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# The Federal Death Penalty Scheme is not a Model for State Reform of Capital Punishment Laws

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# The Federal Death Penalty Scheme is not a Model for State Reform of Capital Punishment Laws

# THE FEDERAL DEATH PENALTY SCHEME IS NOT A MODEL FOR STATE REFORM OF CAPITAL PUNISHMENT LAWS

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*By every reasonable measure, the death penalty is in decline in the United States as a judicially imposed punishment for the most serious homicides. Many reasons—legal, social, and economic—have been cited as the cause of the regular and consistent drop in death sentences and executions over the past two decades. The death penalty is also largely a creature of state prosecutors and courts, with less than three percent of capital sentences imposed in the federal system. While the statistical trends suggest that death sentences will soon be eliminated as a functional feature of the U.S. criminal justice system, committed advocates of capital punishment suggest that the federal statutory review scheme, if adopted by the states, might save the death penalty from fading into a legal anachronism. In truth, the federal statutory scheme is possessed of the same inequities, biases, and cost considerations as the existing state systems for capital punishment. Adoption of the federal statutory scheme by states seeking to preserve the death penalty will not cure the fundamental flaws that have led to the present and inevitable decline of capital punishment as a practical sentencing alternative.*

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## INTRODUCTION

The prosecution and application of the death penalty is one of the most vigorously debated legal issues in American life. Advocates, opponents, and those who imagine some middle road for capital punishment in the twenty-first century yield little ground in this national discussion. Often, competing voices will seek to rely on the same facts, history, or institutions to support radically different

conclusions.[1] One of the prominent examples of this phenomenon—closely examined by advocates on all sides of the debate—is whether the "federal" death penalty[2] provides a more perfect avenue to escape the inconsistencies in state capital punishment schemes.[3] In other words, does the federal construct suggest a path to a limited death penalty that is free of the most obvious racial, economic, and equitable disparities that mark the current state scheme?[4] As with most complex questions, the truth is in the details.

The federal capital punishment scheme is governed by the Federal Death Penalty Act of 1994 (FDPA).[5] U.S. Attorneys intending to seek the death sentence must make a submission to the Assistant Attorney General for the Criminal Division within the Department of Justice (DOJ). The death penalty protocol review process,[6] conducted by the Capital Case Section within DOJ's Criminal Division, is responsible for the evaluation of potential federal capital cases, with the stated purpose of promoting "consistency and fairness in the application of the death penalty."[7] The final decision to seek the death penalty in a federal case is made by the Attorney General following evaluation by the Review Committee on Capital Cases.[8]

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1. *Compare* Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (citing Baze v. Rees, 553 U.S. 35, 96 (2008) (Thomas, J., concurring)) ("Historically, the Eighth Amendment was understood to bar only those punishments that added terror, pain, or disgrace to an otherwise permissible capital sentence." (internal quotation marks omitted)), *with Glossip*, 135 S. Ct. at 2755, 2776–77 (Breyer, J., dissenting) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("The Court has recognized that a 'claim that punishment is excessive is judged not by the standards that prevailed in 1685 . . . but rather by those that currently prevail.' . . . I believe it highly likely that the death penalty violates the Eighth Amendment.").

2. *See* 18 U.S.C. §§ 3591–3599 (2012).

3. *See, e.g.*, *Major Study Finds Arbitrary Application of the Death Penalty*, DEATH PENALTY INFO. CENT. (May 5, 2005), https://deathpenaltyinfo.org/node/1441.

4. *See* Jeffrey L. Johnson & Colleen F. Johnson, *Poverty and the Death Penalty*, 35 J. ECON. ISSUES 517, 520 (2001); Mark Scolforo, *Study Finds Victim Race Factor in Imposing Death Sentences*, ASSOCIATED PRESS (Oct. 22, 2017), https://apnews.com/2127ddd0ca5642589063330dae0a4ec8.

5. Federal Death Penalty Act of 1994, Pub. L. 103-322, 108 Stat. 1959 (codified as amended at 18 U.S.C. §§ 3591–3599 (2012)).

6. U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 70 (2003), https://www.justice.gov/usam/criminal-resource-manual-70-consultation-prior-seeking-death-penalty.

7. *Capital Case Section*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal/capital-case-section (last visited June 1, 2018).

8. *See* Eileen M. Connor, *The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States*, 100 J. CRIM. L. &

Yet the overwhelming majority of capital cases tried in the United States are brought by state prosecutors—typically at the county or judicial district level—and without any external review process or oversight mechanism. The discretion to issue (or withdraw) a death notice for a case involving capital-eligible offenses lies solely with local prosecutors, who are often elected officials whose decisions in capital cases are not subject to any formal review procedure.[9]

This Article compares the federal and state capital punishment schemes in the context of the dramatic decline in the frequency of death sentences and executions during the past two decades. Federal capital prosecutions represent a small percentage of the total death penalty litigation in the United States, and this Article demonstrates that the racial and geographic disparities and inequities in death penalty implementation that are readily apparent in state capital punishment schemes are mirrored in the federal system. Despite these disparities and earlier judicial halting of capital punishment, current precedent sets a very high bar for further checking of both the federal and state capital punishment regimes. This Article concludes by arguing that suggestions to expand the federal death penalty would be unlikely to resolve the racial disparities evidenced by current death row prison populations due to the fundamental role played by prosecutorial discretion in charging decisions. Thus, critical factors that are leading the steady decline in capital prosecutions, death sentences, and executions in the United States appear to be the result of evolving public sentiment about capital punishment, including the heavy financial burdens of such cases and the potential for wrongful convictions—at least in certain areas of the country.

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CRIMINOLOGY 149, 157 (2010); *cf. Federal Death Penalty Background Information*, DEATH PENALTY INFO CTR., https://deathpenaltyinfo.org/federal-death-penalty#Background (last visited June 1, 2018) (reporting that the sixty-one current federal death row prisoners are from only one-third of the ninety-four federal judicial districts and nearly half of federal death sentences occur in three states: Texas, Virginia, and Missouri).

9. While governors of most states have substantial discretion to stop an execution, that authority only arises long after conviction and imposition of the death sentence. *See* Tamar Lewin, *Vast Discretion for Governors in Decisions on the Death Penalty*, N.Y. TIMES (May 20, 1992), https://www.nytimes.com/1992/05/20/us/vast-discretion-for-governors-in-decisions-on-death-penalty.html (noting the lack of clear guidelines for governors when deciding to halt an execution).

## I. THE FEDERAL DEATH PENALTY SCHEME IS NOT REPRESENTATIVE OF THE NATIONAL LANDSCAPE

Part I of this Article identifies the various ways that the federal capital system varies from that of the states. Section I.A begins by acknowledging the overall decline of the death penalty across the United States. Sections I.B and I.C then outline how capital prosecutions are predominantly pursued on the state level where the constitutional framework for imposing death sentences is different from the federal statutory scheme.

