Assessing the Constitutionality and Policy Implications of the 1994 Drug Kingpin Death Penalty

Neil C. Schur*

I. Introduction

The fourth time was the charm for United States Senator Alfonse M. D'Amato (R-N.Y.). After unsuccessful attempts in 1989, 1990, and 1991, Senator D'Amato steered his so-called Federal Drug Kingpin Death Penalty through the Senate on November 16, 1993, as part of President Clinton's Violent Crime Control and Law Enforcement Act of 1994.[1] Five months later, in April, 1994, the House of Representatives resoundingly rejected an amendment striking the provision from the House version of the Act.[2] The provision is now federal law.

For the last quarter-century, the so-called "drug kingpin laws" have established stiff penalties for a participant in a continuing criminal enterprise involving specific minimum amounts of a number of controlled substances;[3] the requisite minimum amounts vary by substance.[4] At present, there are three provisions that impose the death penalty on drug kingpins. The first of these was passed in 1988 and authorizes the death penalty for "drug kingpin" murders and drug-related murders of law enforcement officials.[5] The second and third provisions became effective on September 13, 1994. The second imposes the death penalty on either leaders of a continuing criminal enterprise or their triggermen who attempted to murder a public officer, juror, witness, or member of such person's family or household.[6] The third provision authorizes the death penalty for possession of large quantities of drugs or possession of drugs worth large amounts of money.[7] This Note addresses the third of these provisions. Under that provision, a defendant found guilty of

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* B.A., University of Pennsylvania 1991; J.D., The University of Texas School of Law 1996.

1. By a vote of 74-25 (1 not voting). *See* 139 CONG. REC. S15,750 (daily ed. Nov. 16, 1993); 139 CONG. REC. S15,818 (daily ed. Nov. 17, 1993) (recorded vote).

2. By a vote of 316-108 (1 present, 12 not voting). *See* 140 CONG. REC. H2324 (daily ed. Apr. 14, 1994) (recorded vote).

3. 21 U.S.C. § 848(a) (1994).

4. *See generally* 21 U.S.C. §§ 841, 848 (1994).

5. 21 U.S.C. § 848(e) (1994); *see* 134 CONG. REC. 16,070 (daily ed. Oct. 14, 1988) (statement of Sen. Dixon).

6. 18 U.S.C. § 3591(b)(2) (1994).

7. 18 U.S.C. § 3591(b)(1) (1994).

violating the basic drug kingpin law[8] who is in possession of at least twice that statute's minimum amount of a controlled substance or twice the statute's minimum amount of gross receipts, may be sentenced to death, even when no killing has occurred.[9]

This provision marks a radical departure from United States death penalty law of the last two decades. This Note intends to show that while virulent opposition to drug dealers and the crime associated with them may be nearly universal in the United States,[10] such a provision violates the Eighth Amendment, possibly exceeds Congress' authority under the Commerce Clause, and embraces a fundamentally unwise policy.

II. Assessing Constitutionality

A. Historical Background of the Death Penalty in the United States

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8. *See* 21 U.S.C. § 848(c)(1) (1994); 21 U.S.C. § 841(b) (1994).

9. 18 U.S.C. § 3591(b) (1994) provides:

> A defendant who has been found guilty of (1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. § 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B) . . . shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

10. When asked, "What do you think is the most important problem facing this country today?" the following percentages of survey participants responded that drugs and drug abuse were the most important problems:

Date	Percent
4/90	30%
7/90	18%
3/91	11%
3/92	8%
1/93	6%
1/94	9%
7/94	9%
1/95	6%

Survey, U.S. 1981-95, George H. Gallup, THE GALLUP REPORT, reprinted in BUREAU OF JUSTICE STATISTICS U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 140 (1995). The exact wording of response categories varies across surveys. Multiple responses are possible; the Sourcebook records up to three answers per respondent. *See also* Bill Oliver, *The Drug War*, CIN. ENQUIRER, March 31, 1996, at H1 (discussing 1995 Gallup Poll indicating that "drug abuse places crime and drugs the number one and two issues concerning Americans."); Ed Timms, *Poll finds wide concern about drugs*, DALLAS MORN. NEWS, Dec. 12, 1995, at 4A (reporting that in a Gallup News Service poll of 1,020 adults from Sept. 14, 1995 to Sept. 17, 1995, 63% said they view drug abuse as a "serious problem," while 31% said they view it as a "crisis.").

The history of the death penalty has been the subject of countless books, treatises, and scholarly articles; a full and complete history is beyond the scope of this Note. It is nonetheless important to offer at least an abbreviated summary of this country's use of this most severe punishment. The death penalty has been part of the United States penal system for more than three centuries.[11] As early as 1636, capital offenses in America included "idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion."[12] The framers of the United States Constitution saw the death penalty as an integral part of criminal justice, as evidenced by the provisions of the Fifth and the Fourteenth Amendments providing that a person shall not be deprived of "*life*, liberty, or property, without due process of law."[13] These provisions suggest that punishment by death is permissible so long as due process is afforded.

More recently, the last two decades have witnessed major substantive change in death penalty law. In 1972, the Supreme Court effectively declared all state death penalty statutes unconstitutional in *Furman v. Georgia*.[14] In that decision, the Court held that Texas, Georgia, and Florida statutes giving juries "untrammeled discretion" to impose the death penalty violated the Eighth and Fourteenth Amendments.[15]

Four years later, in 1976, the Supreme Court upheld five states' revamped death penalty statutes, concluding that imposition of the death penalty is not invariably cruel and unusual punishment, is not inherently barbaric or an unacceptable mode of punishment for crime, and is not always disproportionate to the crime for which it is imposed—as long as procedural safeguards are in place.[16] The Court approved of statutory structures that included a direction to appellate courts to determine whether or not the death penalty was imposed "under the influence of passion, prejudice, or any other arbitrary factor"[17] and a requirement that appellate courts engage in meaningful review to ensure that deaths were not imposed "capriciously or in a freakish manner."[18] The Georgia statute went so far as to require courts to ascertain whether the imposition of the death penalty in the case under review

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11. For an excellent and concise history of capital punishment in the United States, see Sandra R. Acosta, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596 (1990).

12. Furman v. Georgia, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

13. U.S. CONST. amend. V (emphasis added); U.S. CONST. amend. XIV (emphasis added). *See* Gregg v. Georgia, 428 U.S. 153, 177 (1976) (plurality opinion).

