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An Uninvited Guest: The Federal Death Penalty and the Massachusetts Prosecution of Nurse Kristen Gilbert

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AN UNINVITED GUEST: THE FEDERAL DEATH PENALTY AND THE MASSACHUSETTS PROSECUTION OF NURSE KRISTEN GILBERT

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I. INTRODUCTION

> *These seven victims, ladies and gentlemen, were veterans. They protected our country during war and peace. They were vulnerable, due to their physical and mental illnesses. Some were seriously ill. And some had no family. And because of that . . . they were the perfect victims. And when Kristen Gilbert decided to kill them . . . she used the perfect poison.*[1]

Theirs was a vicious and macabre death, foisted upon their defenseless bodies by the malevolent and calculated machinations of a serial killer. Of all the ironies, it was unfathomable that evil would lurk between the walls of a sanctuary reserved for those who, after serving their country, arrived for some degree of healing, security, and, perhaps most importantly, serenity. Yet, de-

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1. M. WILLIAM PHELPS, PERFECT POISON: A FEMALE SERIAL KILLER'S DEADLY MEDICINE 9 (2003) (quoting statement of Assistant United States Attorney Ariane Vuono to the jury during the trial of Kristen Gilbert); *see also* Fred Contrada, *Newest State Appeals Court Justice Is One Tough Cookie*, THE REPUBLICAN, Mar. 22, 2006, at 17, *available at* 2006 WLNR 4984131 (quoting portion of same statement by Ms. Vuono).

spite rampant rumors, ghastly allegations, and disquieting coincidences, a narcissistic sociopath[2] on the warpath of death roamed the hospital floors of the Northampton Veterans Affairs Medical Center ("VAMC") in Leeds, Massachusetts in the mid-1990s, preying on the ill. There, wrapped in a shroud of suspicion, but somehow immune from formal accusation, homicidal nurse Kristen Gilbert, wielding the deadly yet plentiful agent epinephrine—her weapon of choice—left a trail of corpses. One by one, this "shell of a human being,"[3] an "angel of death,"[4] methodically flushed the intravenous lines of ailing American veterans with synthetic adrenaline until their innocent hearts raced, and then stopped—snuffing precious life as if it were a cigarette butt.

It would be several years before this rapacious "angel of death," as she was (at first) facetiously referred to by colleagues,[5] was brought to justice before a jury of her peers in the Springfield Division of the United States District Court for the District of Massachusetts. Moreover, the path to finality in the case had a grueling upward trajectory, littered with morbid factual twists, inextricable legal hurdles, conflicted expert testimony, and plenty of political hand-wringing for good measure. Indeed, Judge Michael A. Ponsor, the perspicacious jurist who shepherded the prosecution of Kristen Gilbert from the bench and wrote all but one of the reported opinions in the criminal case, openly rued the whole affair as "the most complicated and stressful thing [he had] ever done."[6]

Yet, somehow, despite all this, on March 26, 2001, after a day and a half of deliberations during the penalty phase of the federal

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2. Interview by Kelly M. Pyrek with M. William Phelps, Author of *Perfect Poison: A Female Serial Killer's Deadly Medicine*, FORENSIC NURSE MAGAZINE, http://www.forensicnursemag.com/webx/391webx1.html [hereinafter Pyrek Interview] (last visited Apr. 10, 2007).

3. Elizabeth Mehren, *Ex-VA Nurse is Spared Death Penalty; Courts: Federal Jury Hands Down Life Sentence to Woman Convicted of Fatally Injecting Patients with Heart Stimulant*, L.A. TIMES, Mar. 27, 2001, at 5, *available at* 2001 WLNR 10497065 (reporting statement by Assistant United States Attorney William Welch that Gilbert was a "shell of a human being" who murdered because "she enjoyed the drama of impending death").

4. *Id.* (stating that some of Gilbert's colleagues at the VAMC dubbed her "the angel of death"); Pyrek Interview, *supra* note 2.

5. *See* Pyrek Interview, *supra* note 2.

6. Michael A. Ponsor, *Life, Death and Uncertainty: To the Judge in Charge, the Murder Trial of Kristen Gilbert Offered an Unsettling Lesson—and Inescapable Conclusion—About the Ultimate Cost of the Death Penalty*, BOSTON GLOBE, July 8, 2001, at D2, *available at* 2001 WLNR 2280523.

murder trial,[7] with jurors deadlocked and, thus, the option of imposing the federal death penalty foreclosed,[8] the trial, which spanned the fall and winter of 2000 through 2001, came to an end.[9] Judge Ponsor then dutifully meted out the "only remaining possible sentence" to Gilbert—mandatory life imprisonment without the possibility of parole.[10] Shortly thereafter, Gilbert was transferred to a high-security federal facility in Texas to be imprisoned until her natural death.[11] Interestingly, had the jury somehow avoided deadlock and recommended the death penalty, Gilbert would have been the only woman on death row in the United States at that moment in time.[12] "Ironically . . . she would [have] die[d] in the same manner as she had killed: by lethal injection."[13] But this was not to be.[14]