### *A. The Clear Decline of the Death Penalty Nationwide*

Currently, a total of thirty-one states, plus the federal government and the military, maintain the death penalty, while the remaining nineteen states—concentrated on the East Coast and in the Midwest, as well as Alaska and Hawaii—have no statute permitting capital punishment.[10] But that national division really does not tell much of the story. California has the largest death row population—746 inmates as of July 2017—but has not carried out an execution since 2006.[11] By comparison, as of this writing, Virginia has only five inmates on death row; however, the Commonwealth has carried out 113 executions since 1976, making it second only to Texas in the number of individuals put to death.[12] Two of the twenty-three executions carried out nationwide in 2017 took place in Virginia.[13]

From a purely empirical standpoint, capital punishment would seem to be in rapid retreat in the United States since *Furman v. Georgia*,[14] a 1972 case in which the U.S. Supreme Court deemed certain death

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10. As of January 1, 2018, Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin have no death penalty statute. The District of Columbia also does not impose the death penalty. *State by State Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state_by_state (last visited June 1, 2018); *States and Capital Punishment*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 2, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

11. *See* DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2018), https://deathpenaltyinfo.org/documents/FactSheet.pdf [hereinafter FACTS ABOUT THE DEATH PENALTY]; *Inmates Executed, 1978 to Present*, CAL. DEP'T CORR. & REHAB., http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited June 1, 2018).

12. *See* FACTS ABOUT THE DEATH PENALTY, *supra* note 11.

13. *See Execution List 2017*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/execution-list-2017 (last visited June 1, 2018).

14. 408 U.S. 238 (1972) (per curiam).

sentences unconstitutional.[15] The year 1999 was the high-water mark of the modern, post-*Furman* death penalty in America when a total of ninety-eight individuals were executed nationwide.[16] Eleven years later, in 2010, the number fell nearly by half to forty-six executions in the United States.[17] Another seven years later, executions decreased by half again, with twenty-three convicted murderers put to death nationwide in 2017.[18] The frequency of death sentences over the same period of time has declined at a similar rate. In 1999, a total of 279 criminal defendants received death sentences in the United States.[19] By 2010, that number had fallen to 114, and by 2017, only thirty-nine death sentences were handed down by all federal and state courts.[20]

The reasons for this dramatic decline in executions as well as death sentences in the United States are much discussed and is almost certainly due to a combination of factors. The almost universal availability of a sentence of life without parole, which is commonly referred to as "LWOP," for capital convictions has given prosecutors, juries, and courts an acceptable alternative to a death sentence in the most grievous homicide cases.[21] The frequency with which courts have exonerated and released inmates under sentences of death from death row—particularly due to technical advances in the use of DNA and other

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15. *Id.* at 239–40. In separate cases, each occurring in Georgia, three black men were sentenced to death after the first was convicted of murder and other two were convicted of rape. *Id.* at 240 (Douglas, J., concurring). The Supreme Court consolidated the cases to consider whether the death sentences were cruel and unusual in violation of the Eighth and Fourteenth Amendments. *Id.* In a 5-4 per curiam decision, the Supreme Court found the sentences unconstitutional because the death penalty had been arbitrarily applied. *See id.* at 239–40. However, all of the justices disagreed about the reasoning and scope of the decision, and each authored a separate concurring or dissenting opinion. *See id.* at 240–470; *see also infra* Section I.C.1.

16. *See* FACTS ABOUT THE DEATH PENALTY, *supra* note 11.

17. *Id.*

18. *Id.*

19. *See* TRACY L. SNELL, BUREAU OF JUST. STAT., CAP. PUNISHMENT, 2013—STATISTICAL TABLES 19 (2014), https://www.bjs.gov/content/pub/pdf/cp13st.pdf [hereinafter CAPITAL PUNISHMENT 2013].

20. *See id.*; FACTS ABOUT THE DEATH PENALTY, *supra* note 11.

21. *See* Roper v. Simmons, 543 U.S. 551, 557, 560 (2005) (announcing that the Eighth Amendment prohibits juveniles from receiving capital punishment and affirming the Missouri Supreme Court's decision to resentence the defendant—who was convicted of "burglary, kidnapping, stealing, and murder in the first degree"—to life without parole). *See generally Life Without Parole*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/life-without-parole#States (last visited June 1, 2018) (stating that Alaska is the only state that does not have a life without parole sentence, in addition to not imposing a death penalty).

forms of sophisticated forensic evidence[22]—has raised judicial and public concern over the finality of capital punishment and the risk that a truly innocent individual could be executed.[23] Moreover, the cost associated with the prosecution, appeal, and implementation of a death sentence to state and local governments substantially exceeds the per-inmate cost of a conventional prosecution and life imprisonment.[24] This has led some conservative commentators to label the death penalty as "another failed government program."[25] Another factor, with far-reaching practical effect on the imposition of the death penalty, is a shortage of the drugs necessary for executions by lethal injection due to the widespread resistance of pharmaceutical companies to manufacture and distribute the drugs.[26]

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22. *See, e.g.*, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017 3, 5 (Mar. 2018), https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf (reporting that of the 139 exonerations that occurred in 2017, seventeen "were based in whole or in part on DNA identification evidence, just under 13% of the total"). Further, "[o]verall, DNA exonerations now account for 21% of the exonerations in the Registry through 2017 (459/2,161)." *Id.* at 5.

23. Since 1973, more than 161 individuals have been released from death row based upon evidence of actual innocence. *See generally Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited June 1, 2018) (providing a list of each individual sentenced to death who has been acquitted, dismissed, or pardoned since 1973); *see also* Ed Pilkington, *US Death Row Study: 4% of Defendants Sentenced to Die Are Innocent*, GUARDIAN (Apr. 28, 2014, 3:50 PM), https://www.theguardian.com/world/2014/apr/28/death-penalty-study-4-percent-defendants-innocent.

24. *Death Penalty Cost*, AMNESTY INT'L USA, https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-cost (last visited June 1, 2018) (estimating that, in 2008, the annual cost of the death penalty system was $137 million per year—$232.7 million per year after implementation of reforms—but only $11.5 million per year in a system that imposes a maximum penalty of lifetime incarceration instead of the death penalty).

25. *See* Daniel LaChance, *What Will Doom the Death Penalty: Capital Punishment, Another Failed Government Program?*, N.Y. TIMES (Sept. 8, 2014), https://www.nytimes.com/2014/09/09/opinion/what-will-finally-doom-the-death-penalty.html.