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

15. *Id.* at 239-40, 247, 256-57.

16. *See Gregg*, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

17. *Gregg*, 428 U.S. at 167.

18. *Id.* at 195.

was disproportionate to sentences imposed in other cases, though the Supreme Court concluded that this last factor was not constitutionally required in a later case.[19]

B. *Proportionality*

1. Background.—As noted *supra*, the Bill of Rights permits the death penalty, as long as due process is afforded. The Bill of Rights offers additional guidance as to *when* the death penalty may be imposed: the Eighth Amendment prohibits "cruel and unusual punishments."[20] Much debate has addressed the issue of whether it requires proportionality, i.e., that the punishment fit the crime,[21] though modern courts have not interpreted this language to impose any general requirement of proportionality on sentences.[22] However, proportionality in issuance of a death sentence is altogether different:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[23]

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19. *See* Pulley v. Harris, 465 U.S. 37 (1984).

20. U.S. CONST. amend. VIII.

21. *See generally* Harmelin v. Michigan, 501 U.S. 957, 965-95 (1991) (holding that it is not "cruel and unusual punishment" to impose a life sentence without possibility of parole on first-time drug offender); Solem v. Helm, 463 U.S. 277 (1983) (holding that a sentence of life imprisonment without possibility of parole was disproportionate for a defendant whose successive offenses included three convictions of third-degree burglary, one of obtaining money by false pretenses, one of grand larceny, one of third-offenses driving while intoxicated, and one of writing a "no account" check with intent to defraud); Hutto v. Davis, 454 U.S. 370 (1982) (holding that a sentence of 40 years in prison and $20,000 in fines is not "cruel and unusual" punishment for a defendant who possessed and distributed approximately nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263 (1980) (holding that it did not constitute "cruel and unusual punishment" to impose a life sentence, under a recidivist statute, upon a defendant who had been successively convicted of fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses); Trop v. Dulles, 356 U.S. 86, 100-101 (1958) (plurality opinion) (stating in *dictum* that "evolving standards of decency" may be considered in determining whether the punishment fits the crime).

22. *Harmelin*, 501 U.S. at 965-95. However, non-capital cases are by no means insulated from proportionality review. The Court has engaged in a proportionality inquiry in a number of non-capital cases. *See, e.g., Harmelin*, 501 U.S. 957; *Rummel*, 445 U.S. 263; *Hutto*, 454 U.S. 370; *Solem*, 463 U.S. 277; *Trop*, 356 U.S. 86.

23. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). *See Harmelin*, 501 U.S. at 993-94.

Because of its unique nature, death—in theory, at least—requires measured, consistent application and fairness to the accused. The Eighth Amendment prohibits extreme sentences that are "grossly disproportionate" to the crime.[24] As a practical matter, however, determining the crimes for which a penalty of death is proportionate is as difficult and opinion-driven as any task in the law. Since 1977, all executions in the United States have been for murder, compounded by an aggravating factor.[25] This is largely explained by the Supreme Court's decision that year in *Coker v. Georgia*.[26] In *Coker*, the Court held that a sentence of death for the crime of rape of an adult woman was "grossly disproportionate and excessive" punishment forbidden by the Eighth Amendment.[27] Apparently, state legislators have interpreted *Coker* to mean that imposition of the death penalty in cases not involving the taking of a life is *per se* unconstitutional.[28] Justice White, writing for the plurality, did not choose to be quite so explicit, though the decision appears to turn on that factor.

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of a human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human

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24. *See,* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

25. This figure may, of course, include felony murder. According to the U.S. Department of Justice, all 226 executions in the United States from 1977 to 1993 were for murder. BUREAU OF JUSTICE STATISTICS U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 598 tbl. 6.82, tbl. 7.26 (1995). In a more recent statistic, the NAACP Legal Defense and Educational Fund reports that there have been 318 executions in the United States since January 1, 1973. *Dispositions Since January 1, 1973*, DEATH ROW, U.S.A. (NAACP Legal Defense and Educational Fund, Inc., New York, N.Y.), Winter 1995 at 1.

26. *Coker*, 433 U.S. 584 (1977) (plurality opinion).

27. *Id.* at 592.

28. This is apparent from the fact that since *Coker,* no state has authorized the death penalty for a crime in which no death has resulted.

life.[29]

Five years later, in *Enmund v. Florida*, the Supreme Court held the death penalty to be an unconstitutional sentence for a robbery during which a death that was not a murder occurred, concluding that the Eighth Amendment prohibits capital punishment when the defendant did not commit murder, intend to commit murder, or attempt to commit murder.[30] In the 1987 decision of *Tison v. Arizona*, the Court narrowed *Enmund* by holding that the Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference.[31]

Professors Carol S. Steiker and Jordan M. Steiker have interpreted the *Coker*, *Tison*, and *Enmund* opinions to reflect the Court's "general reluctance to narrow the class of death-eligible defendants through constitutionally imposed proportionality limitations;"[32] they argue that the cases, taken as a whole, effectively give juries a pre-*Furman* standardless discretion:

> Apart from *Coker*, then, the Court's proportionality decisions suggest strongly that the "narrowing" of the class of offenders and offenses subject to the death penalty should be accomplished primarily, as in the pre-*Furman* regime, by sentencer discretion guided by statutory criteria rather than court mandate. Given that the statutory criteria (in the form of aggravating and mitigating circumstances) do not themselves accomplish any significant narrowing, this approach is essentially indistinguishable from the standardless discretion embodied in the pre-1972 statutes.[33]

The Court's reluctance, though, must stop with this provision. The Court must hold this provision disproportionate because, as discussed *infra*, Congress has gone far beyond the confines of *Tison*, in failing to require even that a death has resulted. If the Steikers' analysis is correct, the Court's intent in *Furman* has not, of course, been realized. This provision could serve as an

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29. *Coker*, 433 U.S. at 598 (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. at 187).
30. Enmund v. Florida, 458 U.S. 782, 797 (1982).
31. 481 U.S. 137, 138, 157 (1987).
32. Carol S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 376 (1995).
33. *Id.* at 378.

excellent starting point for at least some narrowing to occur through the proportionality doctrine rather than through the largely ineffectual statutory factors.

