

University of Massachusetts Amherst

From the Selected Works of John Brigham

2004

Unusual Punishment

John Brigham, *University of Massachusetts - Amherst*



Available at: https://works.bepress.com/john_brigham/19/

Unusual Punishment: The Federal Death Penalty in the United States

John Brigham *

ABSTRACT

This material has been presented at Southern Cross University, the Law and Society meetings in Budapest, the University of Georgia, Victoria University, Melbourne University, and LaTrobe University in Australia. The paper examines the way state and federal legal authority is constituted in the United States by focusing on local jurisdictions that do not have capital punishment as they respond to the federal death penalty. Particular attention is given to both the prosecution of Kristen Gilbert, a nurse who was tried for capital murder in Massachusetts, and research on the federal courts in Puerto Rico.

INTRODUCTION

While the topic does not lend itself to humor, the federal death penalty is certainly characterized by the bizarre. The case that got my attention was Kristen Gilbert's.¹ Gilbert was a nurse at the veteran's hospital in Northampton, Massachusetts.² In the fall and winter of 2000 through 2001 she was tried in Springfield, Massachusetts, for killing four of her patients by injecting them with a drug that overstimulated their hearts. The Assistant United States Attorneys who prosecuted Gilbert called her a "code bug"—drawing on the concept

* Professor of Political Science, University of Massachusetts, Amherst. The author wishes to thank Charles Wilton, Harry Miles, Elyse Geser, Laura Hatcher, Alec Ewald, Hans Linde, Frederick Lewis, Meg Mott, Austin Sarat, Ira Strauber, Peter Rush, Rorie Spill, Stanley Yeo, Atticus Brigham and Christine Harrington for their assistance along the way.

1. *See generally* M. WILLIAM PHELPS, *A PERFECT POISON* (2003).

2. *Id.* at 17.

of a “firebug,” they argued that she enjoyed the excitement of a “code” or “code blue,” the emergency room craziness that ensues when hospital staff responds to a patient that is near death.³ In testimony, some of the other nurses claimed she occasionally killed her patients in order to leave work early.⁴ The defense included an indictment of the medical care provided by the federal government to military veterans when a key witness admitted during testimony that he used drugs while working at the hospital.⁵

From outside the United States, the distinction between national and state executions is difficult to maintain. On the one hand, the United States is ranked as “having” the death penalty even if Puerto Rico, Massachusetts, and ten other states do not.⁶ On the other hand, in the international reaction that followed the execution of Timothy McVeigh, the phenomenon of execution by the national government is definitely seen as United States policy. There have been over 900 executions in the “modern period” in the United States—that is, since 1976—and none of them had been conducted by the national government until June 11, 2001.⁷ The inauguration of the federal death penalty with Timothy McVeigh had special implications for this form of punishment both inside and outside the United States. Federal law, courts and punishment are different.⁸

Addressing some of the peculiarities of the death penalty at what Americans call the “federal” level of government requires an inquiry into the cultural life of federal power. The “federal” in the United States is a mixed sovereignty with local and national aspects that exists in a vaguely constituted political and legal space. In the case of

3. *Id.* at 391.

4. *See generally id.*

5. *Id.* at 396.

6. Amnesty International USA, *Facts & Figures: Executions in the USA by State*, at <http://www.amnestyusa.org/abolish/listbystate.do> (Aug. 24, 2004).

7. Death Penalty Info. Ctr., *Number of Executions by State and Region Since 1976*, at <http://deathpenaltyinfo.org/article.php?did=scid=8&did=186> (last updated Sept. 9, 2004) [hereinafter *Executions by State and Region*] (Texas has executed more since 1976 than any other state: 325).

8. Aspects of this difference in terms of the decision to prosecute federally have recently been highlighted by Fox Butterfield. Fox Butterfield, *A Federal Case for a Teenager: Family Sees Tie to Ex-President*, N.Y. TIMES, Dec. 23, 2003, at A1. Recent controversy over the federal death penalty is evident in a case from the Second Circuit. *See United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002).

the death penalty, the federal power being exercised was recently reauthorized and its practice is idiosyncratic. This paper addresses the legal authority of the federal government both where, as in New England and Puerto Rico, federal policy is not in accord with local culture, and internationally, where a similar tension arises. In the case of Timothy McVeigh, national policy came under international scrutiny and had political implications as President George W. Bush toured the world.⁹ Thus, as the United States asserts its global supremacy, we see the federal government in terms of the diverse cultures that exist both in the American states as well as in the international community.

I. THE LEGAL CULTURES OF CRIMINAL JURISDICTION

The American legal system, as in federal republics throughout the world, contains multiple levels of jurisdiction that have different social and political qualities, or different cultures. The relationship between these levels constitutes legal policy or law in the country. Federalism as culture and policy becomes a way of understanding the order of relations between state and nation.¹⁰ In particular, the contest for supremacy over capital punishment between state and federal government calls attention to jurisdictional tensions that are at the core of national politics in America. At the interstices of state and nation, policy-makers negotiate a constitutional identity, or constitute an identity with regard to matters of political authority.¹¹ These jurisdictional tensions are traditionally understood in terms of the commerce power or the Due Process Revolution, which made the

9. Stephen Bright of the Southern Center for Human Rights has suggested that the death penalty is "much more part of the political process than the judicial." Eric Goldscheider, *Fed's Death Penalty Net Cast Ever Wider*, BOSTON GLOBE, June 11, 2000, at E1.

10. In Australia, scholars and jurists promise national intervention if any state seeks to reintroduce the death penalty. See Sam Garkawe, *The Reintroduction of the Death Penalty in Australia? Political and Legal Considerations*, 24 CRIM. L.J. 101, 108 (2000); Justice Michael Kirby, Address at the Criminal Bar Association Advocating for Justice Lecture Series (May 17, 2001).

11. See generally Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891 (1998).

provisions of the Bill of Rights applicable to state law. They are also part of “the new federalism.”

II. BEYOND STATE AND NATION

In the United States, where constitution making is thought to have taken place two hundred years ago, the constitution of state and nation is a surprisingly vital activity because the commingling of jurisdictions requires continual negotiation. As in other federal republics, such as Australia, there was law in what would become the United States before the creation of the Union. At least initially, the thing created by the act of confederation was considered an addition to, rather than an aspect of, what had existed up to that point.

III. THE COMMINGLING OF JURISDICTIONS

Sometimes it is hard to separate the state from the nation. In the United States, state and federal jurisdictions intermingle in the legal life of their residents. Massachusetts’s jails, like those around the country, hold both federal and state prisoners. Treatment programs to which state prisoners are sentenced and school lunch programs for children receive both state and national resources. Everything from driving and taking the bus to attending a university is subject to corollary state and federal legislation. The federal death penalty, formed in this context, reflects negotiations over the burdens and opportunities of prosecution and punishment that characterize the criminal process.

From the ratification of the United States Constitution, federal law has been an add-on to the state-based legal systems under which Americans live most of their lives. Given the prior existence of the great bulk of state law by which Americans are governed—laws of property, tort, and domestic relations alongside the procedures for civil and criminal trials—the federal system remains largely a meta activity. Federal law arose both in the formation of a nation and in the special circumstances deemed to warrant outside intervention in the legal systems of the states, such as banking, slavery, monopolization, labor, and civil rights. Just as the initial constitutional convention was called to correct deficiencies in the weaker confederation, federal intervention in the life of the nation continues to have that “special,”

often emergency, quality, such as when the federal government creates a “drug czar” or Environmental Protection Agency.¹² But we need to remember that life is led, and legal life is predominately constituted, at the local level.¹³

Citing the nature of the offense, United States Attorney Donald K. Stern, under the authority of former Attorney General Janet Reno, said that the death penalty was justified in Kristen Gilbert’s case.¹⁴ Jurisdiction was established because the veterans hospital in which Gilbert worked is a federal building.¹⁵ Gilbert’s lawyers sought to dismiss the indictment on a number of grounds, one of which relied on the fact that Gilbert was white. They argued that because

12. OFFICE OF NAT’L DRUG CONTROL POLICY, PULSE CHECK: TRENDS IN DRUG ABUSE (Jan. 2004), available at <http://www.whitehousedrugpolicy.gov/publications/drugfact/pulsechk/january04> (Jan. 2004).

13. “Federal” is the name Americans give to the national government when we want to distinguish it from state governments. Paradoxically, “federal” is also the name we give to the system that includes shard power between central and local governments. When no such distinction is necessary, as in foreign affairs, we simply refer to the “United States.” (Alec Ewald called my attention to the debate in Philadelphia during the constitutional convention about whether to refer to “these” or “the” United States. See Library of Congress, Documents from the Continental Congress and the Constitutional Convention (Feb. 2, 2001), at <http://lcweb2.loc.gov/ammem/bdsds/bdsdome.html>.) But that locution is problematic when the distinction is between the national and the state government. Then it becomes awkward to refer to “United States” and “states” in the same context and we don’t generally say “national” when referring to the courts run by the government in Washington, D.C., although we could. We say “federal courts.” This is because the dialectic between the whole and its parts is so rich. That is, the nuances in the relationship deserve the “federal” reference rather than the more unitary “national” terminology. In American English we do not usually say “national” when we want to include the states because, unlike “federal,” the term does not contain or imply, in the same sense, the parts that comprise it. “National” is the sort of thing the French might say about courts if they spoke English.

While the United States government is better known than the governments of the individual states, the national government is a function of local authorities and interests. The federal Congress has this quality with its representation based on states. This is particularly obvious in the Senate, where two delegates represent each state. In the House of Representatives, where representation is based on population, the boundaries and the relatively small character of the districts make the states, and their legislatures, matter in a different way. The pattern laid out in the Judiciary Act of 1789, that drew the boundaries of the federal courts along state lines, remains in place today. LEE EPSTEIN & THOMAS WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: A SHORT COURSE 68–69 (2d ed. 2000).