With this backdrop, the intent of this article is to examine various aspects of the prosecution of Kristen Gilbert with an eye toward spotlighting treatment of the federal death penalty in a state without capital punishment. To establish a foundation, Part II of this piece surveys the salient facts of the case, underscoring the repugnant nature of both the crimes and the perpetrator. Part III then discusses two reported opinions issued during the prosecution, each selected for its unique significance in a case of seminal importance to death penalty jurisprudence. Part IV illuminates the double entendre in the title of this article by providing a glimpse into gender, sovereignty, and other hot-button issues arising when an "uninvited" federal sanction infiltrates a Massachusetts prosecution. Finally, Part V concludes by commending presiding Judge Ponsor for dispensing some "pretty good

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7. *Id.*

8. Eileen McNamara, *Imperfect Norm*, BOSTON GLOBE, May 26, 2004, at B1, *available at* 2004 WLNR 3571988.

9. John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL'Y 195, 195 (2004).

10. Ponsor, *supra* note 6.

11. *Id.*

12. Mehren, *supra* note 3.

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

14. Punctuating the bizarre disposition of Kristen Gilbert's case was her previous arrest in October 1996, and subsequent 1998 conviction, for making a telephone bomb threat to the VAMC, causing its evacuation in violation of 18 U.S.C. § 844(e), while she was being investigated for the murder of several patients. *See* United States v. Gilbert, 181 F.3d 152, 153 (1st Cir. 1999) (affirming Gilbert's trial court conviction for bomb threat); *see also* Cutting v. United States, 204 F. Supp. 2d 216, 219 (D. Mass. 2002) (confirming date of Gilbert's arrest for the bomb threat); United States v. Gilbert, 92 F. Supp. 2d 1, 2 (D. Mass. 2000) (confirming date of Gilbert's conviction for the bomb threat).

justice" in a mammoth case besieged with issues of immeasurable consequence.

II. AN "ANGEL OF DEATH" AMONG THE AILING

The perpetrators are quiet. The victims are quiet. The killings are quiet.[15]

Gilbert was employed as a nurse at the Northampton VAMC in Leeds, Massachusetts from March 1989 through February 1996. At all times relevant to this article, she was assigned to Ward C of the hospital where she worked four days a week from late afternoon to midnight.[16] Ward C houses mostly chronically ill patients along with the hospital's intensive care unit.[17]

Beginning in the summer of 1995, Gilbert befriended a man named James Perrault, a hospital police officer whose work schedule corresponded with Gilbert's and whose duties required him to respond to medical emergencies in Ward C.[18] At the time she met Perrault, Gilbert was married to Glenn Gilbert, with whom she had two children, both boys. Nonetheless, by the fall of 1995, she was having an extramarital affair with Perrault.[19]

During Gilbert's relationship with Perrault, which continued until she terminated her employment at the VAMC in February 1996, Gilbert's co-workers noticed a significant increase in the number of fatalities and medical emergencies in Ward C.[20] Members of the VAMC staff also perceived a rise in the hospital's procurement of the drug epinephrine.[21] Concomitantly, Gilbert's col-

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15. James M. Thunder, *Quiet Killings in Medical Facilities: Detection & Prevention*, 18 ISSUES L. & MED. 211, 219 (2003) (describing the harrowing nature of "quiet killings" by employees in medical facilities, including those carried out by Kristen Gilbert). While an extensive look at the phenomenon of "quiet killings" in hospitals throughout the United States is beyond the scope of this writing, James Thunder's article, cited in this footnote, provides a comprehensive survey of this significant problem with the aspiration of fomenting "robust debate over improving methods of detecting and preventing such killings." *Id.* at 211. Mr. Thunder also introduces a proposed paradigm for improving the prevention and detection of these killings. *See generally id.* at 230–36.

16. United States v. Gilbert, 229 F.3d 15, 17 (1st Cir. 2000).

17. *Id.*

18. *Id.* at 18.

19. *Id.*

20. *Id.*

21. *Id.*

leagues began reporting to superiors that they suspected she was surreptitiously removing vials of the drug from a locked cabinet in the critical care unit of the VAMC.[22]

The suspicions of nefarious behavior, coupled with the unsettling number of patient deaths, culminated in a chilling moniker, bestowed upon Gilbert by staff members at the hospital—the "angel of death."[23] And ultimately, her colleagues' perceptions prompted an investigation by the Office of Healthcare Inspections of the Department of Veterans Affairs, which "concluded that there was no evidence that any VAMC employee had intentionally harmed patients," and then a criminal investigation that led to Gilbert's arrest.[24]

During the course of the criminal investigation, Gilbert placed a series of anonymous, threatening calls to the VAMC. In one of these calls, she made a false bomb threat for which she was eventually convicted.[25] Gilbert also directly harassed and threatened Perrault, after he ended the relationship and agreed to cooperate with authorities.[26] She even expressed anger towards certain coworkers who cooperated with the criminal investigation but would not speak with her hand-picked private investigator.[27]

The fact that Massachusetts had no death penalty did not preclude the Department of Justice from making a calculated decision to prosecute Gilbert under the federal death penalty. United States Attorney Donald Stern submitted a notice of intention to seek the death penalty, which stated that over thirty-seven men died during Gilbert's shifts between January 1995 and February 1996.[28] The method of execution proposed by the federal government, like the defendant's *modus operandi*, was to be lethal injection.[29] The final indictment in the case was even more specific. It alleged that, in the six-month period after her relationship with

22. Mehren, *supra* note 3.

23. *See id.*

24. *Gilbert*, 229 F.3d at 18.