26. *See generally* Jennifer Home, *Lethal Injection Drug Shortage*, COUNCIL OF STATE GOV'TS, July/Aug. 2017, http://www.csg.org/pubs/capitolideas/enews/issue65_4.aspx ("A nationwide shortage of sodium thiopental, an anesthetic that is . . . used in lethal injections, has . . . delay[ed] executions and forc[ed] the change of execution protocols in several states. Last month, Hospira—the sole U.S. company approved to manufacture the drug—announced it will no longer produce sodium thiopental."); *see also* Susan Scutti, *Oklahoma Plans to Use a New Execution Method*, CNN (Mar. 14, 2018, 6:41 PM), https://www.cnn.com/2018/03/14/health/inert-gas-death-penalty-oklahoma-bn/index.html ("Unable to obtain drugs to use for its lethal injections, Oklahoma will use inert [nitrogen] gas inhalation as the primary method for death penalty executions once a protocol is developed and finalized . . . .").

But the most widely cited and clearly documented argument in opposition to the death penalty is disparity based on race. When the race of the individual under sentence of death—the most frequently cited marker of inequity in capital cases—is considered, the results are dramatic.[27] For example, on July 1, 2017, some 41% of all death row inmates in the United States were identified as black, and an additional 13% were identified as Hispanic.[28] In the federal system, albeit with a much smaller population, the statistics were almost identical. Some 42.6% (twenty-six out of sixty-one) of federal death row inmates were identified as black, and another 11.5% (seven out of sixty-one) were identified as Hispanic.[29]

Proponents of the death penalty argue that failed legislative efforts to repeal state statutes and the unlikely prospect that the Supreme Court will abolish capital punishment support its continued viability in punishing the most serious homicides.[30] These arguments ignore and perhaps intentionally obscure what is really happening. The dramatic nationwide drop in the number of cases in which prosecutors seek the death penalty, courts impose a sentence of death, and executions are carried out may be due primarily to social, fiscal, and political factors—not to any legislative or legal process.

In an effort to preserve the death penalty on an institutional basis, capital punishment advocates seek to refashion capital litigation using a more benign legal procedure.[31] They contend that states would do better to model their death penalty statutes on the federal law to obviate the various extra-legal factors that have put capital punishment

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27. *See generally Race and the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/race-and-death-penalty (last visited June 1, 2018).

28. *See* NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 1 (2017), http://www.naacpldf.org/files/case_issue/DRUSASummer2017.pdf [hereinafter DEATH ROW U.S.A.].

29. *See Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR. (last updated July 25, 2017), https://deathpenaltyinfo.org/federal-death-row-prisoners [hereinafter *Federal Death Row Prisoners*]. *See generally* G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 425, 446–47, 458 (2010) (identifying examples from the Eastern District of Louisiana and the District of Maryland, where the local jury pools are largely Black and all of the defendants in capital punishment cases were black or Hispanic, but whose federal jury pools are largely white, to conclude that "[f]ederal prosecutors are able to dilute minority-concentrated populations (obtaining far whiter jury pools) simply by prosecuting the same case in federal court rather than state court").

30. *See* J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1612–13 (2018).

31. *Id.* at 1617.

at risk of constructive abolition.[32] This argument, relying on the federal statute as a panacea, ignores both the reality of federal capital punishment and the broad societal factors that are driving the death penalty from the American landscape.

### *B. The Death Penalty Is Predominantly Charged at the State Level*

The most critical consideration in this analysis is that the federal death penalty represents a tiny component of the national capital punishment picture. On July 1, 2017, of a total of 2817 death row inmates in the United States, only sixty-one individuals (2.17% of the national total) had been sentenced to death by a federal court.[33] By comparison, 1,574,741 individuals were incarcerated in the United States as of December 31, 2013.[34] Of those individuals, 215,866 (13.7% of the total) were serving federal sentences under the control of the Federal Bureau of Prisons.[35] So while prisons house approximately one inmate in eight pursuant to a federal sentence, federal courts impose only about one death sentence in every fifty handed down in the United States.

The frequency of federal executions is equally as rare. Since 1976, the Federal Bureau of Prisons has carried out a total of three executions—the last of which occurred in 2003.[36] In 2016, the federal government did not sentence a single individual to death, and in 2017, just one federal defendant received the death penalty.[37] The incidence of federal capital prosecutions also tracks closely the regional frequency of executions since 1976. Five states—Texas, Virginia, Oklahoma, Florida, and Missouri—accounted for more than half of the federal executions in 2017 and for 65% of all federal executions since 1976.[38] Those same five states were

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32. *Id.*

33. *See* DEATH ROW U.S.A., *supra* note 28, at 1, 63–64.

34. *See* E. ANN CARSON, BUREAU OF JUST. STATS., PRISONERS IN 2013, AT 3 (2014), https://www.bjs.gov/content/pub/pdf/p13.pdf.

35. *See id.*

36. *See Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/number-executions-state-and-region-1976 (last updated May 17, 2018) [hereinafter *Executions Since 1976*] (listing several other states that have also carried out as few as three executions since 1976, including Montana, Idaho, and South Dakota); *see also Capital Punishment*, BUREAU OF PRISONS, https://www.bop.gov/about/history/federal_executions.jsp (last visited June 1, 2018) (detailing the three federal executions carried out in the early 2000s).

37. *See Federal Death Row Prisoners*, *supra* note 29. Dylann Roof, the white supremacist who murdered nine people at a historically black church in Charleston, South Carolina, was sentenced to death in January 2017. *Id.*

38. *Executions Since 1976*, *supra* note 36.

likewise the venues for the homicides that led to the convictions and sentences of about half of the inmates (thirty of the sixty-one) housed in the Special Confinement Unit (i.e., the federal death row) at the U.S. penitentiary in Terre Haute, Indiana, as of July 25, 2017.[39]

### *C. State Models for Capital Decisions Are Less Rigorous than the Federal Framework*

The constitutional police power vested in the states—rooted in doctrines of federalism and states' rights—is deep and wide.[40] Aside from the standards established by the Supreme Court in *Furman* and its progeny, there is no constitutional requirement for uniformity among the states as to when, how, or if the death penalty should be sought in a given case. Just as there is wide variation as to what conduct states choose to criminalize, the process through which state prosecutors decide to seek the death penalty is likwise varied among those states with laws providing the opportunity for capital punishment.

While Congress has established a centralized review process intended to promote consistency and fairness, most states have no such mechanism. Instead, death penalty regimes must only conform to the constitutional framework established after the Supreme Court found that states were imposing capital punishment in an arbitrary manner. States modified their statutory schemes for capital punishment accordingly, but none have adopted the kinds of procedures followed by federal prosecutors before a death sentence may be sought in any given case.