14. PHELPS, *supra* note 1, at 385.

15. See 18 U.S.C. § 7(3) (2000). The hospital was built for the federal government in 1922 but it exists “in” Massachusetts. See generally Elyse Geser, A Capital Trial in Massachusetts: The Role of the Jury (2001) (unpublished honors thesis, University of Massachusetts Amherst) (on file with author).

minorities in the federal system have been tried and sentenced to death in greater proportion than whites, Gilbert was targeted to bring down the racial imbalance.¹⁶ Judge Michael Ponsor, who presided over the trial, rejected this argument. However, the Attorney General's Office, at least under Janet Reno, was concerned about the racial disparity.¹⁷

IV. CONSTITUTING THE FEDERAL

The laws of the American states and of the nation have been commingling since the ratification of the Constitution and with increasing intensity since the Civil War, but the politics of federalism are inevitably presented as a clash of opposites. In calling attention to the federal death penalty and its special meaning, the polarities are problematic. The commingling suggests that nothing as simple as a state and a nation in some sort of separate identity are any more possible than the separation of law and society.

The late Daniel J. Elazar of the Center for the Study of Federalism defended the vitality of state culture in a system of many governing levels.¹⁸ Mixing faith and reason, he labored outside the academic mainstream. For years, the idea that local power might challenge the national government gained few adherents. However, that changed with the Reagan administration, its appointments to the Supreme Court and the Court's shift toward forceful, if occasional, protection of the states from the claims of a pervasive and unquestioned federal supremacy.¹⁹ Elazar's last book, *Covenant and Constitutionalism: the Great Frontier and the Matrix of Federal Democracy*,²⁰ advanced his belief in local government and the diversity of the American political

16. Defendant's Motion for Discovery of Information Disclosing Impermissible Consideration of Race, Criminal No. 98-30044.

17. President Clinton mentioned it in a news conference in June 2000 and it was discussed in a report conducted by the Justice Department in that year. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY, 1988-2000 (2000).

18. See DANIEL J. ELAZAR, THE AMERICAN MOSAIC: THE IMPACT OF SPACE, TIME, AND CULTURE ON AMERICAN POLITICS (1994); DANIEL J. ELAZAR, COVENANT AND CONSTITUTIONALISM: THE GREAT FRONTIER AND THE MATRIX OF FEDERAL DEMOCRACY (1998) [hereinafter ELAZAR, COVENANT AND CONSTITUTIONALISM].

19. See, e.g., United States v. Morrison, 529 U.S. 598 (2000).

20. ELAZAR, COVENANT AND CONSTITUTIONALISM, *supra* note 18, at 193-94.

experience. His position had its partisans, but seldom were they national figures.²¹ As the basis for a community of scholars set against the mainstream, Elazar's Center served a unique role. As an approach to federalism, the work of the Center never seemed to capture the attention of the dominant figures in political science.²²

In the Commerce Clause of the United States Constitution and in the Bill of Rights, there are important doctrinal areas where the relationship between the nation and the states has been delineated. From the Civil War until the 1970s, interpretations of constitutional doctrine in the Supreme Court were generally expansive with regard to national power.²³ More recently, considerable attention has been directed toward the character of state authority to resist national policies sometimes as a limitation on the federal government's power to regulate commerce and sometimes as a matter of state constitutional law.²⁴

In *Michigan v. Long*,²⁵ the United States Supreme Court held that state courts might develop "adequate and independent state grounds" as a basis for resisting the demands of national institutions.²⁶ Here, the relationship is classically formulated as states carving out a separate sphere from the national government. And, in the Commerce Clause cases of the last decade, the jurisprudential developments have often been directed against the extension of federal power in areas where states traditionally had authority. In *Crosby v. National Foreign Trade Council*,²⁷ one of the Court's more important recent efforts to elaborate the relationship between the federal government and the states, the Court chastised Massachusetts for venturing into

21. As evident in the journal *Publius* and at the Center for the Study of Federalism.

22. Separating the aspect of this marginality that derives from the formulation of federalism from the aspect that is a function of the political and social dominance of the national government from at least the New Deal to the 1980s is difficult. Norton Long is quoted by Matthew Holden as arguing that "we might think of the United States as having a variety of local constitutions because of the real variety from one place to another." MATTHEW HOLDEN, JR., FORCE, FEDERALISM, AND THE CONSTITUTIONAL SYSTEM: THREE PROBLEMS IN THE CAPACITY OF GOVERNMENT (1994) (draft on file with author).

23. See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); *Roe v. Wade*, 410 U.S. 113 (1973).

24. See *Morrison*, 529 U.S. at 613 (2000).

25. 463 U.S. 1032 (1983).

26. *Id.* at 1040-42.

27. 530 U.S. 363 (2000).

the international arena.²⁸ Arising in the controversy over the Florida results in the 2000 election for President of the United States, the United States Supreme Court, in *Bush v. Gore*, held out the possibility that the actions of the Florida Supreme Court might be insulated from review if they were based on the Florida Constitution. In the end, the impact of that decision was in the other direction. The case will remain more famous for its politics than its meaning for federalism.²⁹

In *United States v. Lopez*,³⁰ the Court invalidated the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1000 feet of a school. The defendant in that case, a twelfth-grade student, had been convicted under the federal Act for knowingly possessing a concealed handgun and bullets at his San Antonio, Texas, high school.³¹ In holding that the Act exceeded Congress's power to regulate commerce, the Court stressed that public safety and education were traditional state concerns.³² Justice Stevens, in *Jones v. United States*, cited a number of his dissents in cases where federal and state criminal law conflict and emphasized his concern that national policy should not "displace a policy choice made by the state . . . 'unless Congress conveys its purpose clearly.'"³³

28. *Id.* at 387–88.

29. The conservatism of the decision seemed particularly partisan because the interests of the conservative candidate went against the traditional conservatism of "states' rights."

30. 514 U.S. 549 (1995).

31. *Id.* at 551–52.

32. *Id.* at 564.

33. *Id.* at 859–60 (Stevens, J., dissenting). Stevens noted, "[t]he fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years, illustrates how a criminal law like this may effectively displace a policy choice made by the State. Even when Congress has undoubted power to pre-empt local law, we have wisely decided that unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. For this reason, I reiterate my firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain." *Id.* (Stevens, J., dissenting) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)) (internal citations omitted); see also *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 699 (1985) (Stevens, J., dissenting); *Bennett v. N.J.*, 470 U.S. 632, 654–655 n.16 (1985) (Stevens, J., dissenting); *Garcia v. United States*, 469 U.S. 70, 89–90 (1984) (Stevens, J., dissenting); *Bell v. United States*, 462 U.S. 356, 363 (1983) (Stevens, J., dissenting); *McElroy v. United States*, 455 U.S. 642, 675 (1982) (Stevens, J., dissenting).

In another area of federal law, Laura Jensen has identified “the conditional spending conundrum,” a situation where Congress places limits on what states can spend.³⁴ She openly worries about the unfettered coercive power that comes from conditions placed on the largess of the federal government. Such measures were applied in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,³⁵ and they illuminate the ongoing struggle to preserve a modicum of state autonomy. In her work, Jensen calls attention to conditions like those that deny the poor “marital privacy, associational liberty, reproductive choice and vocational freedom.”³⁶ Conditions imposed by the federal government always have the potential to challenge the independence and authority of local jurisdictions. Jensen writes of the “potential to subvert the governmental powers reserved to the states, undermining their integrity as discrete political communities.”³⁷ Here, the most common formulation is the prohibition against legislation that contains “unconstitutional conditions,” or those conditions that may transgress local law and provisions of the federal constitution.³⁸

V. THE CULTURE OF NATIONAL SUPREMACY

The standard refrain in the American academy when local autonomy is considered in matters dealing with rights and criminal justice has been that government at the national level is superior to local government.³⁹ This superiority is both legal and cultural. The culture of the nation dominates while coexisting with subordinate local cultures, which are closer to much of the law. Our patriotic celebrations on the Fourth of July, though they have a local flavor, are a celebration of nationality, of national beginnings. Four aspects of the culture of national supremacy will be mentioned here. There

34. Laura S. Jensen, *Federalism, Individual Rights, and the Conditional Spending Conundrum*, 33 POLITY: J.N.E. POL. SCI. ASS'N 259, 278 (2000).

35. 42 U.S.C. §§ 601–09 (2000).

36. Jensen, *supra* note 34, at 260.

37. *Id.* at 265.

38. *See generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

39. *Cooper v. Aaron*, 358 U.S. 1 (1958), epitomizes this thinking, and it is evident in the generally favorable treatment of *Brown v. Board of Education*, 347 U.S. 483 (1954), over the last fifty years.

are, however, as many aspects as there are nodes of cultural meaning.⁴⁰ These four interact in the constitutional setting and are particularly relevant to the emergence of federal capital punishment.

A. Doctrinal Authority: Commerce

Through the latter half of the twentieth century, the legal supremacy of the national government in the United States has been widely assumed. But, constitutional lore tells us the hegemony of the nation goes back much further. In matters of conflict with state law, the constitutional understanding became a matter of national supremacy. Constitutional law is taught from this perspective and its foundations in the earliest cases have been reinterpreted to establish the supremacy of national law in the federal system.⁴¹

One aspect of this development is elevation of decisions by the nationalist, Chief Justice John Marshall. Thus, *M'Culloch v. Maryland*, which established the federal power to create a national bank that could not be taxed by the state of Maryland, is taught as establishing a hierarchy of nation over state. And *Gibbons v. Ogden*, which read the Commerce Clause broadly to include interstate transportation, is treated as establishing national authority not just over commerce, but also over the internal affairs of the nation.⁴²

At the very least, this doctrine of national superiority is a more recent and limited development. It is contested in the Civil War where the outcome changes the meaning of the older cases, giving the national perspective a power it could not have had during Marshall's time. Legal hierarchies were further solidified with the amendments that followed the war. The early commerce cases established a limited supremacy based on the power to regulate the interstices and relations between the states. But this limited doctrine had been conflated into a more general presumption that the federal is supreme.

