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Federalizing Death

GEORGE KANNAR†

There almost surely is a study somewhere—probably in USA Today—purporting to show that the person whom most Americans hold responsible for reinstituting the federal death penalty is CNN newscaster Bernard Shaw. At the very least, we do owe it to Shaw that the federal death penalty's potential as a powerful national "wedge issue" became so permanently and unmistakably clear.¹ Before Michael Dukakis imploded, in the face of Shaw's question at the 1988 presidential debate, the federal death penalty had seemed pretty much irrelevant both to crime and to politics, even among people who were not of particularly good will.

During the preceding Presidential election in 1984, this writer was actually the apparatchik in the Mondale-Ferraro Issues section who carried that campaign's portfolio on crime. And though the truth is no doubt recorded somewhere in the ancient campaign notes that I just threw out three weeks ago, and notwithstanding some serious recollection-searching in the meantime, I cannot for the life of me recall what our position on the federal death penalty was, or whether we even had one. Our concern that year—or our candidate's concern, anyway—was with a variety of high-tech ideas for trying to stop drugs from coming into the United States. All of these ideas were basically preposterous—schemes that involved sending up huge flights of AWACs to patrol all kinds of places, tethering gigantic radar-equipped dirigibles at key trans-shipment "choke points" between various Caribbean islands, and the like. But nobody, as far as I can remember, paid any attention at all to the idea of federalizing, or rather re-federalizing, the death penalty. As a potential solution to the problem of crime, re-instituting the federal death penalty was thought to be even more far-fetched

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than Mr. Mondale's blimps were.

Re-federalizing was necessary of course, because—according to Coyne and Entzeroth, whose work is the basic source for a great deal of what follows here—only one of the several federal death penalties on the books before Furman v. Georgia was decided had been re-enacted, with the necessary modifications, after Furman came down. The rest had become what Coyne and Entzeroth call "zombie" statutes: on the books, but generally conceded to be unenforceable. The federal sector's Great Awakening with respect to the death penalty issue only started when unabashedly oppositionist Governors of New York started getting prominently mentioned for President, and when primary voter-court Governors of Massachusetts started publicly announcing, in early 1988, that they were "card-carrying members" of the ACLU.

Everybody knows, at least in general terms, what followed. In 1988, Congress hastily established a new federal death penalty for drug "king-pins" implicated in drug-related murders. As numerous courts and commentators have pointed out, the Congress's haste was evidenced most obviously in the fact that it neglected to include in the 1988 statute anything at all about the actual time, place, method, and manner for carrying out federal death sentences. That election-year Congress's interest in the death penalty was purely and transparently symbolic, almost aesthetically so, and not remotely practical. Either inadvertently or pur-
posely, the 1988 bill also listed an element of the underlying offense as an "aggravating circumstance" for consideration in the sentencing phase, which is a pretty sure way of guaranteeing that at least one "aggravating circumstance" is going to be found in every case in which a conviction is returned.

Members of the Bush Administration, after proclaiming throughout the 1988 campaign that they would fulfill the "king pin" statute's mandate if it was the last thing that they ever did, essentially accomplished exactly that precise feat. In no apparent rush once the 1988 campaign was over—following due deliberation, the regular notice-and-comment procedure, the 1992 election, and virtually the entire post-election transition period—the Bush Justice Department issued regulations designed to fill in the "king-pin" statute's gaps regarding death sentence implementation on January 19, 1993—the very last day before Bill Clinton assumed office. As of May, 1995, prosecutions invoking the capital sentencing provisions of the 1988 drug "king-pin" law had been approved in 46 cases, or at a rate of about 6 or 7 a year. One of those was here in the Western District of New York, where a request for the death penalty ultimately was withdrawn in the context of a plea agreement. Earlier this year, two federal capital convictions under this law were actually returned in Binghamton, N.Y., in the Northern District, but the sentencing phase jury re-

12. One senator acknowledged that a particular "aggravating factor" had wound up in the bill because he "just thought of it, on the spur of the moment," and felt that it was "pretty good." 134 Cong. Rec. S7491 (1988) (statement of Senator D'Amato) cited in Jordan, supra note 10, at 92 n.60.