2. Application of the Doctrine.—When, if ever, is the death penalty acceptable? The Supreme Court has said that for guidance we must look to "the evolving standards of decency that mark the progress of a maturing society."[34] In a number of cases, the Supreme Court has identified an ever-changing list of factors to be used to determine the circumstances under which the death penalty may be imposed. The common thread among the cases is that the Court identifies factors that are both subjective (i.e., the judges believe the punishment fits the crime)[35] and objective (i.e., society has indicated it believes the punishment fits the crime). However, the Court has vacillated on the question of what constitutes a factor worthy of consideration and has, most recently, changed the structure of the inquiry as well.

In *Gregg v. Georgia*, the court looked to four factors: history,[36] legislative action,[37] jury decisions, [38]and a state referendum [39]to determine whether to impose a sentence of death.[40] In *Coker*, Justice White modeled his approach after *Gregg*, looking to "history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions."[41] He explained, "As advised by recent cases, we seek guidance in history and from the objective evidence of this country's present judgment concerning the acceptability of death as a penalty . . ."[42] for a particular crime. In examining jury decisions as an "index of contemporary values,"[43] he noted that "the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed."[44] This point is critical to a discussion of the proportionality of the drug kingpin death penalty, as will be discussed *infra*.

Of its four factors, the *Gregg* court stressed the importance of legislative action, when it declared that the "most marked indication of society's endorsement of the death penalty for murder is the legislative response to

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34. *Dulles*, 356 U.S. at 101.
35. The cases do not uniformly acknowledge the existence of this subjective element, though the justices' views inevitably color any discussion of proportionality.
36. *Gregg*, 428 U.S. at 176-79.
37. *Id.* at 179-81.
38. *Id.* at 181.
39. *Id.*
40. *Id.* at 176-82.
41. *Coker*, 433 U.S. at 592.
42. *Id.* at 593.
43. *Id.* at 596 (quoting *Gregg*, 428 U.S. at 181).
44. *Coker*, 433 U.S. at 596.

Furman."[45] Using that approach, the *Coker* court concluded that because only three of sixteen states that had pre-*Furman* statutes punishing rape as a capital offense chose to include rape among capital felonies, and none of the other states chose to include it after *Furman*,[46] public sentiment with respect to rape did not call for imposition of the death penalty.[47] This analysis seems flawed. If congressional acts constitute *per se* public consensus and public consensus is the key to disproportionality, then a congressional act cannot be held disproportionate. Surely, the Supreme Court must play some role in determining when the death penalty is constitutional. The *Gregg* decision's emphasis on legislative action as a key to determining contemporary values seems ill-conceived.

The Court broadly followed this same approach when it decided *Enmund*, in 1982, but there it added international opinion as a factor worthy of consideration.[48] It also stressed that the justices' judgment "should be informed by objective factors to the maximum possible extent."[49] Five years later, in deciding *Tison*, the Court largely followed *Enmund*. In *Tison*, however, the court focused on the actions of state legislatures[50] and states' judicial interpretations of *Enmund*.[51]

Most recently, in 1991, the Court—in a divided opinion—significantly altered the law on proportionality. Though Justice Scalia stated flatly in the plurality opinion that there is no proportionality guarantee in the Eighth Amendment,[52] and then declared that a non-capital proportionality case, *Solem v. Helm*,[53] was "simply wrong,"[54] because death is different, he nonetheless grudgingly applied the three *Solem* factors: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions.[55] The first of these is a subjective test; the second and third

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45. *Gregg*, 428 U.S. at 179.

46. Georgia, Louisiana, and North Carolina were the only states to continue to authorize the death penalty for the rape of an adult woman after *Furman*. By 1977, when the Court handed down *Coker*, the mandatory death penalty statutes of Louisiana and North Carolina had already been struck down as unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). This left Georgia as the only state—at the time of *Coker*—whose death penalty statute provided for death for the rape of an adult woman.

47. *Coker*, 433 U.S. at 594; *Gregg*, 428 U.S. at 179 n.23.

48. *Enmund*, 458 U.S. at 788-89 (looking to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions of juries).

49. *Id.* at 788 (quoting *Coker*, 433 U.S. at 592).

50. *Tison*, 481 U.S. at 152.

51. *Id.* at 154.

52. *Harmelin*, 501 U.S. at 965. *See id.* at 965-75.

53. 463 U.S. 277 (1983).

54. *Harmelin*, 501 U.S. at 965.

55. *Id.* at 986-87 (citing *Solem*, 463 U.S. at 290-91); *see Harmelin*, 501 U.S. at 986-90 (discussion

elements are objective. The second element has been referred to as the "intrajurisdictional" analysis, and the third has been termed the "interjurisdictional" analysis.

In spite of Justice Scalia's strong language, he is joined only by Chief Justice Rehnquist in Parts I, II, and III of *Harmelin*. His opinion stands as the plurality only because Justices Kennedy, O'Connor, and Souter join him in the result. The scope of the opinion, therefore, is defined by Justice Kennedy's concurring opinion. There, Justice Kennedy reasoned:

> A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.[56]

Thus, if the Justices subjectively determine that the death penalty is a proportional punishment for a certain crime, the inquiry ends there; the objective inquiry is necessary only in an admittedly "rare" case in which they find the punishment to be disproportionate. In a sense, then, *Harmelin* may well be the death of proportionality doctrine as a narrowing method. This structure places too much emphasis on the Justices' own opinions, though in the case of the drug kingpin death penalty, the objective factors offer little guidance and leave the decision largely in the hands of the Justices anyway.

3. Applying Proportionality Doctrine to the Drug Kingpin Death Penalty.—Predicting the result if the Supreme Court were to review the drug kingpin death penalty by utilizing this two-tiered subjective/objective approach proves problematic, to say the least.

a. Subjective Factors.—As Justice White noted in *Coker*, "the Constitution contemplates that in the end our own [the Justices'] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[57]

Justice Powell's dissent in *Furman* offers insight here as well:

> [W]here . . . the language of the applicable

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by Scalia J.,of these three factors).

56. *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

57. *Coker*, 433 U.S. at 597.

> [constitutional] provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.[58]

When the proportionality dance is over, the issue boils down to subjective opinions. These opinions are not easy to predict and lack the certainty the law must strive to provide for its citizenry. The Supreme Court must rise to the challenge and think through the provision carefully, considering policy implications and obeying the clear command of its own case law. If it proceeds in accord with the principles identified above, it should hold this provision unconstitutional, as a grossly disproportionate punishment in violation of the Eighth Amendment's prohibition of cruel and unusual punishments.

b. Objective Factors.—Because it is unclear what decision the Court will reach based on subjective criteria, it is critical to attempt to apply the tests of objective evidence. Determining contemporary values often proves difficult, if not impossible. However, as discussed *supra*, the Court has looked to legislative action, jury decisions, and history to provide objective evidence of the public's views as to whether a punishment fits the crime.