40. See, e.g., Butterfield, *supra* note 8.

41. See the importance of *Gibbons v. Ogden*, 22 U.S. 1 (1824), *M'Culloch v. Maryland*, 17 U.S. 316 (1819), and *Dred Scott v. Sanford*, 60 U.S. 393 (1856), as a "self-inflicted wound".

42. Discussions with Christine Harrington helped me to understand how embedded this perspective has become.

In addition, and even more important, this supremacy has grown to encompass not simply the law but also a conception of the national government as superior ethically, professionally, and politically.⁴³ For this, more than doctrine had to be at work.

B. The Cracker Card

The contemporary ethical superiority of national institutions derives from the matter of slavery and its successor, the Jim Crow laws. At its base, it is manifest in contemporary social life, where a culture of fear exists.⁴⁴ Whenever it is suggested in America that the local might be capable of resisting the national, the specter of rural southern resistance of civil rights is invoked. A colleague of mine has characterized this invocation as the “cracker card.”⁴⁵

When I was first investigating the issue of federal capital prosecution in Massachusetts, a state without the death penalty, I mailed an inquiry to 900 of my law and political science colleagues on the “Law and Courts” list administered by Howard Gillman of the University of Southern California.⁴⁶ I was looking for support in my study of what it meant to seek a sentence of death in Massachusetts. I was severely chastised.

The response from Political Scientist Glenn Phelps indicated the dangers that partisans of a national profession see in the idea of local autonomy where the federal government has decided to exercise its authority.⁴⁷ Even in professional company one faces the play of the

43. Elaborating the concept of the federal is becoming exciting these days, as doubts have emerged as to both the inevitability and desirability of the broadest sense of this presumed supremacy. The balance of powers between national and state governments have become contested terrain in the United States with ideological interests shifting the consequences. *See* AM. ENTER. INST. FOR PUB. POLICY RES., Federalism Project, at <http://www.aei.org/research/projectid.13,filter./project.asp> (last visited Sept. 22, 2004).

44. It is evident in images of lynching and Bull Connor’s dogs attacking demonstrators who were part of the civil rights movement. *See* STRANGE FRUIT (California Newsreel 2002).

45. In fact, though I have used the term “redneck” sheepishly from time to time, the somewhat sharper cut of “cracker” was brought to my attention in a conversation with Meg Mott of Marlboro College.

46. Posting of John Brigham, brigham@polsci.umass.edu, to listproc@usc.org (DATE) (copy on file with author).

47. Posting of Glenn Phelps, Professor of Political Science, Northern Arizona University, Glenn.Phelps@nau.edu, to lawcourts-1@usc.edu (Apr. 21, 2000) (copy on file with author). Mr. Phelps stated:

cracker card, and grassroots romance is trumped by the image of lynch mobs or Bull Connor's police dogs attacking civil rights workers.

C. *Bad Attitudes*

The perspective of national supremacy has been reinforced by its own ideological and institutional developments. National institutions and processes were supported in political science by what I have called the "bad attitudes" perspective on local political culture.⁴⁸ Political science since the 1950s has taught that the further you get from the local as well as from politics, the more enlightened you will find the practices of American institutions.⁴⁹ The perspective is based in national surveys and has become a staple of teaching about politics after the Second World War.

In work such as *Communism, Conformity and Civil Liberties* by Samuel A. Stouffer, political scientists learned that if you asked people whether they would allow a communist to teach in the public schools, or an atheist to hold public office, the answer they would give would depend on their education and professional training. The more educated respondents were more likely to provide answers in line with enlightened thought.⁵⁰

This is not simply about what the locals think, but also contains the idea that one finds increasing levels of enlightenment as one gets

I am, as an opponent of the DP, distressed by this case. But Massachusetts' position as John lays it out is pretty lame. It rings Very much like the Kentucky Resolutions or various arguments surrounding nullification (pre-civil war and post-Brown). Massachusetts can pick and choose which federal law it is subject to? Could MA citizens opt out of the draft if they didn't wish to have it? (Oh, yeah, they lost that one already) Or the income tax? Or hard time for Federal drug offenders? Unless there is more to this case than meets the eye, this strikes me as a non-starter even with the states-rights sympathizers currently on the SC.

Id.

48. John Brigham, *Bad Attitudes: The Consequences of Survey Research for Constitutional Practice*, 52 REV. OF POL. 582 (1990) [hereinafter Brigham, *Bad Attitudes*].

49. See generally HERBERT McCLOSKEY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983); SAMUEL A. STOFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND (1954).

50. STOFFER, *supra* note 49.

closer to Washington and to national lawmaking. In addition to matters of geography there are matters of institutional practice. In leaving the terrain of local politics, so the theory goes, higher levels of enlightenment can be achieved, but sometimes this means leaving politics altogether and finding transcendence in the law.⁵¹ Hence the image of the lynch mob may occasionally be held at bay by the sheriff but if not the sheriff then the appellate courts. This is the teaching of many movies, including *To Kill A Mockingbird*, which justifies my belief in the doctrine's deep cultural resonance.

Thus, "bad attitudes" are linked to the "cracker card" to reinforce the authority of elites. It is not enough to point out this ideological phenomenon because, to many educated Americans, it is simply true. That is, according to the professional community that surrounds our enterprise, it really *is* better in Washington and in the federal system than it is in Idaho and Alabama and/or in the hinterlands of the polity.⁵² My response is to call attention to the limited perspective of "attitudes" that reek with the arrogance of a positivist social science. People given limited and scary choices will often recoil. These may be the same people who are decent and gentle in other respects.

D. Doctrinal Authority: The Due Process Revolution

Federal law has been an important force in articulating the parameters of due process. Courts articulated these parameters throughout the Civil Rights Movement and they have been featured by the propensity of legal academics in the United States to focus on appellate doctrine. Following on *Brown v. Board of Education*, and led by the United States Supreme Court, the system of criminal law in America was nationalized. Here, a hierarchy was established in appellate opinions handed down in the middle of the twentieth

51. Brigham, *Bad Attitudes*, *supra* note 48, at 593–97.

52. As an example of the national government's style and quality relative to state and local governments, the court systems are perhaps at an advantage. National courts, like the national police force, the FBI, do not take care of ordinary business. The differences between state and federal justice can sometimes be stunning. As a sort of meta-system, the federal courts pick and choose what they are going to hear. The halls of federal courts are seldom crammed with defendants, victims and their families. Although federal buildings have been subjected to more dramatic forms of violence, the violence associated with law is generally more removed from the places.

century that made federal constitutional guarantees the standard against which to measure local criminal practice.

Known as the “Due Process Revolution,” the decisions in many of these cases, like the right to counsel, accorded the practices of the federal courts universal applicability.⁵³ While the decisions were against wholesale “incorporation” of the Bill of Rights as it applied to the national government as the standard for local criminal practice, the implication of the cases handed down from 1954 to 1973 was to “nationalize” constitutional due process guarantees.

Part of this has been *voir dire* during capital trials. *Voir dire* has developed in an effort to be fair to the defendant.⁵⁴ *Voir dire* is particularly important when a potential juror does not subscribe to the death penalty. *Witherspoon v. Illinois*, handed down during the height of federal judicial intervention into state criminal procedure, set the tone of early federal concern for fairness in jury selection where potential jurors opposed the death penalty.⁵⁵ It has been the subject of much dissent of late.⁵⁶ While federal protection of *voir dire* in the 1960s fit the model of federal supremacy, subsequent judicial interventions have been far less supportive of the rights of the accused.⁵⁷

VI. THE FEDERAL DEATH PENALTY

The federal death penalty is a construction in federal statutory law that draws from the stature of the federal government and is administered in the federal courts. American people generally live under laws that are close to their own cultural life. The emergence of capital punishment at the federal level faces resistance in various state jurisdictions.⁵⁸ This resistance challenges the presumptions of national supremacy. Some of those challenges are the sort associated

53. FRED P. GRAHAM, *SELF-INFLICTED WOUND* 26–66 (1970).

54. *See generally* *Strauder v. West Virginia*, 100 U.S. 303 (1879).

55. *Id.*

56. *See* *Harris v. Alabama*, 513 U.S. 504 (1995); *Morgan v. Illinois*, 504 U.S. 719 (1992); *Robertson v. California*, 498 U.S. 1004 (1990); *Gomez v. United States*, 490 U.S. 858 (1989); *Wainwright v. Witt*, 469 U.S. 412 (1985).

57. *See* Brigham, *Bad Attitudes*, *supra* note 48, at 593–97.

58. Associated Press, *Rare Death Sentence in Mass.* (Dec. 23, 2003), available at <http://www.cbsnews.com/stories/2003/12/23/national/main589988.shtml>.

with the right-wing politics of Timothy McVeigh. Most are simply the way we negotiate identity.

VII. CONSTRUCTING AN UNUSUAL PUNISHMENT

The United States has a long, but minimal, association with federal executions.⁵⁹ The American past begins with a government barely hanging on at the behest of the former colonial regimes that handled most aspects of daily life. The national government generally had not been in the forefront in promoting the death penalty, with the possible exception of war times. On this foundation, current developments amount to a kind of exceptionalism in the administration of the federal death penalty.

