FEDERALISM BY JURY IN *United States v. Fell*, 571 F.3d 264 (2d Cir. 2009)

Sixth Amendment jurisprudence has long sought to give practical form to the constitutional guarantee of a fair jury trial for the criminally accused.[1] Jury selection rules are designed to facilitate the impartial application of relevant law through the fact-finding function of a jury of one's peers. Until recently, courts have not addressed the potential conflict between jury selection rules and the possibility that a jury would be called upon to impose the federal death penalty even in states without the death penalty. Earlier this year, however, the Court of Appeals for the Second Circuit confronted the question of whether there is an insurmountable tension between the Constitution's guarantee of a trial by a jury of one's peers and the oath to uphold federal law over the law of the community from which the jury is drawn.[2] Although the Second Circuit discussed critical aspects of this new battle, it failed to hand down a clear decision on which future cases may dependably rely.

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1. *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005) (holding that federal sentencing guidelines are subject to the jury trial requirements of the Sixth Amendment); Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part) ("When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy."); Strickland v. Washington, 466 U.S. 668, 684–85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . ."); Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."); Herring v. New York, 422 U.S. 853, 857 (1975) (stating that "[t]he decisions of this Court have not given" the Sixth Amendment guarantees "a narrowly literalistic construction"); Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (holding that the Sixth and Fourteenth Amendments demand that venires, panels, and lists from which petit juries are drawn "must not systematically exclude distinctive groups in the community"); United States v. Wood, 299 U.S. 123, 145–46 (1936) ("Impartiality is not a technical conception. . . . For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.").

2. United States v. Fell, 571 F.3d 264 (2d Cir. 2009), *denying reh'g en banc to* United States v. Fell, 531 F.3d 197 (2d Cir. 2008).

Following the Second Circuit's decision in *United States v. Fell*,[3] a majority of the Second Circuit denied a petition for an en banc rehearing.[4] The exchange between Judge Raggi's concurrence and Judge Calabresi's dissent, however, heralded not only a new front in the constitutional battle over the federal death penalty, but also a larger debate about the nature of federalism in an age of seemingly unlimited federal power. Judge Raggi accepted the proposition that federal courts sitting in states without the death penalty should have the power to dismiss jurors who categorically oppose the death penalty.[5] Judge Calabresi's dissent, on the other hand, sought to craft a novel judicial rule that would render a state's death penalty laws binding on federal courts sitting within its boundaries.[6] Because both Supreme Court[7] and Second Circuit[8] precedent permit consideration of legal arguments *sua sponte* when the corresponding issues are properly presented, the court should have ruled on the difficult questions raised by *Fell* instead of denying the petition for an en banc rehearing and leaving the Sixth Amendment available as a potential vehicle for selective federalism.

On November 26, 2000, Donald Fell and an accomplice brutally murdered Fell's mother and her companion in Rutland, Vermont.[9] After leaving the scene of the murder, the two men visited a local mall, where they kidnapped a fifty-three-year-old store clerk and stole the clerk's car.[10] Fell and the accomplice then drove to New York in the stolen car, stopped in a wooded area, and beat the clerk to death.[11] Because this last murder was part of an interstate kidnapping, the crime constituted a federal offense and became the subject of a federal

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3. 531 F.3d 197.

4. *Fell*, 571 F.3d 264.

5. *Id.* at 265 (Raggi, J., concurring).

6. *Id.* at 282 (Calabresi, J., dissenting).

7. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

8. United States v. Pabon-Cruz, 391 F.3d 86, 97 (2d Cir. 2004) ("It is clear that we have the authority to resolve this question despite its not having been raised in the District Court proceedings or in the parties' initial briefs.").

9. *Fell*, 571 F.3d at 265.