Regarding legislative action, the public consensus stands clearly *against* imposition of the death penalty for drug kingpins who merely possessed large amounts of a controlled substance. No state statute, in fact, has imposed the death penalty for such a crime. To be sure, thirty-eight states, the U.S. Government, and the U.S. Military have death penalty statutes;[59] none authorizes death as a punishment for possession of large amounts of controlled substances.

History offers no help, because the phenomenon of vast international drug dealings with carefully insulated leaders and such far-reaching socially destructive impact is relatively new.

Jury behavior, i.e., how often juries sought the death penalty when it was available to them to punish the crime being tried, offers little help. Here, Justice White's point that this is only useful when juries had an "appropriate

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58. *Furman*, 408 U.S. at 431 (Powell, J., dissenting).
59. *Jurisdictions with Capital Punishment Statutes*, DEATH ROW, U.S.A., *supra* note 25, at 1.

measure of choice"[60] is worth repeating here. It is unclear whether a court should inquire into whether defendants received death penalty sentences *for possession* of controlled substances or *for being drug kingpins*. If the answer to that question is the latter, it is highly unlikely to be tried in state court, because the "drug kingpin" is a creature of federal law. If the answer is the former, no state has provided death as an option. In either case, where death was not an option before the jury, sentencing decisions offer no guidance at all.

The use of social consensus raises additional questions. What about the consensus within one state, as evidenced by choice of governor or through other referendum? Should courts use consensus to determine *whether* to impose the death penalty or *when* to impose the death penalty? If courts use social consensus to determine *when* (for which crimes) to impose the death penalty, they are ignoring the threshold question of *whether* to impose the death penalty. Courts cannot ignore a state's right to enforce one social consensus, i.e., not to impose the death penalty at all, and then justify imposition of the death penalty with another (national) consensus, i.e., to impose the death penalty for the crime of possessing large amounts of a controlled substance. Why is one social consensus more valuable than another?

This may suggest that social consensus has no place in the disproportionality doctrine, but that effectively limits the decisions of proportionality to judges' subjective opinions. As noted *supra*, this is difficult to predict. In the end, proportionality is largely a farce. With regard to this provision, both before and after *Harmelin*, legislators and judges must embrace the truth that the decision will rest with the Supreme Court justices' own opinions. As stated above, the Court should find this provision to be a grossly disproportionate punishment in violation of the Eighth Amendment's prohibition against cruel and unusual punishments.

C. The Commerce Clause

The provision is unlikely to pass constitutional muster for another, more basic reason: Congress may well lack the power to pass such a law. The fact that this is a *federal* death penalty is constitutionally significant. In contrast to the thousands now awaiting death's call on numerous state death rows,[61] there are at present only seven people on federal death row.[62] Indeed, the

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60. *Coker*, 433 U.S. at 596.

61. *Total Number of Death Row Inmates Known to LDF*, DEATH ROW, U.S.A., *supra* note 25, at 1, 43 (stating there were 3,053 state death row inmates as of January 31, 1996).

62. These statistics are accurate as of April 26, 1996. All seven defendants are charged with crimes

federal government has not executed anyone since March 15, 1963, when Victor Feguer was hanged for kidnapping.[63] The United States was founded on the notion of limited central government; the federal government is a government of "enumerated powers." The Tenth Amendment specifically states, "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 the people."[64] It is undisputed that in spite of this language, for the last half-century, Congress has made extremely liberal use of its power under the Commerce Clause.[65]

Because the Tenth Amendment only reserves to the states those powers not "delegated to the United States by the Constitution," supporters of Congress' broad assertion of power argue that the Commerce Clause power is a delegated power. The Congress' power, then, depends on the breadth of the reading the Court accords the Commerce Clause. Recently, the Court has questioned Congress' omnipotence under the clause. In *United States v. Lopez*,[66] the Supreme Court held that the Gun-Free School Zones Act exceeded Congress' Commerce Clause authority, because possession of a gun in a local school was not an economic activity that "substantially affected" interstate commerce.[67]

The *Lopez* Court identified three categories of authority under which Congress may pass a law.[68] Congress may regulate the use of channels of interstate commerce, attempt to prohibit the interstate transportation of a commodity through the channels of commerce, or regulate an activity that substantially affects interstate commerce.[69] The drug kingpin death penalty is certainly not an attempt by Congress to regulate the use of channels of

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involving drugs *and* homicide. Six were prosecuted under the 1988 law; *See* United States v. Chandler, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 2724 (1994) (one defendant sentenced); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995) (one defendant sentenced), *cert. denied*, 117 S. Ct. 87 (1996); DAVID I. BRUCK & KEVIN MCNALLY, FEDERAL DEATH PENALTY RESOURCE COUNSEL PROJECT, FEDERAL DEATH PENALTY PROSECUTIONS, 1988-96, at 2 (1996).

63. David Dahl, *Feds dealing death penalty more and more; Anti-crime bill adds to offenses calling for capital punishment; lethal injection chamber on drawing board*, S.F. EXAMINER, Feb. 6, 1994, at B6.

64. U.S. CONST. amend. X.

65. U.S. CONST., Art. I, § 8, cl. 3. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (This case represents the apex of the reach of the Commerce Clause. In that case, a farmer in Ohio sowed 23 acres of wheat, sold some of it intra-state, and used the rest to seed his fields, feed his animals, and eat in his home. The Court found that his activities affected interstate commerce, because if he did not grow the wheat, he would need to buy it, and thus, his practice affected the market price of wheat. "Home-grown wheat in this sense competes with wheat in commerce." *Id.* at 128).

66. 115 S.Ct. 1624 (1995).

67. *Id.* at 1632. *See also* Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1125-27 (1996) (holding that the Indian Commerce Clause does not grant Congress the power to abrogate the states' Eleventh Amendment sovereign immunity).

68. *Lopez* at 1629-30.