17. That the Bush Administration waited until its very last day has been widely noted, including in Jason Vest, The Federal Execution Rush, Progressive, May 1995, at 20.


ported back non-unanimously (11-1 in favor) with respect to imposing death.\textsuperscript{21}

The real "federalizing death" extravaganza took place not in 1988, however, but just prior to the 1994 election, in connection with the Violent Crime and Law Enforcement Act of 1994, effective in September of that year.\textsuperscript{22} The 1994 Act was passed in such a typically calm and deliberative Congressional election year environment that the expert commentators still find it difficult to agree even on such ordinarily easy questions as the \textit{exact number} of the federal crimes that had the death penalty attached to them by that bill—their consensus seeming to be something in the neighborhood of sixty.\textsuperscript{23} Among the federal offenses newly recognized—and made capital when they result in death—are drive-by shootings\textsuperscript{24}, something that seems to amount to old-fashioned, sea-faring piracy\textsuperscript{25}, and the apparently altogether new offense of "Violence Against Maritime Fixed Platforms,"\textsuperscript{26}—whose exceptionally lengthy criminalization required Congress to define what a "maritime fixed platform"\textsuperscript{27} is (apparently, an offshore oil rig), and also the "continental shelf."\textsuperscript{28}

Significantly, with respect to the bombing of the federal building in Oklahoma City in April, 1995, death also was established as a potential penalty for the use of a weapon of mass destruction against federal property in instances where death results.\textsuperscript{29} Carjacking, which had only been made a federal crime in 1993, was one of that slightly unclear number of pre-existing crimes to which the 1994 Act added a capital penalty.\textsuperscript{30} Kidnapping\textsuperscript{31} and espionage\textsuperscript{32}—the latter, in particular, a leading post-\textit{Furman}\textsuperscript{23} quasi-

\begin{itemize}
  \item \textsuperscript{24} 18 U.S.C. § 36 (1994).
  \item \textsuperscript{25} 18 U.S.C. § 2280 (1994).
  \item \textsuperscript{26} 18 U.S.C. § 2281 (1994).
  \item \textsuperscript{27} \textit{Id.} § 2281(d).
  \item \textsuperscript{28} \textit{Id.}
  \item \textsuperscript{31} 18 U.S.C. § 1201 (1994); \textit{see generally} COYNE & ENTZEROTH, \textit{supra} note 2.
  \item \textsuperscript{32} 18 U.S.C. § 794(a) (1994).
\end{itemize}
“zombie” statute—had an updated death penalty explicitly restored.

Out of all of this, what we apparently now have, as of June 21, 1996, according to a usually reliable source, is ten people who have been sentenced in federal court to die;34 a new federal lethal injection death chamber in Terre Haute, Indiana, costing something like $300-$400,000;35 and a new fifty-cell federal death row.36 The 1988 “king-pin” statute, for all its faults, has been treated rather kindly by the courts,37 and the Supreme Court, in June 1994, declined to review a capital appeal arising under it.38 It does not appear, however, that an actual federal execution in that case—or in any other—is imminent. When, and if, a federal execution eventually occurs, it will be the first since 196339, and it will not take place against a particularly extensive historical background: the San Francisco Examiner reports that in the 36 years between 1927 and 1963, “the federal government executed 34 people.”40 And the ten federal capital verdicts obtained since 1988 are, to put it mildly, vastly outnumbered by those returned during the same period in the states.41

34. All Things Considered: Unabomber Suspect Remanded to Sacramento For Trial (National Public Radio broadcast, June 21, 1996).
36. Vest, supra note 17, at 20.
37. Lower courts have consistently concluded that the statute is constitutionally viable despite Fifth and Eight Amendment challenges that claimed the statutory and non-statutory aggravating circumstances were ill-defined and constitutionally vague, and that the statute fails to narrow the class of persons eligible for the death penalty. See, e.g., United States v. McCullah, 76 F.3d 1086 (10th Cir. 1996); United States v. Fores, 63 F.3d 1342 (5th Cir. 1995); United States v. Perry, 1994 U.S. Dist. LEXIS 20462 (D.C. Jan. 11, 1994); United States v. Tidwell, 1995 U.S. Dist. LEXIS 19153 (E.D. Pa. Dec. 22, 1995).
41. According to the Death Penalty Information Center, there were, as of February, 1996, 2,800 state inmates to 8 federal death row inmates. See Malinowski, supra note 35; Vest, supra note 17, at 20.
Whether the *animus* motivating *United States v. Lopez*—the Court’s possible new concern for the over-extension of federal criminal jurisdiction with respect to federalizing *crimes*—will have any bearing on its evaluation of the 1994 Act’s *penalty* provisions is only one of the open questions, and not one where the lower courts’ rulings regarding the more loosely-drafted 1988 bill suggest any great grounds for optimism on the part of anyone interested in challenging it. If the crimes go, obviously, the penalties will go, too; but it hardly seems likely that they all will. More likely indeed is that some of the more exotic of the new capital crimes will go untested because they will also go unused. Because the 1994 bill does contain specific procedures concerning the penalty’s implementation—which will be discussed in more detail below—one of the more powerful arguments against the 1988 bill would at least seem to have been addressed. Whatever else it may have been up to, the 1994 Congress seems at least to have been *trying* to draft a constitutionally valid law containing a usable death penalty.