10. *Id.*

11. *Id.*

prosecution.[12] Donald Fell[13] was found guilty by a jury of his peers and sentenced to death in the U.S. District Court for the District of Vermont.[14]

In his appeal, Fell challenged his sentence on a number of grounds, including violation of certain provisions of the Federal Death Penalty Act[15] and errors in juror selection.[16] One of the alleged errors was the removal of Prospective Juror 64, who had expressed opposition to capital punishment. Fell argued that this juror had been excused based on her general opposition to capital punishment, even though she affirmed that she could consider and impose the sentence if called for by law.[17] If Prospective Juror 64 had been willing to consider and impose the death penalty, the juror's dismissal would have violated Supreme Court precedent as set forth in *Witherspoon v. Illinois*[18] and *Wainwright v. Witt*,[19] which allow a prospective juror to be seated despite general objections to the death penalty, if he can demonstrate that his personal views will not prevent him from following the law. The Second Circuit, however, has reasoned that *voir dire* "must [only] be sufficient to permit a trial judge to form 'a definite impression that a prospective juror would be unable to faithfully and impartially apply the

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12. *See* 18 U.S.C. § 1201(a)(1) (2006) ("capital kidnapping"); 18 U.S.C. § 2119(3) (2006) ("capital carjacking").

13. Fell's accomplice, Robert Lee, died in prison before trial. United States v. Fell, 531 F.3d 197, 206 (2d Cir. 2008).

14. *Id.* at 208.

15. Pub. L. No. 103-322, 108 Stat. 1959 (1994) (codified at 18 U.S.C. § 3591 et seq. (2006)). Specifically, Fell argued that the court of appeals should review and remand the case for reconsideration pursuant to 18 U.S.C. § 3595(c)(2)(A), which provides for review if the appellate court finds that "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." The court, following *Jones v. United States*, 527 U.S. 373 (1999), denied this request, finding that the Federal Death Penalty Act does not create an exception to the plain error review requirement that the objection be properly preserved below. *Fell*, 531 F.3d at 209–10 & n.8.

16. *Fell*, 531 F.3d at 205.

17. *Id.* at 210, 212.

18. 391 U.S. 510, 521–22 (1968) (holding that a sentence of death could not be carried out where the jury that recommended it was chosen by "excluding veniremen for cause simply because they voiced general objections to the death penalty").

19. 469 U.S. 412, 424 (1985) (holding that the standard for determining when a prospective juror may be excluded for cause because of his views on capital punishments is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'" (quoting Adams v. Texas, 448 U.S. 38, 45 (1980))).

law,'"[20] and the panel in *Fell* maintained that "responses that are ambiguous or reveal considerable confusion may demonstrate substantial impairment."[21] The panel in *Fell* thus found no violation of the *Witherspoon-Witt* rule and concluded that the district court had acted within its discretion in dismissing Prospective Juror 64.[22]

In his petition for an en banc hearing of the appeal, Fell continued to assert error in jury selection.[23] The Second Circuit considered the request for a rehearing en banc, but ultimately denied it.[24] Judge Raggi,[25] writing for a majority, concurred in the denial and stated that the dissent's "'federalism' concerns [were] more imaginary than real and [did] not warrant . . . *en banc* consideration."[26] Calling upon federal interest theory, Judge Raggi wrote that "[t]he selection of a federal jury to hear a case arising under federal law involves the exercise of exclusive federal power," and does not "trench on the exercise of any state *power*."[27] Judge Raggi unequivocally concluded that "it makes no difference that, in this case, the juror's partiality manifested itself in a non-death penalty state such as Vermont rather than a state that authorizes the death penalty."[28]

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20. United States v. Quinones, 511 F.3d 289, 301 (2d Cir. 2007) (quoting *Witt*, 469 U.S. at 426).

21. *Fell*, 531 F.3d at 215.

22. *Id.* at 211. After being asked whether she could impose a death sentence if the government carried its burden under federal law, Prospective Juror 64 explained:

> Well, I am just playing the question over that you asked me in terms of if I could do that, and, you know, again, I would much more lean towards someone being [sentenced to] life without parole, but I think that if . . . I had to make that decision, that I could be able to make that decision, yes.

Id. at 212. She later stated, "I guess I would have to say that I would definitely lean more towards life imprisonment than I would towards the death sentence, yes." *Id.*

23. United States v. Fell, 571 F.3d 264, 265 (2d Cir. 2009) (Raggi, J., concurring).

24. *Id.* at 264.

25. Judge Raggi was joined by Chief Judge Jacobs and Judges Cabranes, B.D. Parker, Wesley, and Livingston.

26. *Id.* at 266 (Raggi, J., concurring).

27. *Id.* at 269.