69. *Id.*

interstate commerce. The provision's supporters are likely to attempt to justify it either as a prohibition of interstate transportation of a commodity or as a regulation of an activity that substantially affects interstate commerce. Just as guns are bought, sold, and transported across state lines, drug trafficking obviously crosses state lines. However, just as in *Lopez*, it remains unclear from the statute how possession of drugs substantially affects interstate commerce. Just as in *Lopez*, this statute prohibits possession of a thing in a place; whether that thing is a gun or a bag of drugs, Congress purports to regulate its possession without establishing that the possession affects interstate commerce. After *Lopez*, it is not altogether clear that legislative action of this nature is, in fact, permissible under the Commerce Clause.

To be sure, the framers of the Constitution would be shocked to see that federal prosecutors could seek the death penalty in a state whose voters set forth a clear mandate—through referendum or by electing certain officials—*not* to allow the death penalty within state borders. Federalism has suffered enough; we need not federalize crimes that are already adequately punished by states.[70] This has been the position of U.S. Attorney General Janet Reno as well.[71]

For now, the logistics themselves seem less than clear; the confusion is perhaps an accurate reflection of the muddied relationship of the federal and state governments. The U.S. Bureau of Prisons has completed a federal death row facility in Terre Haute, Indiana, that will hold thirty to fifty inmates and execute them in a lethal injection chamber.[72] The facility is sitting empty, awaiting its first inmates. Those currently on federal death row are being housed in local and state prison facilities in the state in which the sentencing court sits, or in a nearby state if that state does not have death penalty capability. In a classic governmental communication snafu, the statute provides for use of state facilities and subsequent reimbursement.[73] Although the Terre Haute facility has cost taxpayers millions of dollars, the Constitution

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70. *See, generally* Stephen Chippendale, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455 (1994); Jim R. Carrigan & Jessica B. Lee, *Criminalizing the Federal Courts*, TRIAL, June 1994, at 50; William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651 (1994).

71. David Dahl, *Federal Role in Death Penalty May Expand*, ST. PETERSBURG TIMES, Feb. 1, 1994, at 1A (quoting Justice Department spokesman John Russell, "Most of your crimes of violence, we feel, should be handled by local prosecutors.").

72. Dahl, *supra* note 63; Telephone Interview with David I. Bruck (Apr. 26, 1996). Bruck, a private defense attorney in Columbia, South Carolina, is one of two attorneys employed by the Defender's Services Division of the Administrative Office of the United States Courts to "serve as a national clearinghouse for information which might be helpful to appointed defense counsel in [federal death penalty] cases. . . . When requested, and to the extent time permits . . . [to] assist trial counsel with research, draft pleadings. . ." BRUCK, *supra* note 62, at 10.

73. 18 U.S.C. § 3597(a) (1994).

may not allow the Indiana facility to execute a single inmate.

D. Stare Decisis

1. Tracking the Language of Coker.—If neither proportionality doctrine nor Commerce Clause analysis proves convincing, judges may simply look to precedent. Applying the reasoning of *Coker, Enmund,* and *Tison* to the drug kingpin death penalty reveals its unconstitutionality. Simply tracking the language of the *Coker* opinion, one quickly sees the opinion's applicability to the drug kingpin provision. Like the rapist, the drug kingpin "as such, does not take human life."[74] Furthermore, drug trafficking, like rape, "[a]lthough it may be accompanied by another crime, by definition does not include the death of or even the serious injury to another person."[75] The murderer kills; the drug trafficker like the rapist, "if no more than that, does not."[76]

2. Distinguishing Enmund *and* Tison.—However, as discussed *supra*, *Coker* has been narrowed by *Enmund* and *Tison*; relying too strongly on the reasoning of its holding may prove to be a risky venture. Even in light of *Enmund* and *Tison*, this drug kingpin death penalty provision should be held unconstitutional. Some commentators have argued the conceptual leap from a major participant acting with reckless indifference to human life, as in *Tison*, to a leader coordinating the systematic distribution of drugs, a distribution that ultimately results in numerous deaths, is not that large. That leap of logic, however, is intolerably huge. As discussed *infra*, there is simply no proven connection between a single act of possession and a resultant death. In *Tison*, death resulted when the defendants helped effect their father's escape from prison and watched their father and another escaped convict shoot a family of four.[77] Although both defendants later stated they were surprised by the shooting, neither made any attempt to help the victims but instead drove away in the victims' car with the rest of the escape party.[78] This situation is simply nothing like the case of a defendant possessing large amounts of controlled substances. In *Tison*, the defendants were present at the shooting and failed to prevent the death or assist the victims in any way. Here, a defendant merely possessed drugs. The use of drugs is itself unlikely to lead to death. Most of the deaths that the provision's supporters attribute to drugs occur in gang violence as part of "turf wars" or between cartels or drug organizations

74. *Coker*, 433 U.S. at 598.
75. *Id.*
76. *Id.*
77. 481 U.S. at 139-41.
78. *Id.* at 141.

over monetary disputes. The drugs themselves do not cause the majority of these deaths. By contrast, the Tison defendants were the major participants in their father's prison escape and his subsequent flight. Their only saving grace was their surprise at the shooting. Nonetheless, they had little argument that they were not involved in the conspiracy. In short, the cases are distinguishable, because a death resulted in *Enmund* and *Tison*, though no death need occur for a defendant to violate this drug kingpin death penalty provision. Thus, though *Coker* has been narrowed by *Enmund* and *Tison*, it remains good law when no death has resulted and is thus analogous to the scenario this provision seeks to address.

3. Homicide By Any Other Name.—In spite of the reasoning of *Coker*, supporters of the provision have nonetheless attempted to argue that drug dealers *indirectly* take countless lives. Senators Orrin Hatch (R-Utah) and D'Amato have argued somewhat simplistically that drug dealers cause death and are therefore punishable by death, satisfying the requirements of *Coker*. Senator D'Amato, arguing on the Senate floor, set forth the argument:

> Major drug kingpins are killing and maiming Americans. . . . In order for that death penalty to be applicable, that person has to be involved in the sale or distribution and you had that rank and are selling 132 pounds of heroin—and that is the minimum—you are responsible for the deaths of untold numbers of people either directly *or indirectly*, whether through HIV, or whether the heroin addict shoots up and overdoses, or the heroin addict who unfortunately, to support his habit, uses that gun that we speak about and kills an innocent bystander or robs a variety store at night and shoots down someone or was involved in a battle over turf and kills an innocent child. . . .[79]

This argument ignores basic tenets of criminal law. Effectively convicting a drug dealer for the taking of a life without even an iota of proof of the latter crime is nonsensical speculation. It has long been established that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[80] The defendants convicted under this law

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79. 139 CONG. REC. S15750 (daily ed. Nov. 16, 1993) (emphasis added) (statement of Sen. D'Amato).
80. *In re* Winship, 397 U.S. 358, 363-64 (1970) (holding that the federal constitutional requirement

have never been charged with homicide; Congress cannot simply claim homicide through speculation. Such indirect causal links have never been permitted under the law. The 1988 law already punishes drug-related murders; this provision only applies when such homicide *cannot* be proven. If such causation *can* be proven, prosecutors should come clean and charge defendants with homicide, not possession of a large amount of a controlled substance.