#### *1. The Supreme Court's parameters for capital punishment*

In the 1972 case of *Furman v. Georgia*, the Supreme Court halted imposition of the death penalty temporarily by ruling that capital punishment was being administered in an arbitrary fashion and thus constituted cruel and unusual punishment in violation of the Eighth Amendment.[41] Justice William O. Douglas's concurrence highlighted disparities in the imposition of capital punishment and the lack of a

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39. *Federal Death Row Prisoners*, *supra* note 29.

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

41. Furman v. Georgia, 408 U.S. 238, 239–40 (1972); *see also* Weems v. United States, 217 U.S. 349, 367 (1910) (asserting that inherent within the Eighth Amendment is the principle "that punishment for crime should be graduated and proportioned to [the] offense").

legal basis for any distinction between the few individuals sentenced to death and the larger universe of defendants who committed equally reprehensible offenses yet received lesser sentences.[42] Thus, as Justice Lewis Powell wrote almost twenty years later in *McCleskey v. Kemp*,[43] "the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive."[44]

In response to *Furman*, states modified their laws to reinstate capital punishment consistent with constitutional requirements.[45] The prevailing path is often referred to as the "guided discretion" approach: the types of crimes eligible for a death sentence are enumerated, and an automatic appellate review of any death sentence is required.[46] The capital trial is typically broken into separate "guilt/innocence" and "penalty" phases, allowing both the government and defendant to present evidence of aggravating and mitigating circumstances during the penalty phase that would not be permissible in determining whether the accused was guilty of the charged capital offense.[47] In 1976, the Supreme Court upheld this type of state approach in *Gregg v. Georgia*,[48] *Proffitt v. Florida*,[49]

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42. *Furman*, 408 U.S. at 250–51 (Douglas, J., concurring) (citing a study of capital cases in Texas concluding that "most of those executed were poor, young, and ignorant" and that "[s]eventy-five of . . . 460 cases involv[ing] co-defendants, who . . . were given separate trials [and] where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or to a term of years, and the Negro was given the death penalty"). *But see Weems*, 217 U.S. at 399 (White, J., dissenting) ("[L]egislation from time to time altered modes of punishment, increasing or diminishing the amount of punishment as was deemed necessary for the public good . . . without reference to any assumed rule of apportionment or the conception that a right of judicial supervision was deemed to obtain.").

43. 481 U.S. 279 (1987).

44. *Id.* at 301.

45. Some states revised their laws to make capital punishment mandatory for certain offenses, but the U.S. Supreme Court rejected these approaches. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325, 326 (1976) (reversing state law that mandated the death penalty for five categories of homicide); Woodson v. North Carolina, 428 U.S. 280, 280 (1976) (rejecting the death penalty for all first-degree murder convictions).

46. *See generally Capital Punishment Issues in the U.S. Supreme Court*, NAT'L JUD. C., http://www.judges.org/capitalcasesresources/supreme_caselaw_3.html (last visited June 1, 2018) (explaining that a statutory list of aggravating circumstances and requirement to consider all possible mitigating circumstances "guides the sentencer's discretion").

47. *See generally* DEATH PENALTY CURRICULUM, STAGES IN A CAPITAL CASE (2000), https://deathpenaltycurriculum.org/student/c/about/stages/stages.pdf (presenting the typical procedural process of a capital case).

48. 428 U.S. 153, 179–80 (1976) (emphasizing that the response of the state legislatures post-*Furman* indicated "society's endorsement of the death penalty for murder").

49. 428 U.S. 242, 258–60 (1976) (upholding the defendant's death sentence after

and *Jurek v. Texas*.[50] With this judicial "green light" to a permissible approach, the current iteration of capital punishment in the United States allows for the return of death sentences for certain criminal offenses.[51]

The parameters of *Gregg* and subsequent decisions, however, do not require state prosecutors to follow the same multi-layer vetting process currently set forth in the FDPA and DOJ policy.[52] At most—and not unlike in other contexts—the Supreme Court has provided the following overarching requirements for capital punishment to pass constitutional muster but has left the states to arrive at their own particular means of operating within the broad articulated parameters:

- "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[53]
- "There is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the [decision maker's] judgment as to whether the circumstances of a particular defendant's case meet the threshold."[54]
- "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty."[55]

In light of this guidance from the Supreme Court, many states lack a

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the sentencing judge found various aggravating circumstances and no mitigating circumstances).

50. 428 U.S. 262, 276–77 (1976) (holding that the Texas death penalty statute did not violate the petitioner's Eighth Amendment rights because the statute required a finding of aggravating factors and consideration of mitigating factors before upholding a death sentence).

51. The Supreme Court has limited application of capital punishment as to certain defendants, such as the intellectually disabled and juveniles, and to certain offenses that involve murder or crimes against the state. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) ("Difficulties in administering the [death] penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim."); Roper v. Simmons, 543 U.S. 551, 578 (2005) (addressing juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (addressing the intellectually disabled).

52. *See* U.S. ATTORNEYS' MANUAL § 9-10.000 (2014), https://www.justice.gov/usam/usam-9-10000-capital-crimes (utilizing a multi-tier determination process aims for careful and reasoned decision making without disparities across geographic locations).

53. *Gregg*, 428 U.S. at 189.

54. McCleskey v. Kemp, 481 U.S. 279, 305 (1987).

55. *Id.* at 306.

centralized review process akin to the federal review process.

*2. States' schemes do not mirror the multi-layer federal approach*

Since *Furman* and *Gregg*, the reinstatement of capital punishment by the states has resulted in procedural variations that place case-specific decision making at the local level. State prosecutors who decide whether the death penalty will be sought are almost always elected, and many run for office on a platform of aggressively seeking the death penalty in homicide cases.[56] In contrast, U.S. Attorneys are presidential appointees subject only to Senate confirmation, and the DOJ is almost entirely populated by lawyers who are career prosecutors without any political ambition or profile.[57] Likewise, trial court judges in many states in which the death penalty is available are elected and subject to recall, while federal judges enjoy lifetime tenure under Article III and may only be removed through the impeachment process.[58] Until recently, several states allowed for non-unanimous jury determinations and judicial override of the jury's sentencing decision mechanisms that have no parallel in the federal death penalty scheme.[59]

Some contend that safeguards in the federal procedure for making

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56. *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/killing-for-votes#prosecutors (last visited June 1, 2018) (detailing one example of a prosecutor in Oklahoma who campaigned by listing that he had "sent [forty-four] murderers to death row"). *But see New Generation of Prosecutors May Signal Shift in Death Penalty Policies*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/node/6820 (last visited June 1, 2018) (asserting that since 2015, new state prosecutors have been elected on platforms of criminal justice reform and opposition to the death penalty in jurisdictions such as Philadelphia, Orlando, and Denver).