VIII. ANCIENT HISTORY

The United States government has executed 340 people (336 men and 4 women) in its history.⁶⁰ The first federal execution was in 1790 for a murder committed in Maine, which was then part of Massachusetts.⁶¹ The struggle over slavery and the Civil War produced huge casualties, but few executions away from the battlefield. Robert E. Lee, the leader of the rebellious military, returned to a place of honor as co-founder of the distinguished college that bears his name along with that of the first President of the Republic, Washington and Lee. Between 1927 and 1963, the United States has executed thirty-four individuals, including two women.⁶² Until 2001, there had been no federal executions since Victor Feguer was hanged in Iowa for kidnapping in 1963.⁶³

59. Death Penalty Info. Ctr., *Executions in the U.S. 1608–1987: The Espy File* (2004), at <http://deathpenaltyinfo.org/article.php?scid=8&did=269>.

60. Death Penalty Info. Ctr., *The Federal Death Penalty* (2004), at <http://deathpenaltyinfo.org/article.php?scid=29&did=147>.

61. *Id.*

62. *Id.*

63. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347 (1999) [hereinafter Little, *Federal Death Penalty*]; Rory K. Little, *The Future of the Federal Death Penalty*, 26 *OHIO N.U. L. REV.* 529 (2000). Almost forty-three percent of those executed since 1976 have been minorities. See Death Penalty Info. Ctr., *Race of Death Row Inmates Executed Since 1976* (2004), at <http://deathpenaltyinfo.org/article.php?scid=5&did=184>.

The total number of federal executions throughout history is little more than the number of people executed in Texas over the last decade.⁶⁴ The national government did, however, rush to execute Julius and Ethel Rosenberg for spying in the 1950s.⁶⁵ This punishment stands as one of the most dramatic statements of the intensity of Cold War hysteria. Federal capital prosecutions diminished in the 1960s as a result of the civil rights movement and as a foundation for, if not in anticipation of, the ruling by the United States Supreme Court in *Furman v. Georgia*,⁶⁶ which temporarily invalidated capital punishment throughout the United States.⁶⁷

Although the moratorium on the death penalty at the federal level lasted only until 1976,⁶⁸ no federal convict had been executed from the 1960s through the 1990s.

IX. RECENT HISTORY

Running counter to these developments, at least since Richard Nixon's 1968 campaign for the presidency, advocacy of the death penalty has been revived as a staple of conservative politics.⁶⁹ The first President George Bush campaigned in 1988 against Massachusetts' Governor Michael Dukakis with attack advertisements that featured Willie Horton, a man found guilty of murder, after the Dukakis administration had granted him a weekend furlough. The point was to attack the liberalism of the Governor and, by implication, the progressive environment from which he hailed. The first modern federal death penalty statute was the Anti-Drug Abuse Act of 1988,⁷⁰ commonly called the "drug kingpin act." It reintroduced the death penalty at the federal level for a limited number of drug-related crimes.

64. See *supra* note 7 and text accompanying note 60.

65. ROBERT MEEROPOL, AN EXECUTION IN THE FAMILY (2003); BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003).

66. 408 U.S. 238 (1972).

67. *Id.* at 239–40; see also *id.* at 358–59 (Marshall, J., concurring).

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

69. JOE MCGINNIS, THE SELLING OF THE PRESIDENT 1968 (1969); WILLIAM SAFIRE, BEFORE THE FALL: AN INSIDE VIEW OF THE PRE-WATERGATE WHITE HOUSE (1975).

70. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

In the 1992 presidential campaign, candidate Bill Clinton presided over the execution of Rickey Ray Rector, a severely handicapped man, in the midst of the New Hampshire primary.⁷¹ After he was elected, President Clinton signed an expansive federal death penalty bill⁷² in 1994. In 1996, he championed the Antiterrorism and Effective Death Penalty Act,⁷³ which severely limited habeas corpus appeals.⁷⁴ In the 1994 legislation, the federal death penalty was expanded to cover sixty different offenses including espionage and treason, the murder of certain government officials, kidnapping resulting in death, murder for hire, fatal drive by shootings, sexual abuse crimes resulting in death, carjacking resulting in death, and most homicides for which federal jurisdiction exists in addition to some crimes that do not result in death, such as those involved in the running of a large-scale drug operation.

Procedurally, federal protections at trial are extensive. The accused is entitled to two lawyers, one of whom must be experienced in death penalty cases. The trial is bifurcated, with one stage determining guilt or innocence and a second stage determining the punishment based on considerations of special and mitigating circumstances. In 1995, the Justice Department took over review of all federal death penalty cases, including the decision to prosecute. In order for a federal prosecutor to seek the death penalty, he must gain approval from the Death Penalty Committee of the United States Attorney's Office in Washington, D.C. The system is designed to protect against bias and it certainly serves to bring the ultimate

71. JOE KLEIN, *THE NATURAL: THE MISUNDERSTOOD PRESIDENCY OF BILL CLINTON* (2002).

72. The Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified as amended in scattered sections of 18 U.S.C.).

73. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

74. Capital Defense Weekly, President Clinton Grants Clemency to Federal Death Row Inmate Raising Innocence Claim, *available at* <http://www.capitaldefenseweekly.com/archives/010129.html> (last visited Aug. 8, 2004).

On his last day in office, President Clinton commuted David Ronald Chandler's death sentence to life in prison. Chandler was the first man sentenced to death under the 1988 federal drug kingpin law. . . . Since Chandler's trial, the actual triggerman, Charles Ray Jarrell, who was the main government witness, has recanted his testimony.

Id.

decision back to the nation's capital. Attorneys for the defense are allowed an opportunity to present their case against the imposition of death before the committee.

X. CURRENT DEVELOPMENTS

The statutes, the Supreme Court,⁷⁵ and now the executive branch have changed in the area of the death penalty. There has been a steady increase in death penalty prosecutions by the federal government in the last ten years, from twenty in 1990 to thirty-four in 1999.⁷⁶ In 2004, there were thirty-one prisoners on federal death row. Of these, twenty-two were non-white.⁷⁷ Prisoners from ten states are represented on federal death row.⁷⁸ Texas, Missouri, Louisiana and Virginia have more than two, and Texas has six condemned prisoners.⁷⁹ The crimes are all murders in some form or another: six involve drugs, three involve kidnapping, three involve robbery, two occurred in a federal prison, two involve police officers, one involves mass murder by bombing and one involved a white supremacist plot.⁸⁰

With over 3500 people under sentence of death in the United States,⁸¹ the score of prisoners on federal death row are in some respects little more than a footnote. Yet, some fear a "federalization" of the death penalty is taking place, evidenced by a steady increase in death penalty prosecutions over the last ten years.⁸² At the national level, a configuration of large state electoral power and Sunbelt politics in states like Florida, Texas and California make the death penalty a potent national issue. Although President Clinton signed the

75. The current position of the Supreme Court seems to represent some of the ambivalence at the federal level. In *Penry v. Johnson*, 532 U.S. 782 (2001), a six to three majority of the court overturned the death sentence of a mentally deficient individual because of perceived problems with the jury instructions.

76. Death Penalty Info. Ctr., <http://deathpenaltyinfo.org> (last visited Sept. 14, 2004).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 1 (2003), available at http://www.naacpldf.org/content/pdf/pubs/drusa/drusa_summer_2003.pdf.

82. Goldscheider, *supra* note 8; Abby Goodnough, *Acquittal in Puerto Rico Averts Fight Over Government's Right to Seek Death Penalty*, N.Y. TIMES, Aug. 1, 2003, at A14.

major national death penalty statutes into law, there were no executions during his presidency. And, in the waning days of his administration, one heard more about internal assessments conducted by the Justice Department on the fairness of the national process than about preparing for federal executions.⁸³

Juan Paul Garza, convicted under the “drug kingpin act,” was to be executed during the final days of the Clinton Administration on December 12, 2000.⁸⁴ He was given a stay at the last minute by President Clinton, citing evidence of racial disparity in the administration of federal capital cases.⁸⁵ The ascendancy of George W. Bush, with a record of 152 executions in Texas during the five years he was Governor, and the appointment of John Ashcroft as Attorney General, changed the administrative dimension of federal capital punishment. However, there has only been one federal execution during George W. Bush’s first term as President.⁸⁶ President Bush is widely perceived to have brought a Texas view of the death penalty to Washington. Thus, conservative politics in the Bush administration are promulgated at the national level with a distinctively local Texas orientation.⁸⁷ But it was in the final year of the Clinton administration that the Federal Bureau of Prisons converted an old cellblock in Terre Haute, Indiana, into a new facility for condemned federal prisoners and readied a death chamber.⁸⁸

Timothy McVeigh’s case may have been exactly the sort to revive federal capital punishment. Convicted of murder in the 1995 bombing of the Murrah Federal Building in Oklahoma City that killed 168 people, McVeigh, a white man, was executed on June 11, 2001.

83. Two major studies were widely circulated, the first in 1998. This study considered the experience and cost of providing counsel in federal capital cases. The second study appeared in 2000 and considered the racial profile of those convicted in the federal system. See U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY, 1988–2000* (2000).

84. *Death Penalty Doubts*, N.Y. TIMES, Dec. 12, 2000, at A32.

85. *Id.*

86. Louis Jones, Jr. was executed on March 18, 2003, in Terra Haute, Indiana. Shannon Tan, *A Hymn on His Lips, Veteran Is Executed; Gulf Soldier Ignores His Victim’s Relatives as They Watch Him Die*, INDIANAPOLIS STAR, Mar. 19, 2003, at 1B.

87. See Robert Sherrill, *Death Trap: The American Way of Execution*, THE NATION, Jan. 8, 2001, at 1B.

88. Press Release, Federal Bureau of Prisons, *Special Confinement Unit Opens at USP Terre Haute* (July 13, 1999), available at <http://bop.gov/ipapg/ipaspec.html>.