While scholars criticize the punishment of inchoate offenses, the defendant indicted for attempted homicide has proceeded down the path toward homicide far more than a defendant possessing with intent to distribute a large amount of controlled substance. It is elementary law that the prosecution must prove every element of the crime charged beyond a reasonable doubt;[81] here, Congress seems to do away with such a requirement, making the leap from possessing drugs to causing death without batting an eye. Even in the felony murder context, states are divided over how causally connected the sale must be to the death.[82] If the felony is insufficiently causally connected to the death in felony murder cases (where *by definition* a death has occurred), there can be little doubt that possession—linked to neither a sale nor a death—is not sufficiently causally connected to a death that has not yet occurred.

Simply put, the prosecution must prove causation; the mere act of selling or possessing is insufficient. Though these defendants are not being technically charged with homicide, the law cannot allow such leaps to be made by analogy and cannot allow prosecutors or legislators to sidestep Constitutional requirements by hiding behind the political rallying cry of fighting drug kingpins. Actions directly forbidden by the Constitution cannot be achieved indirectly through legislative subterfuge.

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of due process demands that prosecution prove defendant's guilt beyond a reasonable doubt).

81. *Id.*

82. *Compare* State v. Mauldin, 529 P.2d 124 (Kan. 1974) (holding that because the felony of selling heroin was completed upon consummation of the sale, the resultant death did not fall within the scope of the felony murder rule); State v. Aarsvold, 376 N.W.2d 518, 523 (Minn. App. 1985) (reasoning in part that a state must show a direct causal relationship between a sale of cocaine and the subsequent death of the buyer); People v. Cruciani, 334 N.Y.S.2d 515, 523-24 (1972) (holding that whether defendant's injection of heroin into the body of another, whereby such other died, constituted an indictable offense of homicide is a fact question for the trier of fact); Commonwealth v. Bowden, 309 A.2d 714, 718 (Pa. 1973) (holding that element of malice required for second-degree murder cannot be implied from defendant's act of injecting heroin into the decedent, a fellow addict, causing that addict to die); Sheriff, Clark County v. Morris, 659 P.2d 852, 859-60 (Nev. 1983) (holding that felony murder rule would not apply to a situation involving either a sale only or a sale with a non-lethal dosage ingested in the defendant's presence) *with* Bouwkamp v. State, 833 P.2d 486 (Wyo. 1992) (holding that it is immaterial for the purpose of convicting a defendant of felony-murder for a killing which occurred in the perpetration of a robbery whether the killing proceeds, coincides with, or follows the robbery); Heacock v. Commonwealth, 323 S.E.2d 90 (Va. 1984) (holding that death of victim from drug overdose was proximately interrelated with defendant's distribution of cocaine, regardless of who made the injection).

4. Grave Risk to Society.—As an alternative justification for the provision, Senator Hatch articulated a distinct and far more credible argument—*Coker* is inapplicable to a crime posing an "extremely grave risk to society,"[83] and death is proportionate to the crime because the crime's harm is of such great magnitude.

> [The provision's] critics are wrong for two reasons. First, Anglo-American law has a long tradition of imposing the ultimate sanction against those who pose an extremely grave risk to society, even where no death directly results. A few examples are treason, certain types of espionage, and airliner hijacking.
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> Second, because of the enormous magnitude of the public harm drug trafficking and related violence causes [*sic*], applying the death penalty to these cases is wholly consistent with the proportionality requirement of [the] [E]ighth [A]mendment's cruel and unusual punishment clause.[84]

Senator Hatch's arguments are flawed. First of all, few would argue that rape does not pose an "extremely grave risk" to society. If so, the argument fails as to *Coker* itself. Further, even if Hatch's "risk" refers to a risk to the nation—of international scope—such as treason, espionage, and airliner hijacking, the constitutionality of the imposition of the death penalty for those crimes has been repeatedly questioned in recent years.[85] In addition, with those three crimes, the fact-finder can be certain that the person charged is responsible for the serious risk to society. Here, the opposite is near certain. It is quite likely that the person truly holding the power in the drug trafficking industry is well insulated. There is no fact-finding to show that this particular defendant's sale of drugs caused any "extremely grave risk" to society. The so-called drug kingpin death penalty, in short, will not really punish the drug kingpins.

The application of death penalty statutes, generally, has been skewed against nonwhite defendants. The race of defendants charged under the 1988 drug kingpin death penalty bear out this allegation. Of the thirty-six defendants charged under the 1988 drug kingpin statute as of March 1994, thirty-two were African-American or Hispanic.[86] Certainly no one will argue

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83. 139 CONG. REC. S15,735 (daily ed. Nov. 16, 1993) (statement of Sen. Hatch).
84. *Id.*
85. *See Coker*, 433 U.S. at 621 (Burger, C.J., dissenting).
86. H.R. 103-458, 103rd Cong., 2d Sess. (1994) (reporting on H.R. 4017, the proposed Racial Justice

that minorities hold the real power in the international drug trafficking trade. This disparity proves both that the wrong people are being charged as "drug kingpins" and lends credence to the notion that death penalty statutes are inevitably applied in a racist manner.[87]

Thus, the well-intentioned lawmakers are really targeting only the second tier of the drug world hierarchy; these defendants are easily replaced, and the deterrent effect is negligible at best. Senator Hatch's second argument is merely a blanket statement that proportionality doctrine is satisfied; that, however, is far from clear, as discussed *supra*.

III. Policy Implications

A. Supply Side Attack

In addition to being unconstitutional, the drug kingpin death penalty is unwise policy for numerous reasons. First and foremost, countless commentators have argued against efforts solely attacking the problem from the supply side.[88] It is by now trite to argue for demand-oriented strategies,

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Act). *See* Paul Schoeman, Note, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 545 (1995); Derrick Z. Jackson, *Equal Justice Takes a Loss*, BOSTON GLOBE, Aug. 3, 1994, at 15.