57. *See generally* U.S. ATTORNEYS' MANUAL § 3-2.120 (2018), https://www.justice.gov/usam/usam-3-2000-united-states-attorneys-ausas-special-assistants-and-agac (providing an overview of the U.S. Attorney appointment process in section 3-2.120).

58. KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 2 (2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf ("In states that retain judges through elections, the more supportive the public is of capital punishment, the more likely appellate judges are to affirm death sentences.").

59. *See generally Judge Override*, EQUAL JUST. INITIATIVE, https://eji.org/death-penalty/judge-override (last visited June 1, 2018) (explaining that Alabama, Florida, and Delaware were the only states that permitted judges to override jury verdicts of life to impose the death penalty, but have recently abolished use of the override statutes); Hannah Emory, *Who Decides on Life or Death: Judge or Jury?*, CAMPBELL L. OBSERVER (Mar. 14, 2016), http://campbelllawobserver.com/who-decides-on-life-or-death-judge-or-jury (reporting that Florida does not require a unanimous jury recommendation to impose the death penalty).

a capital charging decision eliminate regional and racial disparities as well as the risk that politics or public sentiment will play a role in the process.[60] There is, however, no evidence to support this claim. The role of politics and local sentiment cannot be eliminated from most state capital punishment procedures in the same way that the federal process purports to operate free of those and similar extraneous considerations. Moreover, to the extent a formal decision making process for seeking the death penalty exists in any given circuit, district, or county prosecutor's office—that process is populated solely by lawyers employed by that office and beholden to the elected official for their continued employment.

## II. THE DEATH PENALTY POSES CONCERNS OF CONTINUING DISPARATE APPLICATIONS OF CAPITAL PUNISHMENT NATIONWIDE, BUT PRECEDENT HAS SET EXTREMELY HIGH STANDARDS

Despite less rigorous frameworks in states generally, both state and federal systems suffer from implementation issues that have netted racial disparities in those sentenced to death. Scholars of varying fields of study—including criminologists, legal scholars, economists, and statisticians—have performed extensive research on race and the death penalty. Though the meaning of such counts is often hotly debated, people of color represent a far higher percentage of those on death row than found in the general population.[61] Also, defendants whose victims were white have a greater chance of receiving the death penalty, according to some studies.[62]

The racial distribution of federal death sentences closely mirrors capital sentences handed down by state courts. Of the sixty-one inmates currently under federal death sentence, twenty-six individuals

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60. *See generally* CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 35–38 (2006), http://constitutionproject.org/pdf/MandatoryJustice Revisited.pdf (discussing safeguards to ensure racial fairness).

61. *See, e.g.*, *Race of Death Row Inmates Executed Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/race-death-row-inmates-executed-1976 (last updated May 17, 108) [hereinafter *Race and Executions Since 1976*] (detailing the races of the current death row population: 42.46% white, 41.48% black, 13.24% Latino, and 2.84% other).

62. *See, e.g.*, *id.* (providing statistics on interracial murders where one defendant was executed for the murder of one more victims of one race (not involving multiple victims of several different races) to show that since 1976, twenty White defendants who murdered Black victims were executed, while 288 Black defendants who murdered White victims were executed).

(42.6% of the total) are black and seven are Latino.[63] The history of DOJ review of cases for which the death penalty was considered tells a similar story. Between 1995 and 2000, a total of 682 cases were submitted by U.S. Attorneys' Offices to the DOJ for review under the applicable death penalty decision making procedures.[64] Of that total, 324 defendants (48%) were black and another 195 defendants (29%) were identified as Hispanic.[65] During the study period, slightly less than 20% of all cases submitted to the DOJ for death penalty consideration involved white defendants.[66]

Despite the starkness of the racial statistics regarding capital prosecutions and sentences, Supreme Court precedent has set a high burden of proof for future constitutional challenges based upon arbitrariness or discrimination. The showing required is so high that the many studies regarding implementation of capital punishment in the United States are nonetheless insufficient for obtaining judicial relief from racial factors influencing the imposition of death sentences.

### *A.* McCleskey v. Kemp *Requires a Showing of Purposeful Racial Discrimination in an Individual's Case*

After the Supreme Court found Georgia's revised capital punishment statute to be facially valid in 1976 in *Gregg*, eleven years later, in *McCleskey v. Kemp*, Warren McCleskey contended that the Georgia death penalty system was still arbitrary and capricious in its application because racial considerations could influence capital sentencing decisions in the state.[67] McCleskey, a black man, had been convicted of two counts of armed robbery and one count of murder in October 1978; these convictions related to the killing of a white police officer in the course of a robbery of a furniture store by McCleskey and three others.[68] The jury recommended that McCleskey be sentenced to death for the murder conviction and to consecutive life sentences for the robbery offenses;[69] the court sentenced McCleskey based upon

63. *Id.*

64. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000) 6 (2000), https://www.justice.gov/sites/default/files/dag/legacy/2000/09/13/_dp_survey_final.pdf.

65. *Id.*

66. *Id.*

67. McCleskey v. Kemp, 481 U.S. 279, 308 (1987).

68. *Id.* at 283.

69. *See id.* at 285 (noting that, in deciding to sentence McCleskey to death, the jury considered the aggravating circumstances against him and his complete lack of

that recommendation. To support his argument that Georgia's administration of the capital sentencing process was racially discriminatory such that it violated the Eighth and Fourteenth Amendments, McCleskey relied on what is commonly known as the "Baldus study."[70] The Baldus study, an examination of over two thousand Georgia murder cases in the 1970s, purported to demonstrate a disparity in the imposition of death sentences in Georgia based upon the race of the murder victim—and to a lesser degree, the race of the defendant.[71]

The Baldus data indicate that those charged with killing white individuals were sentenced to death in 11% of the cases, while those charged with killing black individuals were sentenced to death in 1% of the cases. The study explained that "[t]he raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants."[72] The Supreme Court further described the findings of the Baldus study as follows:

> Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.
>
> Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to

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mitigating evidence).

70. *Id.* at 286. This statistical study was authored by three professors: David C. Baldus, Charles Pulaski, and George Woodworth. For a critique of the Baldus study and the characterization of the study by the trial and appellate courts, see Samuel R. Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1907 (2012).

71. *See McCleskey*, 481 U.S. at 286.