25. *See generally* United States v. Gilbert, 181 F.3d 152 (1st Cir. 1999) (affirming Gilbert's trial court conviction for bomb threat).

26. *Gilbert*, 229 F.3d at 18.

27. *Id.*

28. *Woman Faces Death Sentence in State Without that Penalty*, N.Y. TIMES, Jan. 30, 2000, at 124, *available at* 2000 WLNR 3228286 [hereinafter *Woman Faces Death Sentence*].

29. Ponsor, *supra* note 6.

Perrault began, Gilbert murdered four Ward C patients, and attempted to kill three others, by poisoning them intravenously with epinephrine (and insulin, in the case of one patient suffering from diabetes).[30]

Epinephrine, a clear and odorless liquid, is used to resuscitate patients in cardiac arrest or anaphylactic shock, but may cause a potentially fatal rapid or irregular heartbeat when administered in excessive doses or to healthy patients.[31] The four deaths and three near-deaths tied to Gilbert all involved cardiac arrest.[32]

According to the government, Gilbert committed her crimes using a discreet yet meticulous *modus operandi*. She would take epinephrine from Ward C's medical closet, enter the patient's hospital room after other medical personnel had left, and then inject the patient with a fatal dose of epinephrine under the pretext of flushing his intravenous line with a saline solution, which itself is an unusual and possibly dangerous practice.[33] The government's theory was that, by injecting non-prescribed medication into patients already suffering from varying degrees of cardiac troubles, Gilbert was able to generate medical crises, or "codes," during which she could claim she was responding to naturally-occurring cardiac emergencies.[34]

Drawing on the concept of a "firebug," or arsonist, the government posited that Gilbert orchestrated these "codes" not only because they brought her into contact with her lover, Perrault, but also because they provided her with the attention and emergency room freneticism she so coveted.[35] More eerily, the prosecution presented testimony during the trial that Gilbert occasionally even killed her patients in order to leave work early.[36] The government's key evidence in support of its theory consisted of admissions Gilbert made to Perrault, testimony by Gilbert's colleagues, and toxicological evidence collected from those she murdered.[37]

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30. *Gilbert*, 229 F.3d at 18.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*; Brigham, *supra* note 9, at 195–96; Ponsor, *supra* note 6.
36. *See, e.g.*, PHELPS, *supra* note 1, at 395; Brigham, *supra* note 9, at 196.
37. *Gilbert*, 229 F.3d at 18–19.

Gilbert denied any fault for the deaths and other cardiac incidents described in the indictment. Her experts, well-respected and with impressive credentials,[38] testified that the "deaths and all but one of the near-deaths resulted from natural causes precipitated by preexisting medical conditions suffered by the alleged victims."[39] Her lawyers buttressed this testimony by maintaining throughout the prosecution that the murdered men were elderly and sick, and that there were no eyewitnesses to the alleged murders.[40] The defense also proffered a searing indictment of the medical care provided to veterans by the federal government when a key witness admitted during testimony that he used drugs while working at the hospital.[41]

Throughout the fall and winter of 2000 and into early 2001, Gilbert was tried in federal court in Springfield, Massachusetts before Judge Ponsor.[42] At that point, Gilbert's trial marked only the third time in American history that a federal death penalty case went to trial in a state with no capital punishment of its own.[43] And because she committed the crimes at the Northampton VAMC, which is under the concurrent jurisdiction of Massachusetts and the federal government, there was no question that the federal death penalty statute applied.[44]

Judge Ponsor viewed the trial of Kristen Gilbert as a "classic battle of experts."[45] In terms of protocol and practicalities, however, the case was a "monster."[46] It featured more than 250 motions before and during trial, the service of 1500 jury summonses, 70 witnesses, 52 days of trial testimony, over 200 exhibits (many of them medical records running several hundred pages each),

38. Ponsor, *supra* note 6 ("The experts appointed to assist the defense team included . . . three investigators, two toxicologists, a pathologist, two cardiologists, a nursing consultant, a jury consultant, a venue analyst, two mitigation specialists . . . a statistician, a neuropsychologist, a behavioral psychologist, a psychiatrist, an endocrinologist, and a paralegal.").

39. *Gilbert*, 229 F.3d at 19.

40. Mehren, *supra* note 3.

41. *See, e.g.*, PHELPS, *supra* note 1, at 396–97.

42. *See* Brigham, *supra* note 9, at 195.