Perhaps the most significant feature of the 1994 Act, from a strictly legal point of view, is the one just mentioned—that it actually spells out the manner in which a federal death sentence is to be implemented, a matter left completely unaddressed by the 1988 “king-pin” bill. The Bush Administration’s 1993 “Midnight Regulations” on the same subject, which attempted to plug the holes in the 1988 Act administratively, have thus seemingly assumed a “zombie” status of their own. Those Bush-era regulations had provided that federal death sentences were to be implemented via lethal injection at a federal penal or correctional institution (hence, the Terre Haute chamber); that a United States Marshall was to be the executioner; and that setting the exact date and place of execution in a particular case would be left up to the Director of the Federal Bureau of Prisons.

The 1994 bill’s changes on these points are actually quite dramatic, and in this very concrete respect, the 1994 law federalizing

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44. See sources cited supra note 9.
45. See infra notes 51-59 and accompanying text.
48. Id. § 26.3(2).
49. Id. § 26.3(3).
50. Id. § 26.3(1).
the death *penalty* rather clearly also *defederalizes* the federally-ordered deaths themselves. Instead of automatically turning the job over to the new federal lethal injection chamber in Indiana, the 1994 legislation directs the Marshal to “supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.” If the federal death sentence is handed down in a state that does not have the death penalty, the court will “designate another State, the law of which does provide for the implementation of a sentence of death,” and have the prisoner executed in accordance with the law prevailing there. The statute authorizes (and, between the lines, plainly seems to encourage) the Marshal to “use appropriate state or local facilities,” hire the local executioner (or “a person such an official” usually employs), and send the executioner’s bill ( . . . a new Norman Mailer project there, perhaps . . . ) to the Attorney General. How the court is to select the alternative state, when a federal death sentence comes down in a non-death penalty state, is not suggested, much less specified.

But the provision in the 1994 Act that may be the most intriguing—the one that may raise the largest and most meaningful new questions—is the next, and essentially final, one in that portion of the 1994 bill establishing federal death penalty implementation procedures. That section provides:

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

And what this section plainly represents is an attempt to establish something like a *conscientious objector* status for federal employ-

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52. 18 U.S.C. § 3596(a) (emphasis added).

53. *Id.*

54. *Id.*


56. *Id.*

57. *Id.*


59. 18 U.S.C. § 3597(b).

60. *Id.* It continues: “In this subsection, ‘participation in executions’ includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.” *Id.*
ees vis a vis the new federal death penalty.

The evolution of this rather broad exception—whose actual legislative history, despite a considerable research effort undertaken by the most skilled mind and hands, is still almost completely obscure—proceeded through a minimum of three distinct stages. First is the 1988 drug “king-pin” legislation, which established, in a section with the rather punitive-sounding title “Refusal to participate by State and Federal correction employees,” that such employees could not in fact be punished for exercising their consciences; that they could not be required, as a condition of their employment, “to be in attendance at or to participate in an execution” in violation of their “moral or religious convictions.”

The second version of the conscientious objector exemption—contained in the Bush Administration’s 1993 Department of Justice regulations—expanded this concept a little further, seemingly in response to the mountain of commentary that the Department had received from medical professionals, and the major medical associations, following the release of the Administration’s original proposed rules. In addition to exempting correctional staff from compulsory participation on moral and religious grounds, the final Bush Regulations also exempted from compul-

61. This effort consisted of a typically devoted full-court working of the abolitionist telephone network, cheerfully and unhesitatingly undertaken by the late Henry Schwarzschild, on essentially no notice, and under the most difficult of personal conditions. See Eric Pace, Henry Schwarzschild, 70, Opponent of Death Penalty, N.Y. TIMES, June 4, 1996, at B8 (reviewing life of Jewish refugee from Hitler’s Germany who became a Freedom Rider, aide to Dr. Martin Luther King, Jr., and the “leading architect” of the National Coalition to Abolish the Death Penalty).