72. *Id.*

> this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.[73]

The Supreme Court disregarded McCleskey's argument that the Baldus study demonstrated that McCleskey, as a black defendant who killed a white victim, was discriminated against because of his and the victim's race.[74] In order to prevail under the Equal Protection Clause, the Court held that the defendant "must prove that the [decision makers] in *his* case acted with discriminatory purpose."[75] Relying solely on the Baldus study, McCleskey put forth no evidence specific to his own case to support an inference that race factored into his sentence to death row.[76] The Court distinguished the case from instances in which the Court had previously accepted statistics because "[e]ach jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense."[77]

The precedent developed from *McCleskey* has set an incredibly high benchmark for obtaining relief from racial factors influencing the imposition of death sentences, much to the frustration of death penalty opponents and even judges. In December 2016, U.S. District Court Judge Geoffrey W. Crawford was compelled by precedent to move forward with the capital trial of Donald Fell, despite finding that "like the state statutes enacted after *Furman*, the FDPA operates in an arbitrary manner in which chance and bias play leading roles."[78] He found the imposition of the death penalty continued to be done in an arbitrary manner, noting that the state where the "crime occurs is the strongest predictor of whether a death sentence will result" and that

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73. *Id.* at 286–87 (footnotes omitted).

74. *Id.* at 292.

75. *Id.*

76. *Id.* at 292–93.

77. *Id.* at 294; *see also id.* at 297 ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

78. United States v. Fell, 224 F. Supp. 3d 327, 329 (D. Vt. 2016) (dismissing the defendant's motion to dismiss his death sentence in which he argued that the FDPA violated the Eighth Amendment); *see also* Chris Geidner, *Federal Judge Criticizes Death Penalty—But Concludes Only Supreme Court Can End It*, BUZZFEED, (Dec. 13, 2016, 2:08 PM), https://www.buzzfeed.com/chrisgeidner/federal-judge-criticizes-death-penalty-but-concludes-only-su.

having a white murder victim was also a significant predictor.[79] This case is indicative of the fact that legal relief from the death penalty on these grounds rests with the Supreme Court unless Congress and state legislatures choose to revisit capital punishment.

In light of *McCleskey*, the abundant studies of racial disparities in the implementation of capital punishment in this country appear to be a better tool for influencing and potentially changing the public's view of the death penalty from a policy perspective, rather than as evidence of a constitutional issue before the courts. Any shift in public perception then can impact indirectly capital prosecutions where the views of the jury pool are shifting regarding the appropriateness of death sentences.

### *B. The Expansion of the Death Penalty for Civil Rights or Hate Crime Offenses Would Not Necessarily Remedy, Let Alone Help, the Racial Disparity in the Application of the Death Penalty*

Some scholars argue that the death penalty can be compatible with the interests in protecting civil and constitutional rights and therefore should be expanded in federal law to further protect those interests.[80] Before reaching the merits of this proposal, it is important to note that the aggravating circumstances set forth in federal law are not exclusive.[81] Rather, the factfinder at trial "may consider whether any other aggravating factor for which notice has been given exists."[82]

While legally permissible, additions to the federal list of aggravators—circumstances that, if proven, permit deliberation and imposition of a death sentence[83]—will likely have little impact on improving this disparate application of the death penalty. First, adding an option for invoking a civil rights or hate crime aggravator does not guarantee that prosecutors will utilize it.[84] As a practical matter, prosecutors make

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79. *Fell*, 224 F. Supp. 3d at 345.

80. Broughton, *supra* note 30, at 1632 (citing 18 U.S.C. §§ 241–242, 245, 247 (2012)) (explaining how multiple federal statutes authorize the death penalty for violations of constitutional and civil rights).

81. 18 U.S.C. § 3592(c); *see also* notes 45–47 and accompanying text.

82. § 3592(c).

83. *See e.g.*, Broughton, *supra* note 30, at 1641 (suggesting that willful deprivations of rights under color of law, or bias-motivated conduct, be added to the list of aggravating circumstances contained in FDPA).

84. *See* Michael Shively & Carrie F. Mulford, *Hate Crime in America: The Debate Continues*, 257 NAT'L INST. OF JUST. J., June 2007, https://nij.gov/journals/257/pages/hate-crime.aspx.

charging decisions, including notice of aggravating factors, based upon what they believe the evidence can prove and the context of the circumstances.[85] Because federal capital prosecutions are relatively rare, multiple enumerated aggravators are potentially applicable for most of the cases where federal prosecutors seek the death penalty.[86] Proving the intent or bias of a defendant is not necessarily straightforward and could greatly complicate the government's case. For instance—and of course dependent upon the particular facts of a homicide—a federal prosecutor could notice aggravators like the following that are directly tied to the conduct of the homicide(s): (1) multiple killings or attempted killings;[87] (2) vulnerability of the victim;[88] (3) murder by hire;[89] or (4) death during the commission of certain other offenses.[90] Thus, to prove a hypothetical civil rights/hate crime aggravator, the prosecutor may have to develop evidence beyond the typical taped-off crime scene. While prosecutors generally pursue and present a motive for the conduct charged at trial, the government is less likely to notice an aggravator based upon a violation of the victim's civil rights in cases where a defendant's bias is not quickly apparent. If the evidence of bias is less strong than another available aggravator, a federal prosecutor may make a strategic decision not to pursue a bias aggravator because a failed attempt to prove part of the charge could undermine the government's

85. *See, e.g.*, Brian Palmer, *Capital Decision*, SLATE (Apr. 2, 2013, 3:17 PM), http://www.slate.com/articles/news_and_politics/explainer/2013/04/james_holmes_faces_execution_how_do_prosecutors_decide_whether_to_seek_death.html; *see also* Joshua Lloyd, *The Death Penalty and South Carolina Capital Cases Involve Many Factors*, SCNOW (Jun. 28, 2015), http://www.scnow.com/news/local/article_344da748-1d17-11e5-a103-3b27a5ebc821.html (according to the state solicitor, the decision to serve a death notice is based upon more than proving an aggravating factor—"a host of mitigating factors such as age and intellectual handicap level must be considered as well").

86. *See* Indictment at 10, 12–13, United States v. Roof, No. 2:15-cr-472 (D.S.C. July 20, 2015) (noticing three enumerated aggravators, including substantial premeditation, the advanced age of the victims, and the attempted killing of multiple individuals in a single episode); Notice of Intent to Seek Death Penalty, United States v. Tsarnaev at 4–7, No. 13-10200-GAO (D. Mass. Jan. 30, 2014) (noticing six enumerated aggravators, as well as seven non-enumerated factors); Notice of Intent to Seek Death Penalty, United States v. Ward at 2–4, No. 02-05025-02-CR-SW-GAF (W.D. Mo. Aug. 7, 2003) (noticing two enumerated aggravators, as well as five non-enumerated ones); Superseding Notice of Intent to Seek the Death Penalty at 2–3, United States v. Lentz, No. 01-150-A (E.D. Va. Sept. 3, 2002) (noticing three enumerated aggravators, as well as two non-enumerated ones).

87. 18 U.S.C. § 3592(c)(16).

88. § 3592(c)(11).

89. § 3592(c)(7), (8).

