions to Strike the Death Penalty as Unconstitutional as Applied Herein, and to Strike Specific Proportionality, Statutory Aggravating, and Non-Statutory Aggravating Factors, *United States v. Roland*, Crim. No. 12-298 (S-2) (ES) (D.N.J.) (filed Oct. 7, 2016), at 1-32; Mem. in Supp. of Def. Donald Fell’s Mot. to Dismiss the Superseding Ind. and/or to Strike the Am. Not. of Intent to Seek Penalty of Death as Violative of Principles of Limited National Powers and State Sovereignty, *United States v. Donald Fell*, 5:01-cr-00012 (D.Vt.) (filed Nov. 15, 2016), *passim*.

177. See, e.g., *United States v. Andrews*, 2015 WL 1191146, at \*7 (N.D. W. Va. Mar. 16, 2015); *United States v. Pleau*, 2013 WL 1673109, at \*3 (D.R.I. Apr. 17, 2013); *United States v. Johnson*, 900 F. Supp. 2d 949, 961-63 (N.D. Iowa 2012); *United States v. Jacques*, 2011 WL 3881033, at \*2-5 (D.Vt. Sept. 2, 2011).

constitutionality of the practice that they have done in scrutinizing other unprecedented federal schemes.<sup>178</sup>

For those who would like to see a judicially enforced robust federalism in this area, there is some glimmer of hope. In his lone dissent in *Taylor v. United States*, Justice Thomas not only lamented the vast expansion of the reach of the Commerce Clause,<sup>179</sup> but he also went on to specifically criticize the reflexive application of that jurisprudence beyond the economic and regulatory realm, where it was created, to the criminal sphere. He wrote: “[T]he substantial-effects test gained momentum not in the criminal context, but instead in the context in which courts most defer to the Government: the regulatory arena. *Without adequate reflection*, the Court later extended this approach to the criminal context.”<sup>180</sup> Thus, it appears that at least one sitting Justice may be willing to re-think an expansive view of federal power in the area most traditionally reserved for the states: the definition and punishment of criminal offenses. Given the specific constitutional injunction against “cruel and unusual punishments,” a principled line could be drawn at the imposition of a type of punishment foreign to the people of a state.

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178. See *Nat. Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (“[S]ometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action.” (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S.Ct. 3138, 3159 (2010) (alterations in original))).

179. 136 S. Ct. 2074, 2086-87 (2015) (Thomas, J., dissenting) (criticizing the “substantial effects” test).

180. *Id.* at 2089 (Thomas, J., dissenting) (emphasis added).

**APPENDIX**FEDERAL CAPITAL CASES IN NON-DEATH PENALTY STATES BY  
DATE OF DEATH NOTICE\*

|    | <b>Date</b>   | <b>Defendant</b> | <b>District</b> | <b>Crime</b>  | <b>Outcome</b>              |
|----|---------------|------------------|-----------------|---|-----------------------------|
| 1  | July 29, 1993 | Darryl Johnson   | W.D.N.Y.        | Murder in furtherance of drug trafficking and/or racketeering | Guilty plea                 |
| 2  | Aug. 11, 1993 | Reginald Brown   | E.D. Mich.      | Murder in furtherance of drug trafficking and/or racketeering | Acquitted                   |
| 3  | Aug. 11, 1993 | Terrance Brown   | E.D. Mich.      | Murder in furtherance of drug trafficking and/or racketeering | Mooted by defendant's death |
| 4  | Aug. 11, 1993 | Lonnie O'Bryant  | E.D. Mich.      | Murder in furtherance of drug trafficking and/or racketeering | Guilty plea                 |
| 5  | Aug. 11, 1993 | Michael Williams | E.D. Mich.      | Murder in furtherance of drug trafficking and/or racketeering | Guilty plea                 |
| 6  | May 19, 1994  | Charles Wilkes   | E.D. Mich.      | Murder in furtherance of drug trafficking and/or racketeering | Guilty plea                 |
| 7  | July 21, 1994 | Stacy Culbert    | E.D. Mich.      | Murder in furtherance of drug trafficking and/or racketeering | Guilty plea                 |
| 8  | May 31, 1995  | Walter Diaz      | N.D.N.Y.        | Murder in furtherance of drug trafficking and/or racketeering | Life sentence from jury     |
| 9  | May 31, 1995  | Tyrone Walker    | N.D.N.Y.        | Murder in furtherance of drug trafficking and/or racketeering | Life sentence from jury     |
| 10 | Feb. 20, 1997 | Abram Walters    | D. Alaska       | Murder on federal land  | Guilty plea                 |
| 11 | Aug. 31, 1998 | Antonio          | E.D.            | Bank robbery, death   | Indictment                  |