43. Mehren, *supra* note 3.

44. *Woman Faces Death Sentence*, *supra* note 28; Eric Goldscheider, *Fed's Death Penalty Net Cast Ever Wider*, BOSTON GLOBE, June 11, 2000, at E1, *available at* 2000 WLNR 2279405; *see also* Brigham, *supra* note 9, at 199.

45. Ponsor, *supra* note 6.

46. Contrada, *supra* note 1.

stacks of convoluted medical documents, and a stifling amount of arcane science.[47] Moreover, the "jury confronted concepts such as 'accelerated ideo-ventricular rhythm,' 'right bundle branch blockage,' and 'contraction band necrosis.'"[48] Due to the raw complexity of the evidence, Judge Ponsor permitted jurors to take notes, a practice rarely invoked by trial judges.[49]

On February 21, 2001, evidence in the guilt phase concluded and the jury began the first stage of deliberations. On March 14, 2001, exhausted[50] and reportedly dehumanized, the jury returned a verdict of guilty on three counts of first-degree murder, one count of second-degree murder, and two counts of attempted murder.[51] Twelve days later, Judge Ponsor sentenced Gilbert to "constructive" death—i.e., mandatory life imprisonment with no chance of release.[52] While significant by any measure of punishment, Judge Ponsor's sentence did not rise to the level of execution sought by the federal government, pursuant to which most of the controversy in the case ensued.[53] Both sides could claim a "victory" of sorts.

III. NAVIGATING PRECARIOUS WATERS (WITH A RUSTY RUDDER)

I take no position on the death penalty per se. Our Constitution gives Congress the duty to weigh the costs and benefits of particular statutes, and I apply them as enacted.

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47. *Id.*; Ponsor, *supra* note 6.

48. Ponsor, *supra* note 6.

49. *Id.*

50. *Id.*

51. Mehren, *supra* note 3.

52. Ponsor, *supra* note 6; *see also* Mehren, *supra* note 3.

53. As of this writing, Angela Johnson, a white female, is the only woman on federal death row in Terre Haute, Indiana. On June 21, 2005, a federal jury in Iowa recommended the death penalty for Johnson based on her role in aiding drug kingpin Dustin Honken in four of five murders. Honken murdered two girls, their mother, and two other adults who were set to testify against him in a federal drug case. Like Massachusetts, Iowa does not have a state-sanctioned death penalty. Death Penalty Info. Ctr., Federal Death Row Prisoners, http://www.deathpenaltyinfo.org/article.php?scid=29&did=193 (last visited Apr. 10, 2007). Moreover, if Johnson's sentence is carried out, she would be the first woman executed by the federal government since Bonnie Brown Heady, who died in a Missouri gas chamber on December 18, 1953, after she was convicted of murdering a six-year-old boy. Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 629 (2006) (Appendix A); Mehren, *supra* note 3 (mentioning Bonnie Brown Heady's federal execution).

Should another capital case come my way, I will again preside, and perhaps find myself with the duty to order a defendant put to death. I accept this.[54]

While a cumulative analysis of all published opinions in the Gilbert case is beyond the scope of this article, two reported opinions issued by Judge Ponsor merit discussion as they lend context to the big picture narrative of the Gilbert litigation and shed some light on judicial treatment of the federal death penalty in a state with no recent experience adjudicating capital punishment.

In the first opinion, Gilbert moved the court to dismiss most of the counts in the federal grand jury indictment for lack of subject matter jurisdiction, arguing that the VAMC was not within the jurisdiction of the United States.[55] But the United States had purchased the land upon which the VAMC sits in 1922.[56] The history of the VAMC revealed, moreover, that the building was opened in 1924, and the land in question was *officially* ceded to the jurisdiction of the federal government in 1926 pursuant to "public act."[57]

Despite this history, Gilbert offered three reasons why she believed the United States District Court for the District of Massachusetts did not have subject matter jurisdiction over the case: first, the United States did not acquire exclusive jurisdiction over the property because it gained the land as a proprietor rather than as a sovereign; second, the federal government failed to comply with statutory requirements in Massachusetts for ceding jurisdiction; and third, any jurisdiction obtained by the United States reverted to the state in 1926 due to the terms of that year's agreement, which, Gilbert submitted, conditioned acceptance by the federal government on its use of the land for "national defense."[58]

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54. Ponsor, *supra* note 6 (reflecting on his judicial obligations in death penalty cases in the aftermath of the Gilbert trial).

55. United States v. Gilbert, 94 F. Supp. 2d 157, 158 (D. Mass. 2000).

56. *Id.*

57. *Id.* at 158, 162–63. In July 1975, the Department of Veterans Affairs entered into another agreement with the state, in which it offered to "retrocede" some of the federal government's exclusive jurisdiction over the VAMC, thereby establishing concurrent jurisdiction between the United States and Massachusetts. *Id.* at 158–59.

58. *Id.* at 159.