63. Id.

64. 28 C.F.R. § 26.

65. The Federal Bureau of Prisons received twenty-odd comments concerning the proposed rule from such organizations and persons as: The National Commission on Correctional Health Care, California Attorneys for Criminal Justice, Copley Memorial Hospital, Kim Thorburn MD, American College of Physicians, American Medical Association, Law Offices of Cohn and Marks, ACLU - National Prison Project, and Southwestern Medical Center (unpublished letters on file with author). Certain comments expressed the legal and ethical dilemmas presented to health professionals who have an affirmative duty to protect life. Others suggested that the presence of a medical professional lended a false aura of humanness to the killing process. The American Medical Association specifically noted the problems that arise when inmates do not die immediately, and the medical staff may have to specifically indicate what amount of which drug or what amount of electricity would cause death. Further, prison officials themselves commented that forced participation might upset the appearance that officials are simply carrying out a task that has been imposed on them. For a detailed discussion of physicians’ professional ethics and physician involvement with executions, see AMERICAN COLLEGE OF PHYSICIANS, ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN Executions in the United States (1994).
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sory attendance at, or participation in, an execution any employee "who is a medical professional who considers such attendance or participation contrary to medical ethics."66 The Bush regulations thus formally recognized what amounts to an additional potentially-exempted class. Conscientious non-participant status is made available by those regulations not just to people whose personal moral or religious beliefs would be offended by participation. It is extended as well to those who—to take the most extreme case—despite favoring participation personally, nonetheless felt precluded from involvement by formal professional commitments—that is, by perceived ethical duties attaching strictly to their social role, provided only that they personally believe themselves bound by those formal professional commitments.67

Upon first reading all this in the federal regulations, of course, one's head simply spins: who could possibly expect to find such profound stuff, such subtle religious, moral, ethical and social distinction-drawing, lurking in the C.F.R.? Who ever would have thought that President Bush's last Attorney General, William Barr, was made of such philosophically sophisticated, morally fine-spun stuff? And who ever would have thought (or, for that matter, thinks) that Congress—more amazingly still—would actually have noticed that Barr had woven another exception in?

And yet the fact of the matter is that Congress indeed just might have noticed. The 1994 bill's "conscientious objector" provision—that is, the third and latest version of it—differs from its predecessors in two significant and substantial ways. For one thing, it ignores the Bush Administration's special deference to the medical professions per se;68 it omits the categorical, role-based ethical objection to participation in an execution recognized by the earlier regulations. Under the 1994 bill's version of the "conscientious objector" section, strictly professional ethical imperatives against participating in these processes might be overridable, in cases where those formal role-based ethical imperatives do not also re-

66. 28 C.F.R. § 26.5.
68. 28 C.F.R. § 26.
reflect the employee's personal moral or religious beliefs. 69

But, second, and much more importantly, the 1994 bill vastly expands the overall reach and scope of the exception. In the 1994 version, it is no longer just "correctional personnel" whose moral and religious commitments are respected; the Marshals and the Department of Justice also are brought in. Even more significantly, that to which one may object is enormously enlarged. The current, 1994 exception extends to attending or participating in any "prosecution or execution." 70 The federal "conscientious objector" exception is thus no longer merely about the pulling of the lever, or the insertion of the poisonous IV, or—something about which medical professionals have been especially concerned—the process of determining whether death has actually occurred. It is not just about being in the death chamber any more. It is about being in the office or being in the courtroom.

This broad new exception, which extends all the way through the U.S. Attorneys' office, and all the way up the Department of Justice chain of command, perhaps sends a little bit of a message that the practice of law is to be seen as having at least some modicum of real moral content. 71 With respect to the practice of medicine, of course, this notion is well known: legal exceptions from being compelled to perform abortions are familiar; 72 an exception from having to terminate the treatment of a patient who has requested it is part of New York law. 73 But there is now also a legal "procedure" that otherwise responsible government employees can, for similar reasons of conscience, simply decline to do.

What does this new exception amount to? Operationally speaking, probably not too much. No remotely humane, or even competent, prosecutorial manager would want staff members in his or her office handling high profile, capital cases against their better judgment or their deeply-held beliefs. There is no need to antagonize or to demoralize what must, more or less by hypothesis, be some of one's better personnel, by trying to force them to handle

69. Interestingly, the law on conscientious objection to military service specifically excludes such moral grounds. 50 U.S.C. app. § 456(j) (1994). The Supreme Court also distinguishes between moral and religious grounds of objection. See, e.g., West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (an inquiry into the sincerity of a student's religious objection to the pledge of allegiance was unwarranted); Sicerella v. United States, 348 U.S. 385 (1955) (distinguishing between religious and moral views on conscientious objection to military service).