\* Cases in which a defendant was sentenced to death are in bold. Cases in which a defendant is currently under sentence of death are in bold italics.

|    |                      |                        |                   |  |                         |
|----|----------------------|------------------------|-------------------|--|-------------------------|
|    |                      | McKelton               | Mich.             | resulting  | dismissed               |
| 12 | Sept. 16, 1998       | Efraim Garcia          | E.D. Mich.        | Murder in furtherance of drug trafficking and/or racketeering                      | NOI dismissed           |
| 13 |                      | Christopher Kauffman** | S.D. Iowa         | Carjacking, death resulting  | Guilty plea             |
| 14 |                      | Jamie McMahan**        | S.D. Iowa         | Carjacking, death resulting  | Guilty plea             |
| 15 | Jan. 15, 1999        | Chris Dean             | D. Vt.            | Mailing an explosive device  | Guilty plea             |
| 16 | Feb. 22, 1999        | Janette A. Ables       | N.D. W. Va.       | Arson affecting commerce, death resulting  | Indictment dismissed    |
| 17 | Feb. 22, 1999        | Barbara M. Brown       | N.D. W. Va.       | Arson affecting commerce, death resulting  | Indictment dismissed    |
| 18 | Feb. 22, 1999        | Ricky Lee Brown        | N.D. W. Va.       | Arson affecting commerce, death resulting  | Indictment dismissed    |
| 19 | May 14, 1999         | Kristin Gilbert        | D. Mass.          | Murder on federal land   | Life sentence from jury |
| 20 | Aug. 2, 1999         | Richard Lee Tuck Chong | D. Haw.           | Murder in furtherance of drug trafficking and/or racketeering                      | Guilty plea             |
| 21 | Feb. 17, 2001        | John Bass              | E.D. Mich.        | Murder in furtherance of drug trafficking and/or racketeering                      | Life sentence from jury |
| 22 | <i>Feb. 26, 2001</i> | <i>Marvin Gabrion</i>  | <i>W.D. Mich.</i> | <i>Murder on federal land</i>  | <i>Death sentence</i>   |
| 23 | Jan. 30, 2002        | Donald Fell            | D. Vt.            | Carjacking, death resulting; kidnapping, death resulting                           | Death sentence          |
| 24 | Apr. 25, 2002        | Angela Johnson         | N.D. Iowa         | Murder in furtherance of drug trafficking and/or racketeering; murder of a federal | Death sentence          |

\*\* It appears that no notice of intent was filed in the case against Christopher Kauffman and Jamie McMahan because a plea agreement was reached shortly after Attorney General Janet Reno required that the death penalty be sought.