XI. THE PRACTICE OF THE FEDERAL

Comments on the possibility of further investigation into the matter of federal criminal supremacy by Hans Linde gave me confidence in the possibility of this inquiry. Linde is a distinguished former Oregon Supreme Court justice and clerk to then-Justice William O. Douglas of the United States Supreme Court. His life incorporates the national and the local. Responding to an electronic inquiry, Linde affirmed the authority of the United States to apply its criminal law in the face of local opposition as a matter of principle, “else we would have no federal civil rights law.”⁸⁹ Disclaiming authority in the area of capital punishment, Linde suggested what he called a “state-based, relativist interpretation to the Eighth Amendment’s ban against ‘cruel and UNUSUAL’ punishments.”⁹⁰ While common in Texas, the death penalty is presently unusual in Massachusetts, he argued. This suggested to me some of the dimensions of federal practice.

On the eve of the McVeigh execution, *The New York Times* published a study by the United States Justice Department showing that only nine of the ninety-four districts accounted for forty-three percent of all cases in which prosecutions called for the death penalty.⁹¹ New York, the Eastern District of Virginia and Northern Texas were among the leading districts.⁹² The assumption is that prosecutors are influenced by the prevailing attitudes in their states, though New York does not fit this pattern.

89. E-mail from Hans Linde, Former Oregon Supreme Court Justice (Apr. 23, 2000) (on file with author).

90. *Id.* Justice Linde stated:

The death penalty no longer is unusual in Texas or Florida, but it is highly unusual, and arguably regarded as unacceptably cruel, among the people of Massachusetts. The argument is unlikely to prevail in court, because it would allow federal death penalties in some states but not in other states that reject capital punishment. But at least one could claim that this follows the relativist standard that the constitutional adjectives adopt—comparable, perhaps, to the “community standards” phrase that The Burger Court asserted for obscenity law. Some people may not find the analogy to the government-conducted killing of individuals farfetched.

Id.

91. *Death Penalty Doubts*, N.Y. TIMES, Dec. 12, 2000, at A32.

92. *Id.*

XII. STATE PREROGATIVES

In *Jones v. United States*,⁹³ the Seventh Circuit found a federal prosecution for arson in Indiana justified under a federal statute as involving interstate commerce because a gas line serving the house that was torched by defendant's molotov cocktail had crossed state lines.⁹⁴ Justice Ginsburg, writing for a unanimous Supreme Court, held that the statute couldn't be used in that fashion because the private home was not "used" in interstate commerce.⁹⁵

Occasionally federal courts address the degree of state autonomy the federal system will allow. In 1998, Ricky Lee Brown from West Virginia faced a federal capital prosecution, with federal jurisdiction maintained under the commerce clause because the electricity and natural gas in his house came from out-of-state.⁹⁶ But in *Jones* the United States Supreme Court Justices ruled unanimously against federal jurisdiction based on the existence of a natural gas hook-up that crossed state lines.⁹⁷ During arguments in that case, Chief Justice Rehnquist wondered sarcastically whether the federal government would have been justified in coming into the case if the milk the family drank was from out-of-state.⁹⁸ Ultimately, after considering the Court's ruling in *Jones*, federal prosecutors in the Brown case decided to drop the capital charges.⁹⁹

XIII. THE POLITICS OF FEDERAL INTERVENTION

The federal government has long monitored the voir dire and applied generally higher federal standards for this stage in the trial. *McFadden v. Johnson*,¹⁰⁰ an opinion from the Fifth Circuit dealing

93. 529 U.S. 848 (2000).

94. *Id.* at 851. It is a federal crime to damage or destroy, "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (2000).

95. 529 U.S. at 851.

96. *United States v. Brown*, 74 F. Supp. 2d 637 (W.D. Va. 1998).

97. 529 U.S. at 855.

98. Appellee's Oral Argument, *Jones v. United States*, 529 U.S. 848 (2000), 2000 WL 346183, at *42.

99. Goldscheider, *supra* note 8.

100. 166 F.3d 757 (5th Cir. 1999).

with a 1987 murder, held that the verdict in a state capital prosecution could stand although two prospective jurors were excluded for bias prior to the trial that found the defendant guilty of capital murder.¹⁰¹ The appeal was governed by the federal Anti-terrorism and Effective Death Penalty Act of 1996, which required deference to the decisions of state courts.¹⁰² Here, the federal court approved dismissing two potential jurors who were challenged for cause after indicating that they would not be able to impose the death penalty.¹⁰³ *McFadden* denies review of actions in the state trial court on the basis of a federal law limiting habeas corpus review in capital cases. In this limitation, executions are facilitated on the grounds of limiting federal intervention in state prosecutions.

The federal government's position, whether it is limiting habeas corpus review and returning power to the states or taking over the prosecution of murder cases, has been encouraging executions with little regard for the logics of federalism. As Goldscheider points out, one aspect of the federal push already seems to be that no jurisdiction "will be able to declare itself a death penalty free zone."¹⁰⁴

XIV. THE PRACTICE OF SHARING

The basic principle in dual sovereignty cases has been that the prosecution should take place in the most local jurisdiction. In practice, the decision is never a simple one. In the case of Terry Nichols, who is serving a life sentence for assisting in the bombing of

101. *Id.* at 761.

102. 28 U.S.C. § 2254(d) (2000):

[A] writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.

103. 166 F.3d at 759–60.

104. Goldscheider, *supra* note 8.

the Alfred P. Murrah Federal Building in Oklahoma City, state prosecutors are seeking the death penalty in proceedings against the federal prisoner. In this matter, the United States Constitution's protection against double jeopardy has often been interpreted in the context of shared criminal jurisdiction between the federal government and the states.

XV. ADMINISTERING FEDERAL CAPITAL PUNISHMENT

Here we consider some idiosyncrasies of what is already an unusual activity. There are problems with the *voir dire* in capital cases administered under a system of federal constitutional law. Racial discrimination was identified by the Justice Department under the Clinton administration as an aspect of getting federal capital punishment "off the ground." The federal death penalty in states that don't have capital punishment, the special case of Puerto Rico, and the celebrity nature of the execution of McVeigh all bear on the constitution of the federal death penalty as an aspect of legal culture in America.

XVI. LOCAL CULTURE AND THE DEATH PENALTY

Federal executions are unusual, but most of the states with prisoners on federal death row have the death penalty. In these cases, residents have some familiarity with the idea of executing those who have been convicted of the most serious crimes. Twelve states, plus the District of Columbia and Puerto Rico, do not have the death penalty and thirty-one federal prosecutions have been authorized in these states.¹⁰⁵ Here, the prospect of imposition of the death penalty by the federal government is particularly unusual and raises

105. The twelve states that do not have the death penalty are as follows: Massachusetts, Maine, Vermont, Rhode Island, Alaska, Hawaii, Iowa, Michigan, Wisconsin, North Dakota, Minnesota and West Virginia. NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 81, at 1. Of the thirty-one federal prosecutions that have been authorized in these states, four of these cases are in New England. These have stemmed from 152 requests brought to the Attorney General's Office in Washington, D.C., by local U.S. attorneys. There were twenty requests from Washington, D.C. and sixty-four from Puerto Rico. U.S. DEP'T. OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 1988-2000 tbl. 14-1 (2000) [hereinafter U.S. DEP'T OF JUSTICE, SURVEY].

compelling questions about the cultures of law. These questions are amplified in the case of Puerto Rico, where its colonial status, constitutional prohibition of capital punishment, and lack of political representation all call attention to the problem of federal capital prosecutions in jurisdictions without capital punishment.

XVII. NEW ENGLAND

New England is an “old” part of the United States and although it was executing its citizens while Texas was still part of Mexico, a sense of its more recent past is one of the factors weighing on reintroduction of capital punishment. New England has a well-known, and perhaps even significantly distinctive, culture. One current manifestation of this culture is that this region is decidedly less death-prone than the nation as a whole. Four of the six New England states do not have capital punishment: Maine, Massachusetts, Rhode Island and Vermont. New Hampshire, which has the death penalty, has no prisoners on death row. Only Connecticut, a border state containing many suburbs of New York City, has prisoners sentenced to die.

The Northeast more generally, but New England in particular, is the region in the United States with the fewest executions.¹⁰⁶ These are distinctive places in many respects but clearly in terms of feelings about the death penalty.

Massachusetts began phasing out the death penalty in the middle of the nineteenth century. By 1840, milder punishment was being recommended by officials for all crimes other than murder.¹⁰⁷ The website of Massachusetts Citizens Against the Death Penalty, Inc., features a drawing of Bartolomeo Vanzetti and Nicola Sacco, the radicals whose execution in the early twentieth century raised an

106. *Executions by State and Region*, *supra* note 7. And while New York, New Jersey and Pennsylvania have instituted the death penalty, no one has been executed in the Northeast in the modern period. *Id.* Massachusetts has not had an execution since 1947; in Rhode Island it was at least 1930; and 1887 in Maine. Death Penalty Info. Ctr., *Information on States Without the Death Penalty* (2004), at <http://deathpenaltyinfo.org/article.php?scid=11&did=276>.

107. A measure putting this change in effect was passed in 1852. Kathleen J. Burns, *A Chronicle of the Massachusetts Death Penalty*, LAW. J., Jan. 1999, at 1.

international storm of protest.¹⁰⁸ The evocation of that history suggests a culture of remorse, and perhaps even a sense of community, that is at the heart of the opposition to the death penalty in New England and in the Northeast. Michael and Robert Meeropol, who live in Springfield, Massachusetts, are the sons of Julius and Ethel Rosenberg, who were executed by the federal government in the 1950s,¹⁰⁹ and they are active in abolition circles.