87. Racial disparities in the application of death penalty statutes around the nation are well documented. As of the summer of 1995, all 10 death penalty prosecutions sought by Attorney General Janet Reno involved African-Americans. Michael Mello, *Defending Death*, 32 AM. CRIM. L. REV. 933, 1012 (1995); Bryan Stevenson, speaker, *The O.J. Simpson Case and Capital Punishment*, 38 HOW. L. J. 247, 268-69 (1995). This trend surfaces in the application of state death penalty statutes as well. *See* U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding a strong race of victim influence but only an equivocal race of defendant influence); DAVID C. BALDUS, EQUAL JUSTICE AND THE DEATH PENALTY (1990); David C. Baldus, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Samuel R. Cross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1 (Spring 1994); Death Penalty Information Center, FACTS ABOUT THE DEATH PENALTY 2, Jan. 26, 1995; *Another Biased Death Penalty*, N.Y. TIMES, Mar. 17, 1994, at A22. The NAACP Legal Defense and Educational Fund notes that 55% of defendants executed have been white, and 39% have been African American. *Race of Defendants Executed,* DEATH ROW, U.S.A., *supra* note 25, at 3. However, the Fund points out, the numbers are strikingly different when examined in light of the race of the victim. Eighty-three percent of those executed were charged with killing a white victim, while only 13% of those executed were charged with killing an African-American. *Id.* The inevitable conclusion is that white lives are more valuable to the American prosecutors. *But see* McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that statistical disparities in charging rates based on the races of defendants and victims did not establish intentional discrimination under the Fourteenth Amendment).

88. *See* Acosta, *supra* note 11; Philip M. Boffey, *U.S. Attacks Drug Suppliers But Loses Battle of the Users*, N.Y. TIMES, April 12, 1988, at A1; Stanley Meisler, *Bush Plans to Spend Millions Arresting Drug Dealers and Treating Addicts. Doesn't He Know What the Experts Say? Nothing Works*, L.A. TIMES MAGAZINE, May 7, 1989, at 20; James E. Burke, *Breaking a Habit of Mind; The Right Messages Can Change Attitudes Toward Drug Use*, WASH. POST, Nov. 11, 1990, at B3.

but this expertise should finally be heeded. A supply-side attack may have some merit, but the demand-side should be given at least as much attention—backed up by necessary education funding.[89] The two approaches must complement each other. Joseph Califano recently called for a revamped approach to the drug problem and lambasted both our national strategy and our sense of denial.[90]

> For 30 years, America has tried to curb crime with more judges, tougher punishments and bigger prisons. We have tried to rein in health care costs by manipulating payments to doctors and hospitals. We've fought poverty with welfare systems that offer little incentive to work. All the while, we have undermined these efforts with our personal and national denial about the sinister dimension drug abuse and addiction have added to our society.[91]

Califano calls on Americans to face those realities and to embrace a strategy focusing instead on the abuse and addiction that is the real root of the problem, the but-for cause of the drug problem.[92]

B. Likelihood of Extradition

In addition to the flaws in Congress' general approach, this short-sighted law may well backfire. For all its rhetoric, the drug kingpin law is unlikely to empower prosecutors to nab the true drug kingpins and may actually prevent prosecution—much less execution—of those same kingpins. The most powerful drug dealers—the ones legislators claim to be targeting—will not be arrested with large quantities of drugs—in either dollar amount or weight. They are carefully insulated in well-designed systems of trafficking that have left them largely untouched and untouchable by prosecutors for years. More importantly, most of the drug world's real power brokers live abroad, beyond the reach of United States jurisdiction. The rub is that almost no country will agree to extradite any of its citizens to a nation where they face the prospect of the death penalty, according to federal prosecutors and State Department

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89. Americans agree. In a poll discussed *supra*, 93% favored more anti-drug education in public schools. Timms, *supra* note 10.

90. Joseph A. Califano, Jr., *It's Drugs, Stupid*, N.Y. TIMES MAGAZINE, Jan. 29, 1995, at 40.

91. *Id.*

92. *Id.*

legal experts.[93] The politically-motivated legislators may have actually made it more difficult to prosecute the true drug kingpins. Thus, the intended deterrent may well prove a protective shield against federal prosecution of international drug traffickers residing outside U.S. borders.

C. *Slippery Slope*

The drug kingpin death penalty is bad policy for a fourth reason. It is elementary that the law must strive to provide certainty to its citizens—in particular, defendants. The plurality decision in *Coker v. Georgia*,[94] discussed *supra*, draws a clear compromise; the death penalty is not always barbaric, but where there is no unjustified taking of a life, there can be no death penalty. This drug kingpin provision may well begin a long slide down a dangerous path. If the federal government can begin executing for crimes not involving the unjustified taking of a life, who can say where the line will be? If this provision is allowed, there is in reality no line at all and no certainty. This is unwise policy, because the law must strive to provide certainty, especially with regard to the imposition of the death penalty.

D. *Federalism*

Even if the Federalism issue discussed *infra* does not rise to the level of a constitutional violation, it is nonetheless a textbook example of unwise policy. The provision ignores the basic right of states to decide when to impose the most severe punishment and is thus both duplicative and overly

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93. In a letter to Congressman Charles Rangel, Richard Gregorie, Chief Assistant in the United States Attorney's Office for the Southern District of Florida, stated, "Most of the countries in Europe and South and Central America will not extradite a defendant if that defendant faces the death penalty." He concluded that "capital punishment for drug kingpins would not be productive legislation." 134 CONG. REC. H7275 (daily ed. Sept. 8, 1988) (letter of Richard Gregorie); *contra* FEDERAL DEATH PENALTY LEGISLATION: HEARINGS ON H.R. 2102, TITLE II OF H.R. 2709, TITLES I AND II OF H.R. 3119, H.R. 3238, H.R. 3342, H.R. 3539, H.R. 3871, H.R. 3918, AND H.R. 4402, BEFORE THE SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 101st Cong., 2d Sess. 345-50, 356-57 (1990) (House Hearings) (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State) (minimizing impact of federal death penalty legislation provisions on international extradition). *See also* Charles Kallenbach, *Plomo o Plata: Irregular Rendition as a Means of Gaining Jurisdiction over Colombian Drug Kingpins*, N.Y.U. J. INT'L L. & POL., (1990) (arguing that Colombian drug kingpins will effectively pressure the Colombian government not to enforce the United States-Colombia Extradition Treaty so that the Colombian government may enjoy some degree of domestic tranquility); Hans Schultz, *The Classic Law of Extradition and Contemporary Needs*, 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW § 1.2.4.4.1, at 319 (M. C. Bassiouni and V. P. Nanda, eds., 1973); Craig R. Roecks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime*, 25 CAL. W. INT'L L.J. 189 (1994); Michael Isikoff, *'Self-Defeating' Drug Bills?; Death Penalty Could Bar Trials of 'Kingpins,'* WASH. POST, July 26, 1988, at A1.