|           |                      |                      |                  | <b>witness/person aiding a federal investigation</b>  |                         |
|-----------|----------------------|----------------------|------------------|---|-------------------------|
| <b>25</b> | <b>Nov. 19, 2002</b> | <b>Gary Sampson</b>  | <b>D. Mass.</b>  | <b>Carjacking, death resulting</b>  | <b>Death sentence</b>   |
| 26        | Jan. 24, 2003        | Jairo Zapata         | E.D.N.Y.         | Murder in furtherance of drug trafficking and/or racketeering   | Guilty plea             |
| 27        | Feb. 4, 2003         | Raymond Canty        | E.D. Mich.       | Murder in furtherance of drug trafficking and/or racketeering   | Guilty plea             |
| 28        | Feb. 6, 2003         | Milton Jones         | E.D. Mich.       | Murder in furtherance of drug trafficking and/or racketeering   | Guilty Plea             |
| 29        | Feb. 4, 2003         | Eugene Mitchell      | E.D. Mich.       | Murder in furtherance of drug trafficking and/or racketeering   | Guilty plea             |
| 30        | Feb. 21, 2003        | Michael Ostrander    | W.D. Mich.       | Murder in furtherance of drug trafficking and/or racketeering; Hobbs Act robbery, death resulting                                       | Life sentence from jury |
| 31        | Feb. 21, 2003        | Robert Ostrander     | W.D. Mich.       | Murder in furtherance of drug trafficking and/or racketeering; Hobbs Act robbery, death resulting                                       | Life sentence from jury |
| <b>32</b> | <b>June 10, 2003</b> | <b>Dustin Honken</b> | <b>N.D. Iowa</b> | <b>Murder in furtherance of drug trafficking and/or racketeering; murder of a federal witness/person aiding a federal investigation</b> | <b>Death sentence</b>   |
| 33        | July 2, 2003         | Charles Hatten       | S.D. W. Va.      | Murder in furtherance of drug trafficking and/or racketeering   | NOI dismissed           |
| 34        | Sept. 18, 2003       | Darryl Green         | D. Mass.         | Murder in furtherance of drug trafficking and/or racketeering   | Life sentence from jury |
| 35        | Sept. 18, 2003       | Branden              | D. Mass.         | Murder in furtherance of  | Life                    |

|    |                      |                               |                    |   |                         |
|----|----------------------|-------------------------------|--------------------|---|-------------------------|
|    |                      | Morris                        |                    | drug trafficking and/or racketeering  | sentence from jury      |
| 36 | May 14, 2004         | Martin Aguilar                | E.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering                                     | Life sentence from jury |
| 37 | May 14, 2004         | Gilberto Caraballo            | E.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering                                     | Life sentence from jury |
| 38 | <b>Oct. 28, 2004</b> | <b>Alfonso Rodriguez, Jr.</b> | <b>D.N.D.</b>      | <b>Kidnapping, death resulting</b>  | <b>Death sentence</b>   |
| 39 | Feb. 23, 2005        | Charod Becton                 | S.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering                                     | Guilty plea             |
| 40 | Mar. 3, 2005         | Humberto Pepin-Taveras        | E.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering                                     | Life sentence from jury |
| 41 | <b>Aug. 2, 2005</b>  | <b>Ronell Wilson</b>          | <b>E.D.N.Y.</b>    | <b>Murder in furtherance of drug trafficking and/or racketeering; carjacking, death resulting</b> | <b>Death sentence</b>   |
| 42 | Jan. 19, 2006        | Khalid Barnes                 | S.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering                                     | Life sentence from jury |
| 43 | Mar. 22, 2006        | Kenneth McGriff               | E.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering                                     | Life sentence from jury |
| 44 | July 31, 2006        | Noah Gladding                 | W.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering; kidnapping, death resulting        | Guilty plea             |
| 45 | July 31, 2006        | Wilver Lopez                  | E.D.N.Y.           | Murder in furtherance of drug trafficking and/or racketeering                                     | NOI withdrawn           |
| 46 | <b>Aug. 16, 2006</b> | <b>George Lecco</b>           | <b>S.D. W. Va.</b> | <b>Murder in furtherance of drug trafficking</b>  | <b>Death sentence</b>   |