The reasons for opposition to the death penalty in this region are complicated. The reasons include Yankee Protestantism with a strong communal quality in rural areas and in whole states, like Vermont. They also include Catholic opposition to the death penalty in Rhode Island and in the cities of Massachusetts. The factors do not always make a sensible, clear or conventional mix. Former Cardinal Bernard Law had been active in opposing the death penalty in Massachusetts.¹¹⁰ Existing in an interesting relationship with Catholic opposition is a liberal policy orientation that may explain reluctance to institute the death penalty in the Northeast as a whole.

In Massachusetts, the Supreme Judicial Court invalidated the last death penalty statute in 1984. In 2000, Senator Patrick Leahy of Vermont introduced into Congress the Innocence Protection Act of 2000,¹¹¹ which would bar the Department of Justice from seeking the death penalty in non-death penalty states except under special circumstances.¹¹²

108. <http://www.mcadp.org> (last visited August 12, 2004).

109. See *Execution of Julius and Ethel Rosenberg* (News Report, 1953), available at http://www.historychannel.com/speeches/archive/speech_390.html

110. Bernard Law, Speech at the State House Hearings on the Proposed Legislation to Reestablish the Death Penalty in the Commonwealth of Massachusetts (Mar. 22, 1999).

111. See S. 2073, S. 2690, 106th Cong. (2000).

112. This development was suggested in my correspondence with Hans Linde. Linde stated in his e-mail:

The second avenue is more down your line as a student of government: the political uses of "states' rights." At this time, Congress is considering changing the laws governing the use of lethal drugs by physicians, in response to Oregon voters' adoption of a law permitting physician-assisted suicide. The Oregon congressional delegation obviously feels some obligation to preserve the majority decision of Oregon's voters, and most of them are doing what they can to defeat, delay, or weaken the proposed federal override. (Another analogy may be found in the legislation of some states to allow the medical use of marijuana, contrary to federal law.)

E-mail from Hans Linde (Apr. 22, 2000) (on file with author).

One facet of a death penalty prosecution in a state that does not have capital punishment is the extraordinary public attention a trial receives. This is part of the same phenomenon that makes selecting a jury capable of deciding about the sentence of death so problematic. Murder is a form of criminal prosecution that gets a lot of attention in any case, but it gets even more when the death penalty is an option, and even more still in a situation where capital punishment is not a locally sanctioned penalty.¹¹³

The context, the local cultural background for a federal capital prosecution in Massachusetts, is successful local opposition to the death penalty. In the United States today there are forces always seeking to make the option available to prosecutors. This gives states that have resisted the death penalty a special salience in national politics and raises unique questions about capital prosecution as an aspect of policy making. In his *Boston Globe* article, Eric Goldscheider held that the Gilbert prosecution was prepping the state for execution, softening resistance to capital punishment.¹¹⁴ The trial got a great deal of attention, and the penalty phase even more, because it focused directly on the unusual nature of the prosecution.¹¹⁵ Ultimately, Kristen Gilbert was sentenced to life in prison.¹¹⁶

At the very least, federal capital statutes are sometimes turned to where the availability of the death penalty under federal law presents an opportunity to seek harsher punishment where the states do not provide a capital sanction. There is, however, some evidence of hesitation on the part of the Death Penalty Committee. Suggested imposition of the death penalty by the Committee in states without

113. A story by Fred Contrada, the reporter who covered Kristen Gilbert's trial for *The Springfield Union News*, begins with the lead: "A respiratory therapist admits she took heroin while at work. Lawyers say her boyfriend, a nurse, was addicted to both heroin and crack during the same period. . . ." Fred Contrada, *Case Spurs Debate on Death Penalty*, SPRINGFIELD (Mass.) UNION NEWS, October 8, 2000. It concludes that "some of the testimony at the Gilbert trial has painted a troubling picture of medical care at the U.S. Department of Veterans Affairs Medical Center in Northampton, and that's without factoring in the defendant herself." *Id.* The Mayor of Springfield, where the trial took place, reportedly believed that the case would "shed a darkness over the city and the state." *Id.* (statement of Mayor Albano).

114. See Goldscheider, *supra* note 8. This position is not developed here but it certainly deserves attention.

115. *Id.*

116. *Id.*

capital punishment is twenty-one percent, while it is thirty percent in states with capital punishment.¹¹⁷ These data are skewed a bit by the large number of requests coming from Puerto Rico.¹¹⁸ And, institutionally, the Death Penalty Committee is under fire for biased application of the death penalty statutes. This casts an additional shadow over the prisoners on federal death row.

With no recent history of execution in Massachusetts or New England, citizens only know capital prosecutions from somewhere else. This makes federal capital prosecutions a very big deal. The United States District Court normally sends out 350 summonses for jury duty every two months. For the Gilbert trial the court summoned 1700 for service. Initially 600 were called in order to begin the selection process. The prospective jurors reportedly exhibited a somber demeanor that was no doubt due to both the nature of the trial and the potential inconvenience of an obligation that might last six months.¹¹⁹ During voir dire in the *Gilbert* case, potential jurors were asked their opinion on the death penalty and excluded if they were unwilling to consider imposing the death sentence.¹²⁰ It all seemed quite surreal. In this context it is hard to fathom a completely fair negotiation of the minefield of jury selection in a capital trial. With “death qualification” a central issue in jury selection, the meaning of an opinion on the death penalty in a state without one is highly problematic.

When Massachusetts citizens became federal jurors, when Northampton attorneys came to the defense of Kristen Gilbert, indeed when Gilbert became a federal defendant, they all entered the theater of the federal. They became players, more or less self-consciously, in a drama that the judge, the prosecutors and the court personnel had presumably negotiated more fully. Indeed, in the case of the former

117. See <http://deathpenaltyinfo.org> (last visited Sept. 16, 2004).

118. U.S. DEP'T. OF JUSTICE, SURVEY, *supra* note 105, at tbl. 14-2.

119. Fred Contrada, *Somber Jury Pool Convenes*, SPRINGFIELD UNION NEWS, Oct. 17, 2000, at 1.

120. Elizabeth Mehren, *Death Penalty Case: Will of Which People?*, L.A. TIMES, Dec. 14, 2000, at A1. In Massachusetts the judge conducts the voir dire in consultation, but not with direct participation, from counsel. In the Gilbert case, Judge Michael A. Ponsor allowed attorneys to participate directly. Fred Contrada, *Somber Jury Pool Convenes*, SPRINGFIELD UNION NEWS, Oct. 17, 2000, at 1.

veterans hospital nurse who was the defendant and the nurse witnesses who offered their testimony, the trial meant that they were part of the federal system more fully than they are likely to have realized no matter how many years they worked at a hospital run by the Department of Veterans Affairs. What it means to negotiate a federal existence is more evident in the case of Puerto Rico.

XVIII. PUERTO RICO

In Puerto Rico, federal criminal law becomes a facet of colonialism. The colonial condition of Puerto Rico calls attention to the power dynamics in the federal relationship by imagining issues of liberation and hegemony while giving federal relations special meaning in the fluid dynamics of the island's idiosyncratic status. In the United States, colonialism takes its law and its logic from federalism. The evolution of states from territories and the tradition of national penetration into separate cultures—in Hawaii, New Mexico and Puerto Rico—is a colonial relationship.¹²¹ In Puerto Rico, status or sovereignty issues are the key to the island's politics, and while “the federal” becomes important when something like the Kristen Gilbert trial arises in Massachusetts, it is always important for Puerto Rico.

Puerto Rico is part of the First Circuit. The story of the immensely important attachment has not often been told, but the conventional wisdom is that by 1915, when jurisdiction for appeals from the District Court of Puerto Rico was first maintained in the First Circuit, Puerto Rico and New England, particularly Boston, “had long standing trade and banking ties, dating back to the days of molasses and rum,” and “[t]he First Circuit also had the least busy docket of the courts of appeals.”¹²² For an expansion of considerations linked to “established lines of communication,” one needs to examine more

121. In this regard I have been influenced by work on the relation of the United States to the penal policy of Australia by Arie Freiberg. Arie Freiberg, *Three Strikes and You're Out—It's Not Cricket: Colonisation and Resistance in Australian Sentencing*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard Frase eds., 2001).

122. Manuscript on file at John Joseph Moakley U.S. Courthouse, Boston.

closely the Northeast sugar refining operations and the interests of Boston companies in colonial sources of raw materials.¹²³

In the matter of capital punishment, Puerto Rico and New England have a good deal in common, but the colonial status of Puerto Rico places the island into starker relief. Puerto Rico expressly prohibits capital punishment in its Constitution.¹²⁴ Law enforcement on the island “entered into a ‘Memorandum of Understanding’ with the local U.S. Attorney’s Office, agreeing that the federal authorities will prosecute much of the ‘local’ violent crime, such as carjacking, in Puerto Rico.”¹²⁵ While thirteen people have been proposed for capital prosecution in Massachusetts and only one has been recommended for such punishment, in Puerto Rico, where federal administration of many violent crimes makes the jurisdiction similar to the District of Columbia, sixteen out of sixty-four cases presented to the Attorney General’s committee were approved for capital prosecution.¹²⁶ This is more than any other jurisdiction except the Eastern District of Virginia.¹²⁷

In *United States v. Acosta-Martinez*, the federal district court in Puerto Rico held that the Constitution of the Commonwealth of Puerto Rico precluded the federal government from asking for the death penalty.¹²⁸ The case involved a drug-related murder. The district judge, Salvador E. Casellas, argued that the almost four million Puerto Ricans on the island were not specifically mentioned in the legislation establishing the federal death penalty and that implementing the death penalty would violate the Federal Relations Act of 1950 because Puerto Rico’s Constitution prohibits capital punishment.¹²⁹ He relies on the work of Rory K. Little, former

123. *Id.* at 169; see also CESAR J. AYALA, *AMERICAN SUGAR KINGDOM: THE PLANTATION ECONOMY OF THE SPANISH CARIBBEAN 1898–1934* (1999).