Citing 18 U.S.C. § 7(3)[59] and Article I, § 8, Clause 17 of the Constitution,[60] which collectively establish the federal government's jurisdiction over "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof" where the land is ceded with the consent of the state, Judge Ponsor rejected Gilbert's arguments seriatim.[61] Specifically, on the first issue of viewing the United States as a proprietor, the court chided Gilbert for failing to cite any legal authority, and then concluded that its own research revealed no source to support the proposition that a state's consent must be contemporaneous with the federal government's purchase of the land at issue.[62] Furthermore, Judge Ponsor found that the United States, in 1926, accepted jurisdiction over the land where the VAMC is housed.[63]

As to the faulty statutory requirement claim, Gilbert was, in effect, "hoisted by her own petard," as the court highlighted the fact that her own research revealed files containing a copy of a certain chapter of a pivotal "public act,"[64] which incorporated a description of the full parcel purchased by the United States. This was thus "sufficient" to satisfy any statutory requirement for filing a "suitable plan" for the tract of land in question with the state government.[65]

On Gilbert's third contention, pertaining to a section in the "public act" at issue that conditioned acceptance of the land by

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59. This statute, in part, states that the relevant jurisdiction for the specific type of first degree murder alleged in the indictment against Gilbert includes

> [a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3) (2000).

60. This specific clause of the United States Constitution "permits the United States to obtain exclusive jurisdiction over lands within a State." Humble Pipe Line Co. v. Waggonner, 376 U.S. 369, 371 (1964). It specifically provides that Congress shall have power to "exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17.

61. *Gilbert*, 94 F. Supp. 2d at 159–62.

62. *Id.* at 160.

63. *Id.* at 161.

64. The court referred to Chapter 386 of the Massachusetts Public Acts of 1926. *Id.*

65. *Id.*

the United States in 1926 on its use in a "national defense" capacity, Judge Ponsor found Gilbert's interpretation of this section rendered the whole act incomprehensible.[66] The court explained that acceptance of Gilbert's "incongruent" reading of the provision would have meant that the state both ceded jurisdiction of the VAMC and then took it back on the same day.[67] It also ruled that the phrase "for purposes of national defense" in the "public act" included the mission of a Veterans Administration hospital, which, in Judge Ponsor's words, "obviously serves the interests of national defense."[68]

After its analysis of Gilbert's three contentions, the court formally held that "jurisdiction did not revert back to the Commonwealth in 1926, but remained in the exclusive jurisdiction of the United States."[69] The court then took judicial notice of the fact that the United States had legal jurisdiction over the Gilbert case due to the VAMC's placement within the territorial control of the United States.[70]

In the second opinion, Gilbert moved to strike portions of the four nonstatutory aggravating factors that the federal government proposed to offer as justification for the federal death penalty—assuming, of course, that the trial eventually reached the penalty stage.[71] Gilbert specifically objected to portions of "Factor 2," entitled "[o]ther, charged and uncharged, acts of violence and other offenses" and "Factor 3," entitled "[f]uture dangerousness of the defendant."[72] Judge Ponsor couched the principal issue in this dispute in somewhat dramatic terms: "what may a jury consider in deciding whether a capital defendant should live or die?"[73] In doing this, he noted that Congress "has entrusted trial judges both with substantial responsibility and with broad discretion to act as guardians of the sentencing process."[74]

The court began its analysis of Gilbert's motion to strike with an overview of the penalty phase in cases tried pursuant to the

66. *Id.* at 161–62.
67. *Id.* at 162.
68. *Id.*
69. *Id.*
70. *Id.* at 163.
71. United States v. Gilbert, 120 F. Supp. 2d 147, 149 (D. Mass. 2000).
72. *Id.*
73. *Id.*
74. *Id.*

federal death penalty.[75] Judge Ponsor noted that nonstatutory aggravating factors "contain some of the last pieces of evidence that may appear before the jury," and that they are considered during the sentencing phase of a capital trial if and only if the jury finds unanimously and "beyond a reasonable doubt" (1) that the defendant "intentionally killed the victim" and (2) that at least one *statutory* aggravating factor is present.[76]

The court then outlined the three-part test that guides a federal court's discretion in evaluating nonstatutory aggravating factors: first, the information must be relevant; second, the information must meet a "heightened standard of reliability" required by the Supreme Court in death penalty cases; and third, even if relevant and reliable, the probative value of the factors must not be outweighed by the "danger of unfair prejudice to the defendant, confusion of the issues, or a likelihood that the jury will be misled."[77]

Judge Ponsor carefully reviewed proposed nonstatutory aggravating "Factor 2," noting that it alleged uncharged violent conduct by Gilbert, linked Gilbert's on-duty presence to patient deaths over the course of a six-year period at the VAMC, and highlighted a prior conviction Gilbert had for making the bomb threat to the VAMC while being investigated for patient deaths.[78] The uncharged violent conduct included Gilbert's alleged scalding of a mentally retarded boy with hot bath water some eight years prior to the VAMC crimes, along with an apparent assault of her husband, Glenn Gilbert, with a large kitchen knife in 1988.[79] Judge Ponsor ruled that neither of these first two allegations passed muster under federal death penalty standards because there was no evidence of actual injury in either situation; moreover, given how far removed the incidents were, temporally speaking, testimony would be unreliable.[80]

The court, did, however, opine that three other nonstatutory aggravating incidents contained in "Factor 2" might be appropriate for the jury's consideration in the penalty phase of the trial.