90. § 3592(c)(1).

credibility generally. The same concerns would apply to state prosecutors in states with hate crime laws.[91]

Second, expanding the conduct that qualifies a defendant for capital punishment to include civil rights violations does not guarantee that instances where such an aggravator is invoked will avoid the racial disparities already occurring. The current federal statutes that permit imposition of the death penalty are race neutral.[92] Nonetheless, of the sixty-one individuals currently on federal death row, twenty-six (or approximately 42.6%) are identified as black, twenty-six (or approximately 42.6%) as white, seven (or approximately 11.5%) as Latino, and one each as Native American and Asian (or approximately 1.6% each).[93] By contrast, the 2017 estimates of the U.S. Census Bureau report the country's racial breakdown as 76.9% white, 13.3% black, 17.8% Hispanic or Latino, 1.3% Native American, and 5.7% Asian.[94]

Finally, federal capital cases are a minute portion of the country's landscape, as noted in Section I.B.[95] As federal capital cases are rare, the potential impact expanding the enumerated aggravators at the federal level would have on the death penalty nationally is small. Even within that reduced universe of death penalty cases, the reported instances of hate crimes resulting in murder is fairly low, meaning the opportunities to invoke any added hate crime aggravator could be few and far between.[96] Of 4720 hate crime offenses classified as crimes against persons in 2016, nine of those were murders (occurring in the

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91. *See, e.g.*, Marcus K. Garner, *DeKalb DA to Seek Death Penalty in Killing*, ATLANTA CONST. J. (Dec. 4, 2012), http://www.ajc.com/news/local/dekalb-seek-death-penalty-killing/i5B9jbBh5d6TEOut5NMNkM (reporting that the state prosecutor chose not to charge the hate crime law based on sexual orientation because harsher punishment was available under state gang law). Excluding the Dylann Roof case, the most prominent recent state case involving a sentence of a hate crime was F. Glenn Miller Jr., who killed three people in Missouri in a stated (but failed) attempt to kill as many Jews as possible. Miller, however, was convicted of capital murder, not a hate crime. *See* Tony Rizzo, *Death Sentence Imposed on F. Glenn Miller Jr. in Hate Crime Killings*, KAN. CITY STAR (Nov. 10, 2015, 12:44 PM), http://www.kansascity.com/news/local/crime/article44100303.html.

92. *See* 18 U.S.C. §§ 3591–3598.

93. *Race and Executions Since 1976*, *supra* note 61.

94. *Quick Facts: United States*, U.S. CENSUS BUREAU (July 1, 2017), https://www.census.gov/quickfacts/fact/table/US/PST045217.

95. *See infra* Section I.B (discussing how the death penalty is predominantly charged at the state level).

96. *FBI Releases 2016 Hate Crime Statistics*, FBI NAT'L PRESS OFFICE (Nov. 13, 2017), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-hate-crime-statistics.

course of five incidents).[97] Furthermore, though crimes against persons accounted for over half of the reported hate crime incidents in 2016 with 3765 incidents, instances of murder and non-negligent manslaughter constituted fewer than one percent of events.[98] Offenses involving the death of a victim are the most prevalent crimes in which the federal government seeks the death penalty.[99]

## III. AS COSTS FOR CAPITAL PROSECUTIONS SOAR, DETERRENCE DOES NOT JUSTIFY OR COUNTER-BALANCE THE DEATH PENALTY'S APPLICATION ISSUES

Those in favor of retaining capital punishment in the United States often focus their arguments upon the notion that the death penalty fulfills one of the general purposes of punishment that is also a required factor for district judges to consider when imposing a sentence: "to afford adequate deterrence to criminal conduct."[100] The argument is essentially that because the public knows of the severe punishment of others for certain crimes, individuals will be less likely to commit such offenses:

> Deterrence theory posits that the severity of criminal sanctions dissuades other potential offenders from committing crimes out of fear of punishment. This applies both to the individual punished, who theoretically decides not to commit future crimes because he was incarcerated, and to people in the community who decide not to commit a future crime because they know they too may be incarcerated.[101]

Much like in the context of racial disparities in the imposition of the death penalty, studies touted by both sides of the debate abound.[102] In

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97. *Id.*; *see also 2016 Hate Crimes: Incidents, Offenses, Victims, and Known Offenders*, FBI: UNIFORM CRIME REPORTING, https://ucr.fbi.gov/hate-crime/2016/tables/table-2 (last visited June 1, 2018).

98. *Id.*

99. *Id.*; *see also* 18 U.S.C. § 3591 (2012).

100. 18 U.S.C. § 3553(a)(2)(B).

101. Oliver Roeder, et al., *What Caused the Crime Decline?*, BRENNAN CENTER FOR JUSTICE 26 (2015).

102. *Compare Oversight of the Federal Death Penalty: Hearing Before the S. Subcommittee on the Constitution of the Committee on the Judiciary*, 110th Cong. 70–72 (2007) (statement of David Muhlhausen of The Heritage Foundation) (citing a study finding that executions resulted in fewer subsequent murders), *with* Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists'*, 99 J. OF CRIM. L. & CRIMINOLOGY 489, 501 (2009) (finding that the majority of criminologists polled in 2008 did not believe the death penalty served as a deterrent). For an analysis of homicide rates outside the United States, see Franklin E. Zimring et al., *Executions,*

*Glossip v. Gross*,[103] the justices voiced opposing views on deterrence, with Justice Antonin Scalia contending that the death penalty seemed likely to have significant deterrent effect, while Justice Stephen Breyer contended it did not.[104]

After a review of various styles of deterrence studies, the Committee on Deterrence and the Death Penalty for the National Research Council concluded in 2012 that "research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates" and recommended that such studies not be used in forming judgments about capital punishment's effect on the homicide rate.[105]

In 2015, the Brennan Center for Justice found no evidence that executions had an effect on crime in the 1990s or 2000s because, in part, capital punishment occurs too infrequently to have an impact on the crime drop.[106] Also, the Brennan Center notes that other research suggests that many offenses are crimes of passion or committed in an agitated moment based upon current circumstances such that "potential offenders may not consider or weigh longer-term possibilities of punishment and capture, including the possibility of capital punishment."[107] At the other end of the spectrum, the government also has sought the death penalty against those who have been radicalized or act based upon deeply rooted beliefs.[108] It is difficult to fathom how individuals akin to Timothy McVeigh or the Tsarnaev brothers would be deterred by a potential death sentence

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*Deterrence and Homicide: A Tale of Two Cities*, J. EMPIRICAL LEGAL STUD. 1 (2009), which compares the homicide rates of Singapore and Hong Kong in the context of U.S.-based deterrence claims.

103. 135 S. Ct. 2726 (2015).