70. 18 U.S.C. § 3597(b).


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such cases.

But conceptually—that is, in effect, politically—this quiet recognition of the death penalty’s continuing moral problems, especially among prosecutorially-minded members of the legal profession, may represent a lot. For one thing, it may send a signal that at least once in awhile the Congress still remembers just what kind of issue this really is. And it also introduces a kind of moral symmetry into—creates another moral wrinkle on—the American system of capital punishment as a whole: a potential juror with strict moral or religious scruples against the death penalty can be prevented from participating in society’s decisions regarding whether to impose it.\(^\text{74}\) And a federal government official with similar convictions can now voluntarily opt out.

The truth of course is that, even with this new exception, not all government officials really can “opt out.” The current Attorney General has been quite forthright about her personal opposition to the death penalty.\(^\text{75}\) And yet, as Dade County’s chief prosecutor, she is said to have approved something like 100 capital prosecutions.\(^\text{76}\) As Attorney General, it is similarly asserted that, as of September, 1995, she had never rejected a single recommendation that the death penalty be sought in any particular federal case when such a recommendation had made it through the Department of Justice’s capital case-screening process.\(^\text{77}\) But the fact of the matter is that only a very few of us are in any position to be seriously judgmental. The truly uncompromising abolitionist, the one who really wishes “not to be involved” in all of this, is going to have to find a minor party candidate to support for President in the 1996 campaign. And anyone who does not do so is engaging in precisely the same kind of moral calculus—the trade-off between adhering to personal principle, at the price of effectively withdrawing from meaningful participation in our public life—as that presumably engaged in by the Attorney General.

The idea that public officials might opt out of the death penalty process of course also brings this discussion back to the death penalty in New York. Since the New York statute was enacted, we have all seen different efforts by different public officials person-


76. Jackson, supra note 75.

ally opposed to the death penalty, trying to accommodate their convictions—and sometimes rather obviously to evade—what appears to be the intention of that law.\textsuperscript{78} As of March 2, 1996, we had observed the different public play given to two different decisions not to seek to have the death penalty imposed. The District Attorney for one New York City borough took a stand early on against imposing the death penalty as a matter of principle, and took considerable public heat when he subsequently declined to seek the penalty in a celebrated case.\textsuperscript{79} A different borough’s District Attorney’s opposition to the death penalty was a little more ambiguously phrased. That District Attorney found, upon close factual examination, that another recent celebrated case, arising in his borough, failed to present an occasion where seeking the penalty was appropriate—and even supporters of the death penalty thereupon praised his circumspect professionalism.\textsuperscript{80}

What this focus on moral responsibility in the 1994 crime bill shows—this ongoing process of reformulation and expansion of the “conscientious objector” exception that these three different versions of it serve to illustrate—is just how much even the proponents of the death penalty recognize that the question of capital punishment is one of those bells that, in moral terms, unfortunately tolls for us all. Those same otherwise enthusiastic proponents of capital punishment also perhaps show, through these provisions, just the slightest little trace of shame. How many other policy areas exist in which the statute establishing the policy also explicitly recognizes that many well-meaning, well-educated citizens—in fact, full-time prosecutors and prison guards, for heaven’s sake—are going to regard that policy not just as mistaken, but immoral?

At the same time, it is also true that what this broadened exception may actually accomplish is merely to insure that the federal death penalty is ever more vigorously applied, ever more frequently sought—and also ever more frequently obtained, especially when one remembers the specifically “death qualified” juries.\textsuperscript{81} To paraphrase the old anti-gun control bumper sticker: if death penalty objectors all exit (or are caused to leave) the process, only that

\textsuperscript{78} Adam Nossiter, Balking Prosecutors: A Door Opens to Death Row Challenges, N.Y. Times, Mar. 11, 1995, § 1, at 27.
\textsuperscript{80} Id.; see generally Shirley E. Perlman, et. al, District Attorneys Face a Difficult Decision: Life or Death, Newsday, Mar. 31, 1998, at A7.
penalty's advocates will be left in charge of making it become real. In the last analysis, therefore, what the new federal capital punishment law may actually represent is a unique law-and-order, libertarian, law-and-economics three-fer: a death penalty; a nod toward conscientious individualism; and a lovely, morally frictionless efficiency of application, too.