94. 433 U.S. 584 (1977) (plurality opinion).

intrusive. State law punishes the crime of drug possession, and numerous jurisdictions—through their elected officials—have determined that imposition of the death penalty under any circumstances is inappropriate in that state.[95] From a practical standpoint, it seems far wiser to allow the states to handle these cases. Federal prosecutors appear wholly unenthusiastic about their new powers under the 1994 law and have not announced a single prosecution seeking the death penalty under the drug kingpin death penalty.[96]

Beyond the theory of preserving a central government of limited powers, the simple reality is that federal prosecutors are already heavily overburdened and continue to struggle with their own workload and backlog.[97] Much of this backlog derives from the federalization of "conduct traditionally regulated solely by states."[98] The facts bear out this lack of enthusiasm and feasibility. As noted *supra*, as of the publication of this Note, no prosecutions have been announced under the provision, though some may be in the works, according to Death Penalty Resource Counsel David Bruck.[99] Bruck speculated that the requirement that federal prosecutions seeking the death penalty be approved by the Attorney General may have slowed the process.[100] Prosecutors are not alone. Some judges, too, believe that far too high a percentage of their cases are drug cases and any increase in the burden the federal system now bears is inconceivably unwise.[101]

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95. Jurisdictions without capital punishment statutes include Alaska, the District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. DEATH ROW, U.S.A., *supra* note 25, at 1.

96. This information is accurate, as of April 26, 1996. Telephone Interviews with David I. Bruck (Jan. 23, 1994, Apr. 26, 1996).

97. The backlog of federal criminal cases has risen from 292 cases in 1982 to 1227 cases in 1993. William T. Rule & Jeffrey Jackson, *After the Split—The Recent Workload of the Court of Appeals for the Fifth Judicial Circuit*, 14 MISS. C. L. REV. 281, 306 (1994). More generally, there was a 430 percent increase in the number of federal cases brought in 1989 as compared to 1949. Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 3 (1990). Federal drug prosecutions tripled in the decade after 1982. Paul M. Barrett, *Clinton Wants to Broaden Federal Fight Against Crime, but Strategy Has Critics*, WALL ST. J., Mar. 12, 1993, at 10A.

98. William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH L. REV. 261, 305 (1994). As a result of this federalization of crimes, the number of drug-related prosecutions in the Western District of Texas increased by 366 percent between 1982 and 1992. *Id.* *See* Chippendale, *supra* note 70, at 472. ("The federal criminal docket . . . has increased by seventy percent since 1980 while the number of judges has remained relatively static. As a result, 73.6 criminal cases are filed annually for each authorized judgeship as opposed to the 54.2 new cases filed annually fourteen years ago.") *Id.* (citing Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 672 (1993); John F. Rooney, *Senior Judges Tote Heavier Federal Caseload, But Courts Still Short*, CHI. DAILY L. BULL., Apr. 12, 1994, at 1; Sam Meddis, *Court Study Calls for More Judges, Greater State Role*, USA TODAY, Mar. 30, 1990, at 3A).

99. Bruck's role in the death penalty drama is explained *supra* at note 72.

100. Telephone Interview with David I. Bruck (Jan. 23, 1994).

101. In 1990, Judge Irving Kaufman of the Second Circuit wrote that "the greatest pressure on our court system . . . is the 'war on drugs.'" Kaufman, *supra* note 97, at 5; *see* Mary Wisniewski, *Judicial Panel Opposes Criminal Bill Provision*, CHI. DAILY L. BULL., July 16, 1991, at 1.

From a policy standpoint, the provision is clearly a political quick-fix, with little thought given to incentive structures, prosecutors' workloads, court dockets, the precedential slippery slope or states' rights. The drug kingpin death penalty is short-sighted and politically motivated, and is—in short—a policy catastrophe.

IV. Conclusions

Scholars traditionally identify the single greatest challenge to judges as remaining above the fray, to see beyond the politically popular and yet balance the Constitution with the changing face of society. Federal prosecutors responsible for doing the work of implementing the death penalty lack the time to do so. Judges lack space on court dockets to hear these cases. If the drug kingpin death penalty remains a political slogan about which legislators can boast to calm their constituencies, the provision offers little cause for worry. However, as soon as prosecutors begin to seek the penalty for a defendant who merely possessed large amounts of drugs, our civil rights as citizens will be in grave danger. Of the numerous federal crimes now punishable by death, the drug kingpin death penalty poses the gravest risk to the civil rights of Americans. Judges must have vision incisive enough to slice through political rhetoric and see both the self-defeating policy implications of the law and the unconstitutional disproportionality of the punishment it levies.

Americans see the drug problem as one of the most serious problems facing our nation today. However, eighty-five percent of Americans polled in September, 1995 said they oppose legalization.[102] Drug crimes are crowding court dockets; defendants convicted of drug offenses are crowding prisons. While legislators' political motivations are inevitable, and some may genuinely believe in the law, the drug kingpin death penalty is ill-advised in every direction. Federalizing crime, attacking the supply side of the drug problem, and executing an easily replaced second tier are all bad solutions to a serious and growing problem. The likely impact of the Supreme Court's holding the drug kingpin death penalty unconstitutional would be to change the sentence to life with no possibility of parole. This change will solve only a small part of these problems, but it will send a message of certainty to citizens and preserve our civil rights - such as they are. The ambiguities plaguing the law are ubiquitous and unavoidable, but death, unique in its severity, requires a bright-line rule, for it is essential that potential defendants know clearly the crimes for which this ultimate sanction may be imposed. This, at least, the

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102. *Most polled say they're against legalizing drugs,* S.F. EXAM., Dec. 12, 1995, at A11 (reporting that in the poll, discussed *supra* at note 10, 85% of 1,020 adults surveyed opposed legalizing drugs).

government owes its citizenry; this, at least, is a civil right.