28. *Id.* at 268. Judge Raggi later illustrated this point by stating that it would be hard to explain how "a capital defendant in Texas . . . is entitled to any less rigorous *voir dire* of a potential juror who expresses opposition to the death penalty (because Texas law authorizes capital punishment) than we would insist on for a capital defendant in Vermont (because Vermont law proscribes capital punishment)." *Id.* at 271.

Judge Calabresi, dissenting from the denial of an en banc rehearing, refused to treat the case as a traditional death penalty appeal. He grounded his theory in the vicinage requirement of the Sixth Amendment[29] and the value of federalism, a value which, he maintained, "entails the right to be tried by a set of people who truly represent the point of view of a state and district."[30] For Judge Calabresi, *Fell* went to the very heart of how federalism functions: "For a federalism like ours . . . to work, perhaps even to survive, it is at least arguable that the values of the citizens of the state in question—not just a minority of them—be reflected in trial juries, even in federal cases."[31] Judge Calabresi suggested that one solution was to remand the petition to "ask the able District Judge whether . . . he fully considered the constitutional relevance of the values of Vermonters."[32] If those values had been excluded, Judge Calabresi stated, "the sentence the jury selected must fall."[33]

Judges Pooler and Sack also filed brief dissents, both emphasizing that the issue was one of first impression and deserved a decision of the full court. Judge Sack's opinion primarily focused on the institutional argument for granting a rehearing.[34] Judge Pooler's opinion, like Judge Calabresi's, questioned the application of the "traditional rules" in this case.[35]

The unprecedented course charted by Judge Calabresi's dissent merited a formal en banc response because of the opinion's potential consequences and because this factual context has been largely unaddressed and is certain to be litigated

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29. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law . . . ." (emphasis added)).

30. *Fell*, 571 F.3d at 285 (Calabresi, J., dissenting).

31. *Id.* at 284.

32. *Id.* at 285.

33. *Id.* at 284.

34. *Id.* at 295–96 (Sack, J., dissenting) ("[B]ecause 'death is different' and this is our first decision in many decades addressing the imposition of the death penalty on appeal, I think that this is the rare case in which it makes institutional sense for us to render it as 'the Court' and not as a panel thereof.").

35. *Id.* at 295 (Pooler, J., dissenting) ("[O]ur Court would benefit from *in banc* review since the factual circumstances of this case raise the question whether traditional rules suffice if 'the death penalty verdict here is constitutionally "unusual."'" (quoting *id.* at 273 (Calabresi, J., dissenting))).

again.[36] Through the lens of juror selection, the Raggi-Calabresi dialogue raises the fundamental issue of when and how courts should announce new constraints on federal power. Judge Calabresi intended to craft a judicial rule that would restrict federal power where that power is antithetical to "the values of the citizens of the state in question,"[37] especially as represented by legislative action. Although defendants have, in the past, attempted to circumvent federal law in the death penalty context,[38] Judge Calabresi's theory is the first circuit court opinion to use the Sixth Amendment's vicinage requirement as a conduit for this type of circumvention. Judge Calabresi grounded his theory in a respect for "the value and endurance of federalism itself—the recognition that we are part of a country, of a polity, that has to live with both Texan values and Northeastern values."[39] This foundation highlights long-standing questions about the relationship between state and federal power, questions with which scholars continue to grapple. Instead of denying an en banc hearing, the Second Circuit should have addressed these recurring issues and rejected Judge Calabresi's proposed rule.

Judicial curtailment of federal power is not a novel concept, although it remains controversial. Professor Lawrence Lessig has pointed out that the Supreme Court in *United States v. Lopez* found implied powers in the Constitution "which today can be supported only by affirmative limits constructed by the Court."[40]

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36. Every Circuit except the Fifth and Eleventh encompasses districts in non-death penalty states. Judge Calabresi recognized this fact and predicted that "such cases will repeat." *Id.* at 282 (Calabresi, J., dissenting).

37. *Id.* at 284.

38. *See infra* notes 45–50 and accompanying text.

39. *Fell*, 571 F.3d at 289 (Calabresi, J., dissenting). As Judge Raggi was sure to point out, though, this "special solicitude for local values in the selection of a federal petit jury" would be rejected if the local value at hand stood in opposition to "civil rights, environmental, or gun trafficking requirements that are enforced through federal criminal law." *Id.* at 270 (Raggi, J., concurring).

40. Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 130. Indeed, Professor Lessig criticizes *Lopez* for not going far enough in its stated rationale, arguing that its "naive realism" cannot "effect effective judicial limits on governmental power . . . . If limits are to be found, they must be made." *Id.* at 197. *But see* Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1170 (1998) ("Professor Lessig's approach would evade the political and procedural safeguards of federalism by shifting significant power to the federal judiciary at the expense of the political branches."); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A*

Although Professor Lessig's argument envisioned a regime in which "the invasions of some federal statutes are harmless, while others are not," he admitted that this exercise would require the judiciary to take on a normative role and exceed what he regarded as the judiciary's political constraints.[41] On this issue, however, Judge Calabresi seems to find an authorized exception to the political constraint: The Supreme Court has proclaimed repeatedly that "death is different."[42] Relying on this acknowledgement, Judge Calabresi brought the concept of "harmful invasion" back into the debate by arguing that, in cases like *Fell*, "citizens are likely to be forced to confront for the first time, as jurors, these momentous issues of life and death which they thought had been taken off the table by the voters."[43]

Judge Calabresi's rule fares less well on the other longstanding issue it implicates. The proposition that jurors must "set aside their own beliefs in deference to the rule of law"[44] necessarily depends on a determination of which law controls in a case like this. Other courts have addressed this issue in the past, but only one court has done so at the appellate level. In

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Comparative Analysis, 55 ARK. L. REV. 1185, 1206 n.104 (2003) ("Lessig's thesis would require federal judges to apply nonconstitutional rules to make pivotal constitutional decisions, which cannot be squared with any defensible concept of judicial review.").

41. Lessig, *supra* note 40, at 210. For a more enthusiastic proposal, see Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002), which promotes a doctrine that "categorize[s] federal criminal statutes into those that supplement state regulations and those that oppose state norms," with the latter category "implicating independent-norm federalism." *Id.* at 1565–66.

42. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion); *see also* Baze v. Rees, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) ("In subsequent years a number of our decisions relied on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases."). *But see* Brewer v. Quarterman, 127 S. Ct. 1706, 1725 (2007) (Scalia, J., dissenting) ("Whether one regards improvised death-is-different jurisprudence with disdain or with approval, no one can be at ease with the stark reality that this Court's vacillating pronouncements have produced grossly inequitable treatment of those on death row.").

43. *Fell*, 571 F.3d at 291 (Calabresi, J., dissenting). This concern is echoed in Professor Klein's proposed doctrine. *See* Klein, *supra* note 41. Professor Klein proposes that when a state characterizes a means "to be sufficiently important to enact state legislation protecting or prohibiting such means," the Supreme Court should give the state, as opposed to the criminal defendant, standing to object to a federal statute as "violative of a state norm." *Id.* at 1566 (using Massachusetts as an example of a state without the death penalty).

44. Lockhart v. McCree, 476 U.S. 162, 176 (1986).

United States v. Acosta-Martinez,[45] the First Circuit held that the Federal Death Penalty Act[46] applies to Puerto Rico's federal defendants, even though the Commonwealth's constitution expressly prohibits the death penalty.[47] The defendants in *Acosta-Martinez* argued that the Act does not attach where a popularly enacted constitutional provision protects the territory's defendants from capital punishment.[48] The court, however, identified the defendants' erroneous premise—that the Act itself is the source of the penalty—and explained that "the source of the penalty. . . is in the substantive statutes which define the crimes and their punishments."[49] Thus, any judicial attack on federal capital sentencing would be tantamount to an assault on the multitude of federal criminal statutes currently in existence. Such an attack ultimately would seek to diminish Congress's power over federal crimes.[50]

Given the inseparability of federal punishments from their corresponding federal offenses, Judge Calabresi's proposed rule proves to be legally unworkable. To decouple federal punishment from federal crimes would denature the very statutes passed by Congress, and such action has no basis in law. The federalization of what was once a sacred province of state law is undoubtedly an area of real concern,[51] but as a matter of constitutional principle, the application of Judge Calabresi's proposed rule is not a viable alternative. The First Circuit characterized the attempt to separate federal power over crime from federal power over punishment as "a political one, not a legal one."[52] Other courts have echoed this conclusion. In *United States v. O'Reilly*,[53] for example, the U.S. District Court for the

45. 252 F.3d 13 (1st Cir. 2001).