|    |               |                         |                |   |                               |
|----|---------------|-------------------------|----------------|---|-------------------------------|
|    |               |                         |                | <b>and/or racketeering;<br/>murder of a federal<br/>witness/person aiding a<br/>federal investigation</b>   |                               |
| 47 | Aug. 16, 2006 | Valeri<br>Friend        | S.D. W.<br>Va. | <b>Murder in furtherance<br/>of drug trafficking<br/>and/or racketeering;<br/>murder of a federal<br/>witness/person aiding a<br/>federal investigation</b> | <b>Death<br/>sentence</b>     |
| 48 | Sept. 8, 2006 | Naeem<br>Williams       | D. Haw.        | Murder on federal land  | Life<br>sentence<br>from jury |
| 49 | Nov. 1, 2006  | Norman<br>Duncan        | E.D.<br>Mich.  | Bank robbery, death<br>resulting  | Life<br>sentence<br>from jury |
| 50 | Nov. 1, 2006  | Timothy<br>O'Reilly     | E.D.<br>Mich.  | Bank robbery, death<br>resulting  | Life<br>sentence<br>from jury |
| 51 | Nov. 1, 2006  | Kevin<br>Watson         | E.D.<br>Mich.  | Bank robbery, death<br>resulting  | Life<br>sentence<br>from jury |
| 52 | Dec. 19, 2006 | Michael<br>Petzold      | D.N.D.         | Murder in furtherance of<br>drug trafficking and/or<br>racketeering   | Guilty plea                   |
| 53 | Dec. 29, 2006 | Eugene J.<br>Talik, Jr. | N.D. W.<br>Va. | Interstate murder for hire  | Guilty plea                   |
| 54 | Jan. 9, 2007  | James<br>McTier         | E.D.N.Y.       | Murder in furtherance of<br>drug trafficking and/or<br>racketeering   | Life<br>sentence<br>from jury |
| 55 | Feb. 15, 2007 | Gerard<br>Price         | E.D.N.Y.       | Murder in furtherance of<br>drug trafficking and/or<br>racketeering   | NOI<br>withdrawn              |
| 56 | May 7, 2007   | Vincent<br>Basciano     | E.D.N.Y.       | Murder in furtherance of<br>drug trafficking and/or<br>racketeering   | Life<br>sentence<br>from jury |
| 57 | May 23, 2007  | Herman                  | E.D.           | Murder of a federal   | NOI                           |

|           |                      |                          |                 |  |                         |
|-----------|----------------------|--------------------------|-----------------|--|-------------------------|
|           |                      | Johnson                  | Mich.           | witness/person aiding a federal investigation  | withdrawn               |
| 58        | Dec. 7, 2007         | Damion Hardy             | E.D.N.Y.        | Murder in furtherance of drug trafficking and/or racketeering  | Life sentence from jury |
| 59        | Dec. 7, 2007         | Eric Moore               | E.D.N.Y.        | Murder in furtherance of drug trafficking and/or racketeering  | NOI withdrawn           |
| 60        | Apr. 30, 2009        | Joshua Wade              | D. Alaska       | Carjacking, death resulting  | Guilty plea             |
| 61        | Aug. 25, 2009        | Michael Jacques          | D.Vt.           | Kidnapping, death resulting  | Guilty plea             |
| 62        | Feb. 10, 2011        | Joel Cacace              | E.D.N.Y.        | Murder in furtherance of drug trafficking and/or racketeering  | Life sentence from jury |
| <b>63</b> | <b>July 25, 2011</b> | <b>Azibo Aquart</b>      | <b>D.Conn.</b>  | <b>Murder in furtherance of drug trafficking and/or racketeering</b>   | <b>Death sentence</b>   |
| 64        | Jan. 26, 2012        | John McCluskey           | D.N.M.          | Carjacking, death resulting; Hobbs Act robbery, death resulting; murder of a federal witness/person aiding a federal investigation   | Life sentence from jury |
| 65        | June 18, 2012        | Jason W. Pleau           | D.R.I.          | Hobbs Act robbery, death resulting   | Guilty plea             |
| 66        | Oct. 23, 2012        | Patrick Andrews          | N.D. W. Va.     | Murder on federal land   | Life sentence from jury |
| <b>67</b> | <b>Jan. 30, 2014</b> | <b>Dzhokhar Tsarnaev</b> | <b>D. Mass.</b> | <b>Use of A Weapon of Mass Destruction Resulting in Death; Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death; Bombing of a Place of</b> | <b>Death Sentence</b>   |



|    |               |              |          | <i>Public Use Resulting in Death;<br/>Malicious Destruction of Property<br/>Resulting in Personal Injury and Death</i> |             |
|----|---------------|--------------|----------|--|-------------|
| 68 | Jan. 5, 2015  | Farad Roland | D.N.J.   | Murder in furtherance of drug trafficking and/or racketeering  | Pending     |
| 69 | Apr. 21, 2015 | James Watts  | S.D. Ill | Att. bank robbery, death resulting   | Guilty plea |