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75. *Id.* at 149.
76. *Id.* at 149–50.
77. *Id.* at 150 (citing 18 U.S.C. §§ 3593(a)(2) and 3593(c)).
78. *Id.* at 151.
79. *Id.* at 153.
80. *See id.*

One involved the allegation that Gilbert tried to murder her husband in 1995 by lethal injection, around the same time the VAMC murders were committed. This allegation was, in the court's judgment, "comparable to those listed as *statutory* aggravating factors in 18 U.S.C. § 3592(c)."[81] A second allegation involved the assault and attempted murder by poison of another patient at the VAMC, in which the "gravity and relevance" of Gilbert's conduct in the incident, in the court's opinion, would make it proper for consideration at the penalty stage.[82] Regarding the third incident, the court found that the government could introduce evidence relating to Gilbert's conviction for making a bomb threat to the VAMC because it required evacuation of patients, put people at grave risk, and had already been proven beyond a reasonable doubt in a court of law.[83]

Proposed nonstatutory aggravating "Factor 3," relating to future dangerousness, included three allegations: (1) Gilbert tried to obtain medication and medical equipment through theft and false pretenses; (2) she abused her position as a nurse; and (3) in certain instances she feigned being overmedicated.[84] While the federal government maintained that these circumstances demonstrated that defendant would be dangerous if sent to prison (as opposed to being sentenced to death), the court disagreed.[85] The court opined that it was "simply inconceivable that . . . [Gilbert] will ever have the remotest opportunity to obtain poison or medication" if convicted, and that the threat of Gilbert poisoning anyone in a prison setting was "simply illusory."[86] Consequently, Judge Ponsor ruled that the evidence in these subparagraphs was irrelevant to the question of future dangerousness and thus unsuitable for the penalty stage.[87]

The two remaining subparagraphs of proposed nonstatutory aggravating "Factor 3" included an attempted breaking and entering into the home of Gilbert's lover, James Perrault, and a 1996 incident where Gilbert supposedly threatened to stab her husband and thereafter tore a telephone off the wall of her resi-

81. *Id.* (emphasis added).
82. *Id.* at 153–54.
83. *Id.* at 154.
84. *Id.*
85. *See id.*
86. *Id.* at 154–55.
87. *See id.* at 155.

dence.[88] On the former, Judge Ponsor failed to see the relevance to the jury's ultimate decision on the death penalty, and marveled at the government's inability to explain how the incident had any nexus to defendant's putative "dangerousness" in prison.[89] The court therefore found the incident of insufficient gravity to be considered as a nonstatutory aggravating factor.[90] On the latter, the court categorized the incident as a "confused and angry outburst during a heated domestic dispute" of "insufficient weight to count towards the death penalty" and lacking sufficient gravity to be considered by a jury determining whether Gilbert was to be executed.[91]

Viewed as a whole, this opinion represented a moderate victory for Gilbert, given the court's rejection of several of the nonstatutory aggravating factors presented by the government that were at issue in this particular dispute. The opinion also, however, demonstrated Judge Ponsor's ability to thread his way through the federal death penalty's web of complexity with considerable precision, efficiency, and confidence.

IV. A GLIMPSE INTO RACE, GENDER, AND STATE PREROGATIVES

> *Since [Gilbert] allegedly committed [her] crimes at a Veterans Affairs Medical Center, the federal death penalty statute applied. The fact that Massachusetts has no death penalty did not matter.*[92]

While the dramatic bar was set exceedingly high by the appalling nature of the killings at the VAMC in Leeds, Massachusetts between 1995 and 1996, the actual prosecution of perpetrator Kristen Gilbert, some years later, more than held its own in terms of factual intrigue and legal maneuvering, as shown in Parts II and III above. But beyond the idiosyncratic factual and legal saga that was the Gilbert federal death penalty case, the matter presented many tangential, but highly-charged, issues of a national scope, each with weighty social and political implica-

88. *See id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. Ponsor, *supra* note 6.

tions.

For example, the "special issue of women, and the matter of race and ethnicity, bore particularly heavily on the Kristen Gilbert prosecution."[93] Indeed, a relative dearth of women and Caucasians on federal death row raised suspicion that the government felt intense pressure to prosecute Gilbert, a white female, under the federal death penalty.[94] Intuitively, Gilbert's attorneys exploited this suspicion with a dose of legal ingenuity. In seeking dismissal of the indictment, for instance, they argued, among other things, that because minorities were sentenced to death in a greater proportion than whites in the United States, Gilbert was unfairly earmarked for capital prosecution by the Clinton administration in an effort to bring some harmony to the imbalance.[95] Judge Ponsor, however, dismissed this contention outright.[96]

Placing the microscope specifically on gender for the moment, it is critical to understand that women are considerably less likely than men to commit homicide and, in fact, account for only ten percent of murder arrests in the United States.[97] Moreover, women receive a mere two percent of death penalty sentences imposed by trial courts, account for only 1.5 percent of those presently on death row, and represent a meager 1.1 percent of persons executed in the United States since 1973.[98] Accordingly, because about 99% of those executed in the United States are men, female offenders are seldom found on America's death rows.[99]

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93. Brigham, *supra* note 9, at 226.