124. P.R. Const. art. II, § 7. Puerto Rico has not had an execution since 1927. Death Penalty Info. Ctr., *Puerto Rico and the Death Penalty*, at <http://deathpenaltyinfo.org/article.php?scid=11&did=670> (last visited Aug. 12, 2004).

125. Little, *Federal Death Penalty*, *supra* note 63, at 357. “As a result, the Puerto Rico U.S. Attorney’s Office has submitted the largest number of potential death penalty cases (59) of any of the ninety-four federal districts since the Capital Case Review protocol was issued in 1995.” *Id.* at 357 n.36.

126. See *supra* text accompanying note 118.

127. *Id.*

128. 106 F. Supp. 2d 311 (D.P.R. 2000), *rev’d*, 252 F.3d 13 (1st Cir. 2001).

129. *Id.* at 313–21; see also P.R. CONST. art. II, § 7.

member of the Justice Department Capital Case Review Committee, who held that the death penalty in Puerto Rico raises unresolved sovereignty issues and is characterized by conflicting federal law.¹³⁰

Like many cases coming from Puerto Rico to the appellate court in Boston, *Acosta-Martinez* is replete with issues about colonial power and the nature of law in a multicultural context. The United States Courts on the island conduct their proceedings in English even though the population is Spanish speaking and appeals leave the island to be heard in Boston. Yet, the promise of the Bill of Rights remains one of the most potent symbols of the advantages of the relationship with America. And to add to the ironic nature of this case, the Chief Judge in Boston, Juan Torruella, is from San Juan. This makes him the highest-ranking island resident ever to have an official position in the United States government. Judge Torruella is a staunch supporter of statehood and critic of the discriminatory position Puerto Ricans on the island find themselves in, yet his position in the judiciary suggests a degree of integration far greater than in the political process. In this case, the district court opinion was reversed by the First Circuit¹³¹ and the Supreme Court denied certiorari.¹³²

In matters of law as in currency, public health and markets, the island is more fully integrated into the American nation than it is politically. For Puerto Rican residents, there is no vote for President or Congress to mediate the authority of the national over the local. Instead, in the land where they were born, they are asked to serve on juries and they are brought to trial where the proceedings take place in a foreign tongue. Ultimately, one of the things that give meaning to the national identity, the contributions from the various locales, is severely restricted when the federal comes back to Puerto Rico.

130. *Id.* at 311 (citing 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 n.36 (1999)).

131. 252 F.3d 13 (1st Cir. 2001).

132. 535 U.S. 906 (2002).

XIX. SOME “ADMINISTRATIVE” CHALLENGES

Federal capital cases are expensive, results show that defendants of color are put on death row more often than whites and the federal system produces a decided celebrity character in its condemned. In the last year of his administration, President Clinton considered a moratorium on the federal death penalty under the urging of Senator Russ Feingold of Wisconsin. The issues considered here—high cost, race and gender, and celebrity execution—are related. They are among the more visible ways we understand punishment that is only a tangential part of the ordinary social fabric and which belongs more completely to the fabric of our constitutional existence. While there are many interesting facets of the administration of the death penalty,¹³³ we focus here on those that bear on the constitutional dimension of the federal sanction.

A. High Cost and Uncertainty

The federal death penalty is costly and a number of studies have been conducted to try and understand where those costs are going. In 1997, a study done for the Federal Judicial Conference found that death penalty cases consume six percent of the budget for defender services, but they comprised only three-tenths of a percent of the caseload.¹³⁴

The death penalty challenges the expectation of certainty in the determination of the criminal sentence. When Governor George Ryan of Illinois declared a moratorium on the death penalty in Illinois, the assessment was felt at the federal level. Ryan found that nearly as many death row inmates had been exonerated due to DNA evidence—thirteen—as had been executed since 1976.

133. The manner of execution for conviction of a federal capital offense is to be that employed by the state in which the federal sentence is handed down. If a state does not allow the death penalty the judge must choose another state for carrying out the execution. On January 29, 2004, Judge Mark L. Wolf of the Federal District Court for Massachusetts sentenced Gary Sampson to be executed in New Hampshire. Boston Independent Media Center, <http://www.boston.indymedia.org> (Jan. 31, 2004).

134. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATIONS (1998).

B. Race and Gender

Execution has been a predominately male phenomenon in the general population, with roughly one woman being executed out of one hundred executions in the United States since 1976.¹³⁵ But the percentage of white women sentenced to death and executed, out of the total population of women convicted of murder, is substantial compared with the number of white men sentenced to death as a percentage of the total.¹³⁶ However, at the federal level, where issues of equity are traditionally more strongly felt, there is reason to imagine a greater gender-balance emerging. In this context all it might take is someone noticing to tip the balance to a measurable degree.

The special issue of women, and the matter of race and ethnicity, bore particularly heavily on the Kristen Gilbert prosecution. The lack of women and whites on federal death row was grounds for suspicion that the Justice Department might have felt pressure to approve the prosecution. The courts did not see it as such. One of the puzzles is that if you look at race and gender together, the women executed tend to be white.¹³⁷

135. Death Penalty Info. Ctr., *Women and the Death Penalty* (2004), at <http://deathpenaltyinfo.org/article.php?did=230&scid=24>.

136. The percentage of white men sentenced to death, out of the total number convicted of murder, is twenty-two percent in the modern period. Death Penalty Information Center, <http://deathpenaltyinfo.org> (last visited Sept. 14, 2004). Arkansas executed its first woman in 150 years, a nurse, Christina Riggs on May 2, 2000 for killing her children. Emily Yellin, *Arkansas Executes a Woman Who Killed Both Her Children*, N.Y. TIMES, May 3, 2000, at A22. The prosecution told the jury that Riggs's children had become an inconvenience to her. *Id.* She was only the fifth woman since 1976 to be executed in the United States. *Id.* The first was Velma Barfield in 1984 for poisoning her boyfriend. Chase Squires, *Cryptic Words, and then She Dies*, ST. PETERSBURGH TIMES, Oct. 10, 2002, at 1B. Karla Faye Tucker was executed in Texas in 1998 amid uproar that she had found Jesus. *Id.* Betty Lou Beets was executed in February 2000 for murdering her fifth husband. *Id.* On January 11, 2001, Wanda Jean Allen was executed in Oklahoma. Death Penalty Info. Ctr., *Women and the Death Penalty*, *supra* note 135.

137. Women account for only one in fifty-three death sentences imposed at the trial level, or 1.9%, and account for only 3 of 540 persons executed since 1970, or 0.6%. Victor L. Streib, *Death Penalty for Female Offenders, January 1, 1973, through June 30, 2003*, at <http://www.law.onu.edu/faculty/streib/femdeath.htm> (last updated July 1, 2003).

C. Due Process and Counsel

Upon coming into office as President of the American Bar Association in 2000, Martha Barnett called for the abolition of the federal death penalty and “challenged lawyers across the country to work to suspend the death penalty in their states until it can be shown that it is imposed fairly.”¹³⁸

More recently, Justice Ruth Bader Ginsburg made an unusual comment on the lack of fairness of the death penalty, stating that “[p]eople who are well represented at trial do not get the death penalty.”¹³⁹

There is no death penalty bar in Massachusetts, although there are Massachusetts lawyers that defend capital cases in other jurisdictions. David Hoose, lead attorney on the Kristen Gilbert case and former President of Massachusetts Citizens Against the Death Penalty, has ventured to other states to represent those accused of capital murder.¹⁴⁰

Locally, lawyers defend against murder charges, of course, but they do it in a different light. New England has murders and makes a good deal of trying those accused. But, the implications of a murder case without the penalty of death are substantially less significant than a prosecution where execution is an option.

D. Celebrity Execution

Federal executions were still a thing of the past when I began writing this article. This all changed with the execution of Timothy McVeigh.¹⁴¹

138. Press Release, American Bar Association, ABA President-Elect Calls For a Moratorium on Federal Death Penalty, Urges Lawyers to Review Death Penalty Systems in Their States, *available at* <http://www.abanet.org/media/jul00/barnettdeath.html> (last visited Aug. 12, 2004).

139. *Texan Earns New Trial over Snoozing Lawyer; Case a Wake-Up Call on Lapses*, SEATTLE TIMES, June 4, 2002, at A2..

140. David Hoose, Remarks at the Ehrmann Awards (May 14, 2001) (transcript available at <http://www.mcadp.org/Hoose.html>).

141. Timothy McVeigh was convicted of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), and then filed a formal request to end the appeal process, Kevin Johnson, *McVeigh Asks Judge to Set an Execution Date*, U.S.A. TODAY, Dec. 13, 2000, at 08A. On June 4, 2001,

One way in which federal capital punishment seems to be developing in line with the tradition of federal supremacy is celebrity executions. People like McVeigh and the four men who were convicted for the 1998 bombings of the U.S. embassies in Kenya and Tanzania that killed 224 people stand out among federal capital defendants for their notoriety and the magnitude of the crimes for which they have been convicted.¹⁴² News reports of the later case classify it as terrorism and suggest that the Middle Eastern origin of the defendants fits the American image of a terrorist.¹⁴³ These are the kind of exceptional murders that the federal government seems prone to feature. A number of commentators in the Spring of 2001 referred to Timothy McVeigh as a “poster boy for capital punishment, suggesting he would clear the way for federal executions.”¹⁴⁴ But it does not seem that his execution meant the floodgates would open either in the federal or state systems. Instead, he may be the poster boy for the kind of executions the federal government has always featured, celebrity ones, likely to better support the claim that national leadership is on a higher moral plane.