46. Pub. L. No. 103-322, 108 Stat. 1959 (1994) (codified at 18 U.S.C. § 3591 et seq. (2006)).

47. *Acosta-Martinez*, 252 F.3d at 20.

48. *Id*. at 18.

49. *Id.* at 19.

50. *See* United States v. Lampley, 127 F.3d 1231, 1245–46 (10th Cir. 1997) ("The Supremacy Clause, the Civil War, the decisions of the Supreme Court, and acts of Congress make it clear that so long as there is a constitutionally authorized federal nexus, the federal government is free to act anywhere within the United States.").

51. *See generally* William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651 (1994) (outlining the debate over the federalization of criminal law and examining its constitutional implications).

52. *Acosta-Martinez*, 252 F.3d at 21.

53. No. 05-80025, 2007 WL 2421378 (E.D. Mich. Aug. 23, 2007).

Eastern District of Michigan held that the imposition of the federal death penalty neither infringed upon the state's sovereignty nor deprived its people of their right under the Guarantee Clause[54] to the benefits of representative government.[55] Thus, to decouple the punishment from the crime is to exceed what the Constitution requires.

Additionally, Judge Calabresi's proposed rule may have undesirable effects on federal criminal adjudication. Allowing a district court judge to sit a juror who categorically opposes the application of federal sentencing law on the basis of state legislation that abolishes capital punishment would, in effect, make the penalty phase of capital trials dependent on local law. By replacing consistent rules with expanding uncertainty, the resulting patchwork of districts with and without the death penalty would exacerbate the unjust sentencing disparities that Congress has repeatedly attempted to ameliorate.[56] Judge Calabresi's approach could even lead to coordination difficulties among prosecutors' offices. For example, the Department of Justice might desire to have certain capital cases tried in districts that would fully enforce federal death penalty statutes and would have to incur costs to do so.[57] Furthermore, the predictable increase in venue-related pretrial motions would obfuscate the facts of the case and delay the administration of justice.[58]

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54. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

55. *O'Reilly*, 2007 WL 2421378, at *4. The court in *O'Reilly*, like the court in *Acosta-Martinez*, dismissed these claims as political and nonjusticiable. *Id*.

56. Congress's most significant attempt to ameliorate national sentencing disparities was the creation of the U.S. Sentencing Commission and that body's adoption of the U.S. Sentencing Guidelines. 28 U.S.C. § 991 (2006). Other statutes also address this problem. *See, e.g.*, 18 U.S.C. § 3553(a)(6) (2006) (instructing courts to consider during sentencing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

57. *See generally* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1699 (2003) (discussing the Department of Justice's increasing commitment to enforcing the death penalty because "it is provided for by federal law," and because "subjecting some defendants but not others to the death penalty is unfair").

58. At least one scholar argues, however, that the Framers did not envision uniformity in federal criminal jurisprudence. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1617 (2008) ("[The First Judiciary] Act made no provision for Supreme Court review of criminal cases, though it could do so in some cases by granting petitions for writs of habeas corpus."). Others contend that there is no

Judge Calabresi used the vicinage requirement, however, to argue that a patchwork of different death penalty rules across federal districts is actually justified. This argument has some merit, however limited it might be. As a historical matter, constitutional text and case law do not completely support Judge Raggi's assertion that "nothing in the plain language of the Sixth Amendment indicates that its vicinage requirement reaches beyond simple geography to local ideology."[59] The Framers must have intended for the vicinage requirement to be more than just a safeguard against far-flung trials. That protection is already embodied in the venue provision of the Constitution, which provides that the trial "shall be held in the *state* where the said Crimes shall have been committed."[60] In contrast, the Sixth Amendment's vicinage provision protects the defendant's right to a trial by a jury summoned from the *district* in which the crime was committed, "which district shall have been previously ascertained by law."[61] The distinction is an important one: The place in which a court sits does not determine the place from which the jurors are summoned. If either the government or defendant successfully moves for a change of venue, the jurors of the crime's locality could be made to travel to the new trial location.[62] This emphasis on the provenance of a jury, as distinct from the location of the trial, seems to lend credibility to the control that Judge Calabresi would give to local mores.