94. *Id.*

95. *Id.* at 199–200. David Hoose, the lead attorney for the Gilbert defense team, commented that the local district attorney was more than capable of prosecuting Gilbert for the crimes she committed at the hospital and, in doing so, directly accused the federal government of improperly considering race in selecting Gilbert for capital punishment. He argued that three quarters of suspects selected for federal death penalty treatment by the federal government in the early 1990's were members of minority groups and, thus, Gilbert "make[s] the numbers look better." *Woman Faces Death Sentence*, *supra* note 28. *See generally* United States v. Gilbert, 75 F. Supp. 2d 12, 16 (D. Mass. 1999) (prohibiting discovery in furtherance of Gilbert's contention that she was being singled out for reverse discrimination to compensate for the disproportionate designation of black defendants in federal death penalty prosecutions).

96. Brigham, *supra* note 9, at 200.

97. Streib, *supra* note 53, at 620.

98. *Id.*

99. *Id.* at 609–10.

In terms of gender disparity, it "appears that female offenders have always been treated differently from male offenders in the death penalty system, sometimes for reasons that are . . . justifiable," but, at least in the view of one widely-published scholar on the subject, "often simply because of sex bias."[100] This same expert on women and the death penalty, Professor Victor Streib, deftly synopsizes the framework of possible sources of gender-based disparate treatment in death penalty jurisprudence in the following manner:

> [A] brief sketch of the differential treatment of men and women in our national death penalty system identifies two primary sources. The first is probably unintentional and usually benign, in that some factors in death penalty law and procedure may not intend to treat women differently but nonetheless do have a disparate impact. Obvious examples are using the felony murder rule and a past record of violent crime in considering the death sentence, both of which are more likely to put a man on death row than a woman, albeit perhaps for good reason. The second source of differential treatment may be subconscious, but certainly it is not benign. Examples here are assumptions that women who kill are more likely than men who kill to have been acting under emotional disturbance or under the domination of their co-felons. These mitigating factors provide opportunity for biases in favor of women defendants that are quite difficult to support.[101]

A plausible and widely endorsed theory is simply that mitigating factors tend to benefit women more so than men.[102] Mitigating factors include emotional trauma, submission to emotional or physical dominance, overall character, and family background.[103] As a general premise, some scholars submit that juries are more apt to find "sympathetic factors" in the backgrounds of females than males, especially in homicide trials.[104] This may have something to do with the reality that women are less inclined to reti-

100. *Id.* at 612.

101. *Id.* at 619–20.

102. Janice L. Kopec, *Avoiding a Death Sentence in the American Legal System: Get a Woman To Do It*, 15 CAP. DEF. J. 353, 357 (2003); *see also* Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 462–63 (2002).

103. Kopec, *supra* note 102, at 357; *see also* 18 U.S.C. § 3592(a) (2000) (listing, among others, impaired capacity, duress, participation level, prior criminal record, and emotional disturbance as mitigating factors permissible for consideration under the federal death penalty).

104. Streib, *supra* note 102, at 463.

cence when the time comes to expose mitigating factors to judge and jury in the heat of trial.[105]

Indeed, the outcome of the Gilbert prosecution arguably embodied the longstanding and widely-accepted proposition in death penalty jurisprudence that "the burden of leaving behind motherless children presumably weighs more heavily on a jury than the burden of leaving behind fatherless children."[106] By Judge Ponsor's own post-trial account, the most dramatic evidence of mitigating factors during the penalty phase of the trial came from Gilbert's family members.[107] Gilbert's father, for example, showed the jury pictures of his daughter as an infant, toddler, and young mother.[108] And both of the defendant's grandmothers ambled to the stand, "recalling cookie-baking and quilt-making" with Gilbert, and explaining for the jury the debilitating impact her death would ostensibly have on them.[109]

But most compelling, perhaps, was the penalty phase testimony of Gilbert's former husband, who has custody of her two children and appeared on behalf of the *government* during the guilt phase of the prosecution.[110] In the earlier stage of the trial, he testified, quite convincingly, that his ex-wife attempted to murder him by poisoning his food.[111] In a reversal of fortune for Gilbert, however, he submitted a statement during the penalty phase of the trial, expressing his profound concern for his sons, and the injury they would suffer if their mother were placed on death row and ultimately executed.[112] His testimony probably saved Gilbert's life.