On the other hand, although the Bush administration moved deliberately to execute McVeigh,¹⁴⁵ there was also a noticeable public

prosecutor Sean Connelly argued that execution should take place because McVeigh admitted his guilt. Howard Pankratz, George Lane & Virginia Culver, *No Delay On Execution: Matsch Finds ‘No Good Cause’ to Let McVeigh Live Beyond Monday*, DENVER POST, June 7, 2001, at A01. Defense Attorney Richard Burr filed motions for a new trial on the basis of withheld FBI documents, which he presented to Judge Richard Matsch of the Federal District Court in Denver. On June 6, 2001, Judge Matsch refused to postpone the execution based on the high standard for second appeals that are part of the Antiterrorism and Effective Death Penalty Act of 1996. *United States v. McVeigh*, 9 Fed. Appx. 980 (10th Cir. 2001). On June 4, 2001 the U.S. Supreme Court delayed a ruling on Terry Nichols request for a new trial. *Nichols v. United States*, 532 U.S. 1064 (2001). He has been sentenced to life as an accomplice in the bombing and has been convicted of murder charges in the state of Oklahoma. *Nichols Won’t Appeal State Bomb Convictions*, L.A. TIMES, Aug. 20, 2004, at A15.

142. Colum Lynch & Christine Haughney, *Jury Rejects Death for Embassy Bomber*, WASH. POST, June 13, 2001, at A01. In the sentencing phase which took place immediately after the McVeigh execution, and just before the attack on the World Trade Center, the defendants were spared the death penalty. *Id.*

143. See http://www.cbsnews.com/htdocs/embassy_bombings/timeline.html (last visited Sept. 13, 2004).

144. Christopher Hitchens, *Covenant with Death*, NATION, April 26, 2001.

145. Columnist Tony Snow, writing for the conservative journal Townhall.com on the delay in executing McVeigh argues that the Bush administration purposely delayed the execution of Juan Raul Garza to put McVeigh first. Tony Snow, *An Unexpected Delay* (May

hesitation. The other aspect of celebrity executions is that massive numbers of people are attentive to the occurrence of them.¹⁴⁶ At least some of this attention comes from the idea that federal punishment is national policy and hence something of a legitimate world event. Some comes from the ongoing perception that the federal government is special. Some may be because it is special.

As we have seen, much of the jurisprudential ideology bearing on state resistance to the federal government is not of the progressive sort one sees in Massachusetts or Puerto Rico. Indeed it derives from the same conservative milieu that produced Timothy McVeigh. This is what Fran Rich, in *The New York Times*, called an “insular, itinerant gun-show culture which fed his Second Amendment absolutism and hatred of government.”¹⁴⁷ The execution of McVeigh has the special qualities of celebrity execution. In addition, it was presided over by the very conservative Attorney General John Ashcroft, a fundamentalist Christian with strong anti-federal government views. But while this happens in some states with very few looking on, at the federal level in the United States the whole world is watching, as we used to say in another context.

Against this backdrop is the very delicate politics of McVeigh’s act and its relevance for the Bush administration in Washington. McVeigh learned to kill as a soldier and came from the heartland of America. His ideology was an extreme version of the anti-government, nativism that is at the core of mainstream Republican ideology. And celebrity execution brings this to light. The Attorney General’s Office was deeply involved in the execution of McVeigh. Part of this would be the normal obligation of an administrator focusing on getting a new policy off the ground. Another part may be the distinctive nature of the crime, where local offices reporting to the Department of Justice were affected by the bombing and former Attorney General Janet Reno was an alternative target. At issue here

13, 2001), at <http://www.townhall.com/columnists/tonysnow/ts20010513.shtml> (last visited Aug. 22, 2004).

146. Associated Press, *Execution Bridging Media Crush*, WASH. POST, Mar. 5, 2001, at A08 (noting that the government received 250 requests from victims and relatives who wanted to watch McVeigh’s execution and was considering a closed-circuit television broadcast of the execution).

147. Frank Rich, *It’s Closure Mongering Time*, N.Y. TIMES, Apr. 28, 2001, at A23.

is the treatment of an American terrorist, in the months before the term became widely associated with Islamic fundamentalism.¹⁴⁸ Equally consequential was the making of an anti-government icon a summer before terrorism was given new meaning. Today, rather than speaking about the making of a radical conservative martyr, the McVeigh execution of a domestic terrorist barely fits into the anti-terrorism framework.

McVeigh killed a lot of people and the cries for vengeance were prominent in the debate over his execution. My colleague Austin Sarat has made this vengeance central to how we know the executee.¹⁴⁹ Alison Young altered that view in a review of *The American Terrorist* where she made the government the victim.¹⁵⁰ Part of the cultural context for McVeigh's execution is that he was executed for a crime against the federal government that was motivated by a refusal to accept the claim of its superiority. McVeigh and conservatives of his inclination posit that the federal government is an arrogant, unfettered monster responsible for crimes against local heroes like Randy Weaver and his family at Ruby Ridge, Idaho and David Koresh at Waco, Texas. They make the government appear more real as well as a good deal more evil than is generally the case and probably than has been a popular convention since the Civil War.

The challenge of McVeigh is social and political and the way these forces intermingle as federal policy is cultural. The federal government in the United States is legally superior, not just because of its institutional life, but because it has been able to establish a social or cultural superiority. This is often understood today in terms of civil rights. A sense of right and justice is the social foundation of constitutional law and federal sovereignty. An aspect of this culture of federalism has for some time been that more executions take place in the American South than in the North, and in the historic national

148. See LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING* (2001). These commentators have proposed that the McVeigh phenomenon strikes against the traditional American image of terror as a foreign enterprise. The particular image is somewhat contested with Austin Sarat drawing attention to the orange-clad defendant and the victims of the carnage and Young speaking of the defendant and the image of the building ripped to shreds by McVeigh's bomb.

149. AUSTIN SARAT, *WHEN THE STATE KILLS* (2001).

150. Alison Young, *American Crime and Punishment*, AGE, May 12, 2001, at 8.

culture that is its descendant, there are no executions except in matters of state, like that of Julius and Ethel Rosenberg. In this regard, the politics of federal execution continues to be colored by the fact of its exceptionalism.

CONCLUSION

Austin Sarat has argued that violence is at the center of law.¹⁵¹ He uses death penalty trials to epitomize Robert Cover's point about the "word" of law being linked to its "violence".¹⁵² Sarat traveled to Georgia to experience Cover's "field of pain and death."¹⁵³ In this rendering, the bad violence of the convicted is juxtaposed with the action of the state in taking a life through capital punishment. Like the federal death penalty, Timothy McVeigh was anomalous—a white, well-educated person with political concerns—he is not like most people who face execution in America. This is the place where inquiry into the federal death penalty begins. In particular, we must ask what is to make of the imposition of federal law in a place that has rejected capital punishment? Or, what is to make of using celebrity executions to support the authority of the modern state?

These questions lead to ones about jurisdiction, as well as the meaning of state lines and circuit boundaries. The First Circuit has not had an execution in over fifty years and it is made up of a number of jurisdictions for which capital punishment is anathema. This raises jurisprudential questions, the most important of which consider the meaning of national law for people in particular states and the meaning of the federal system for people who usually have no idea what it means to be in a federal system. While the matter of legal jurisdictions is a narrow, somewhat technical, perspective on the issue of state sanctioned death, it is a perspective that has other qualities. In the case of capital punishment, the uniqueness and terror surrounding the process throws everything about it into stark relief. Here, the way a juror in Springfield, Massachusetts, or a judge in San

151. Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19 (1993).

152. *Id.*

153. *Id.* at 20 (quoting Robert H. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622–23 (1986)).

Juan, Puerto Rico, respond to the law become matters of life and death.

This work began in curiosity about the nature of federal power in America. In discussing the cultural foundations of federal supremacy I have tried to place the law where many of us have learned to find it, in a social and political context. For liberal democracies, culture, not state violence, is at the center of law. Sometimes we have trouble seeing the phenomenon because there is too much reliance on doctrine, such as case law like *M'Culloch v. Maryland*¹⁵⁴ that teach the superiority of the federal government. Similarly, social hegemony, where we think of ourselves as Americans rather than Californians is falsely deterministic. As with doctrine, nuance is often lost.¹⁵⁵ In the divided world of law and cultural studies, it is too often the case that whatever you are working on trumps the other.

The lecture on the nature of the federal, contained in the opinion by Judge Matsch that sealed McVeigh's fate, is worth quoting here: "Timothy McVeigh was at war with the United States government, but the United States government is not some abstraction, is not some alien force. It is the American people, the people in the Murrah Building who were there in service to their fellow citizens."¹⁵⁶ There is some confusion here. Neither the bombing nor the execution suggests the government is an abstraction, but its meaning is less than clear. Bombing the federal building clearly put more stock in the jurisdictional quality of the place than it had for most people. Some, of course, went to work meaning to contribute to the enterprise of national governance. Others were no doubt aware that the national government in Oklahoma City was a distinctive hybrid, different from the national government's presence in Chicago or Santa Fe. The message the federal government wanted to send by executing Timothy McVeigh comes from the refusal to accept the national government as an abstraction.

154. 17 U.S. (4 Wheat.) 316 (1819).

155. If the U.S. is superior, say, in the taxation issue settled in *M'Culloch*, it seems like it is just plain superior or ALWAYS superior.

156. Richard A. Serrano, *Judge Rejects McVeigh's Bid to Delay Death*, L.A. TIMES, June 7, 2001, at A1.

Ultimately, the shock of renewed federal capital punishment and its penetration into the heartland and the consciousness of America pales under the bright lights of the war on terrorism. Yet, with all the death and destruction that has been unleashed since September 11, 2001, federal executions have remained unusual. Capital punishment is a thing of the past when looked at in terms of the sweep of history. And, while the federal government has shown its capacity to kill, even in the context of the “War on Terror,” the federal death penalty has not been used at this point in that potentially protracted conflict. The presumption of moral authority at the national level may undermine resistance to the death penalty more generally when the federal government executes but the federal death penalty remains an unusual form of punishment.