104. *Compare id.* at 2748–49 (Scalia, J., concurring) ("The suggestion that the incremental deterrent effect of capital punishment does not seem 'significant' reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate."), *with id.* at 2768 (Breyer, J., dissenting) (noting that "executions are *rare* . . . it makes it difficult to believe (given the studies of deterrence cited earlier) that such a rare event significantly deters horrendous crimes").

105. DANIEL S. NAGIN & JOHN V. PEPPER, NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 2 (2012). The report characterizes the plethora of deterrence research done to date as rife with unverifiable assumptions and subjective assessment and weight for factual variables.

106. Roeder et al., *supra* note 101, at 43.

107. *Id.* at 44–45.

108. *See, e.g.*, cases cited *supra* note 86.

when their conduct was a calculated attack against American society.[109]

Finally, there is the cost factor, which gives no shelter to those advocating the application of the federal death penalty model to the states. While there is no definitive study of the overall cost profile of federal capital punishment litigation, a 2010 report to the Judicial Conference of the United States stated that the average cost of the *trial defense alone* in a federal death case is $620,932, or about eight times the $76,665 in defense costs generated in a federal murder case in which the prosecutor did not seek the death penalty.[110]

In high profile cases, the cost of a capital prosecution can be extraordinary. The judge in the case of Timothy McVeigh calculated the trial cost as being in excess of $13.8 million.[111] In a more recent, highly publicized federal prosecution in which the government sought and obtained the death penalty, the cost of additional police security for the 2015 trial of Dzokhar Tsarnaev in the U.S. district court in Boston generated nearly $750,000 in additional overtime costs for the Boston police alone.[112] A copy of the 15,300 pages of Tsarnaev trial transcript cost $92,565.[113] Those amounts are just the result of extra police security and the transcript of the proceedings and do not include the cost of the extensive sets of trial lawyers for the prosecution and defense (all paid

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109. *See* Tung Yin, *Game of Drones: Defending Against Drone Terrorism*, 2 TEX. A&M L. REV. 635, 661 (2015) (stating that McVeigh's primary bombing motivation was "to avenge what he perceived as the federal government's role in the Waco firestorm that killed Branch Davidian sect lead David Koresh and his followers"); Scott Wilson et al., *Boston Bombing Suspect Cites U.S. Wars as Motivation, Official Say*, WASH. POST (Apr. 23, 2013, 7:40 PM), https://www.washingtonpost.com/national/boston-bombing-suspect-cites-us-wars-as-motivation-officials-say/2013/04/23/324b9cea-ac29-11e2-b6fd-ba6f5f26d70e_story.html (reporting that Dzhokhar Tsarnaev told interrogators that he and his brother were "self-radicalized" and politically motivated as tensions between the United States and the Middle East remained high throughout the Obama Administration).

110. JON B. GOULD & LISA GREENMAN, JUDICIAL CONF. OF THE U.S., REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 25 (2010).

111. *McVeigh Trial Cost US £10M*, GUARDIAN (June 29, 2001, 8:18 PM), https://www.theguardian.com/world/2001/jun/30/mcveigh.usa.

112. Milton J. Valencia, *Boston Police Spent Nearly $750,000 on Overtime for Tsarnaev Trial*, BOS. GLOBE (July 12, 2015), https://www.bostonglobe.com/metro/2015/ 07/16/boston-police-spent-nearly-overtime-for-tsarnaev-trial-security/lyx3bgc0RiTCI5DrVZAd5N/ story.html.

113. Hilary Sargent, *You Could Buy the Tsarnaev Trial Transcript or You Could Buy a Range Rover*, BOSTON.COM (March 10, 2015), https://www.boston.com/news/local-news/2015/03/10/you-could-buy-the-tsarnaev-trial-transcript-or-you-could-buy-a-range-rover.

by the federal government), overtime for court personnel, and the cost of appeals, which are likely to continue for decades.[114]

There can be no reasonable argument that, by every measure, the cost of prosecuting a federal capital case dwarfs the annual cost of incarceration for federal inmates, which in fiscal year 2015 averaged $31,977.65 per inmate.[115]

States fare no better with the fiscal impacts of seeking the death penalty for criminal defendants.[116] In South Carolina, one capital murder trial costs $415,000 more than a non-capital homicide trial, and taxpayers bear $1.1 million in additional costs from trial to execution of a defendant than if that individual were sentenced to life without parole.[117] Some states are citing the hefty fiscal burden of capital punishment as a reason to discontinue seeking death sentences.[118] A February 2017 Legislative Finance Committee report for the New Mexico legislature estimated that reinstating the death penalty for three limited types of homicides would cost up to $7.2 million during the first three years.[119]

The common issue of fiscal implications of capital punishment in both the federal and state models demonstrates that the broader implementation of the federal approach would not alleviate some of the key criticisms of capital punishment. In fact, a more nuanced and multi-layered process likely increases cost due to the additional man hours expended in a charging review process.

## CONCLUSION

The facts are clear, uniform, and unambiguous. The practical application of the federal capital punishment differs little from the

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114. *See* Valencia, *supra* note 112.

115. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *Annual Determination of Average Cost of Incarceration*, 81 Fed. Reg. 46957 (July 19, 2016).

116. *See* Kelly Phillips Erb, *Considering the Death Penalty: Your Tax Dollars at Work*, FORBES (May 1, 2014), https://www.forbes.com/sites/kellyphillipserb/2014/05/01/considering-the-death-penalty-your-tax-dollars-at-work. For a compilation of reports and analysis of state costs, see *Costs of the Death Penalty*, DEATH PENALTY INFO CTR. (Feb. 2, 2017), https://deathpenaltyinfo.org/costs-death-penalty.

117. *See* Lloyd, *supra* note 85.

118. *See* Peter A. Collins & Aliza Kaplan, *The Death Penalty Is Getting More and More Expensive. Is It Worth It?*, CONVERSATION (Mar. 30, 2017), https://theconversation.com/the-death-penalty-is-getting-more-and-more-expensive-is-it-worth-it-74294.

119. LEGISLATIVE FIN. COMM. OF THE N.M. LEGISLATURE, FISCAL IMPACT REPORT: REINSTATE THE DEATH PENALTY 1 (2017), https://www.nmlegis.gov/Sessions/17%20Regular/firs/HB0072.PDF.

collective results reported by those thirty-one states that maintain the death penalty. The federal and state death row populations reflect that perceived advantages to the centralized review process for federal capital prosecutions do not address the concerns about racial bias in the implementation of the death penalty. The issue is not being addressed via case law, however, because the Supreme Court has set an extremely high standard for achieving any kind of judicial relief for the racial disparities based upon arguments of arbitrariness. The geographic disparities, racial and ethnic inequities, and extraordinary cost considerations that are moving American society toward the constructive abolition of the death penalty are equally present in the federal capital punishment construct.