Case law and commentary also support the view that the Sixth Amendment protects a special interest by way of the

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legal justification for such variations, and that they should be avoided as a matter of policy. *See, e.g.*, Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 140 (2005) ("Policy and value variations are appropriate among states because federalism respects state sovereignty, but this conclusion does not justify variation within the national government.").

59. United States v. Fell, 571 F.3d 264, 269 (2d Cir. 2009) (Raggi, J., concurring).

60. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

61. U.S. CONST. amend. VI.

62. *See* Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 859 (1976) (explaining the functional consequences of such a venue provision); *see also* Akhil Reed Amar, *Sixth Amendment First Principles*, 25 ANN. REV. CRIM. PROC. 641, 687 (1996) ("[W]e should note that, technically, the District Clause regulates the place from which jurors are chosen, rather than the place that they must sit at trial."); Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 133 (1994) ("[T]he Sixth Amendment contains the vicinage provision, which furnishes a right to have a jury selected from a particular community regardless of where the trial is held.").

vicinage requirement. For example, Professor Drew Kershen has argued that early supporters of the vicinage provision believed that "a jury of the vicinage would be different from a jury anywhere else" precisely *because* that jury would "reflect the attitudes, sympathies, and values of the community from which [it] was drawn."[63] Judge Friendly, writing for the Second Circuit in *United States ex rel. Owen v. McMann*,[64] hinted at this special function by explaining that "entitl[ing] a defendant to trial where he is known," is "[o]ne, although *by no means the only*, purpose of the insistence on trial in the vicinage."[65] And at least one district court has affirmed that, in colonial America, "[t]he importance of 'trial by the vicinage' to obtain local knowledge and sentiments was recognized."[66]

Yet even if the vicinage provision supports community values and sentiments, such mores must control only the *application* of federal law, not the validity of federal law itself. As Judge Raggi correctly noted, local sentiments are accounted for "by drawing a jury pool from a fair cross-section of the residents of the particular state and district."[67] The twelve jurors selected from this pool must nonetheless be "willing to temporarily set aside their own beliefs in deference to the rule of law."[68] As made clear by the Supreme Court in *Witherspoon v. Illinois*,[69] this mandate applies both to those with an inclination toward capital punishment as well as to those who categorically oppose it.[70] The setting aside of personal beliefs is thus grounded in the Sixth Amendment's call for impartiality in fact-finding and in that sense is no different from excluding jurors in other contexts when the trial judge believes the jurors' biases to be insurmountable.[71] The creation of an exception for

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63. Kershen, *supra* note 62, at 842.

64. 435 F.2d 813 (2d Cir. 1970).

65. *Id.* at 817 (emphasis added).

66. United States v. Khan, 325 F. Supp. 2d 218, 230 (E.D.N.Y. 2004) (detailing the historical evolution of the jury's role in American courts).

67. United States v. Fell, 571 F.3d 264, 269 (2d Cir. 2009) (Raggi, J., concurring) (citing Lockhart v. McCree, 476 U.S. 162, 173–74 (1986)).

68. *Lockhart*, 476 U.S at 176.

69. 391 U.S. 510 (1968).

70. *Id.* at 520 ("Culled of all who harbor doubts about the wisdom of capital punishment . . . such a jury can speak only for a distinct and dwindling minority.").

71. *See* Wainwright v. Witt, 469 U.S. 412, 429 (1985) ("Once it is recognized that excluding prospective capital sentencing jurors because of their opposition to

local values that have been codified in state legislation thus has the potential to expand, and wreak havoc on, settled judicial practice in this area.

Judge Raggi's opinion in *Fell* addresses much of the dissent's proposed unsettling of established precedent, but her refusal to issue a controlling opinion en banc threatens an expansion of litigation through reliance on Judge Calabresi's theories. The recurring casualty of this larger debate will be Sixth Amendment doctrine, an area of law that preserves the rights of each defendant and the rights of society at large. Opponents of the federal death penalty have a wealth of arguments and avenues by which to achieve their goals, but the dismantling of existing protections and restraints should not be one of them.

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capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, *Patton* must control."); *see also* Patton v. Yount, 467 U.S. 1025, 1038 (1984) (holding that a finding of juror bias is based upon the determinations of demeanor and credibility that are peculiarly within the trial judge's province).