Consider also that the formal decision on May 13, 1999, of United States Attorney Donald Stern—via the authority of then-Attorney General Janet Reno—to prosecute Gilbert under the federal death penalty[113] enabled the government to pursue the ultimate punishment in a state without a capital punishment stat-

105. *Id.*
106. Kopec, *supra* note 102, at 357.
107. Ponsor, *supra* note 6.
108. *Id.*
109. *Id.* "As they spoke, Gilbert, just a few feet away, sobbed." *Id.*
110. *Id.*
111. Mehren, *supra* note 3.
112. Ponsor, *supra* note 6.
113. PHELPS, *supra* note 1, at 385.

ute.[114] Federal prosecutors managed to establish jurisdiction because the VAMC in Leeds, where Gilbert was employed, is a federal building.[115] Thus, while physically located in the Commonwealth of Massachusetts, it falls under concurrent state and federal jurisdiction.[116] This decision was extraordinary. The last time anyone had been executed in Massachusetts was in May of 1947 when thirty-four-year-old Edward Gertson and his thirty-two-year-old accessory, Phillip Billeno, were convicted and then electrocuted for the murder of Robert Williams.[117]

Furthermore, at the time of Gilbert's crimes, Massachusetts was one of twelve states in the nation without the death penalty.[118] Some commentators branded the government's decision to prosecute the Gilbert case under the federal death penalty as dismissive of state prerogatives and adverse to notions of localized crime management—the latter, a somewhat reliable tenet of traditional federalism.[119] As a writer for the *Boston Globe* opined shortly before the trial, such "'federalization' of cases . . . means that no state will be able to declare itself a death penalty-free zone."[120] Attorneys for Gilbert elevated this argument to excoria-

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114. *See, e.g.*, Goldscheider, *supra* note 44. The Supreme Judicial Court of Massachusetts invalidated the state's last capital punishment statute in 1984. Brigham, *supra* note 9, at 219. Historically speaking, however, Massachusetts

> began phasing out the death penalty in the middle of the nineteenth century. By 1840, milder punishment was being recommended by officials for all crimes other than murder. . . . The [abundant] evocation of [the history of abolition in the state] suggests a culture of remorse, and perhaps even a sense of community, that is at the heart of the opposition to the death penalty in New England and the Northeast. Michael and Robert Meeropol, who live in Springfield, Massachusetts [where Kristen Gilbert was tried], are the sons of Julius and Ethel Rosenberg, who were executed by the federal government in the 1950s, and they are active in abolition circles.

Id. at 218–19 (citations omitted).

115. Brigham, *supra* note 9, at 199; *Woman Faces Death Sentence, supra* note 28; Goldscheider, *supra* note 44; *supra* Part III.

116. Brigham, *supra* note 9, at 199; *Woman Faces Death Sentence*, *supra* note 28; Goldscheider, *supra* note 44; *supra* Part III.

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

118. Mehren, *supra* note 3; *Woman Faces Death Sentence*, *supra* note 28. At the time of this writing, these same twelve states, plus the District of Columbia, continue to outlaw capital punishment under state law: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Death Penalty Info. Ctr., Death Penalty Policy by State, http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited Apr. 10, 2007) (juxtaposing states and other American institutions that have the death penalty—including the federal government and the United States military—with states that do not).

119. *See, e.g.*, Brigham, *supra* note 9, at 216; Goldscheider, *supra* note 44.

120. Goldscheider, *supra* note 44.

tion of the federal government, contending that the "continual federalization of criminal law" was a "retrograde development" that was "politically driven" and "leading to a huge expansion of federal crimes that were perfectly well handled by the states."[121]

To grasp the gravamen of such frustrations, one must consider that federalism in the United States is a "mixed sovereignty with local and national aspects that exists in a vaguely constituted political and legal space."[122] With specific regard to the federal death penalty sanction, the power exercised by the national government was only recently reauthorized and is not necessarily in accord with local and state sentiment.[123]

Only six short years before the Gilbert trial, President Clinton signed the Federal Death Penalty Act of 1994 ("FDPA")[124] into law as part of the comprehensive Violent Crime Control and Law Enforcement Act.[125] The FDPA vastly expanded the authority of the federal government "to seek the death penalty for defendants accused of certain crimes within federal court jurisdiction."[126] With this expansion, the federal death penalty encompassed about sixty offenses, including murder in a federal facility or during an attack on a federal facility, kidnapping resulting in death, rape or child molestation resulting in death, genocide, murder during a drug-related drive-by shooting, and many others.[127] This enlargement of federal jurisdiction raised the spectre of turf wars between the federal government and the states and, consequently, the prospect of prosecutorial jockeying in capital punishment cases invoking "dual sovereignty."

A basic principle of federalism in "dual sovereignty" matters, which now include many cases with death penalty implications, is that the prosecution should be managed by the most local jurisdiction.[128] While the number of prisoners on federal death row is

121. *Woman Faces Death Sentence*, *supra* note 28.

122. Brigham, *supra* note 9, at 196.

123. *Id.* at 196–97.

124. 18 U.S.C. §§ 3591–3598 (1994).

125. *See generally* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (federal death penalty provisions codified as amended in scattered sections of 18 U.S.C.).

126. John P. Cunningham, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 939 (1998).

127. *Id.* at 940, 952–56.

128. Brigham, *supra* note 9, at 216.

negligible vis-à-vis those on state death rows, Gilbert's attorneys, and others, argue that a "federalization" of the death penalty is in the works given the steady increase in federal prosecutions of capital cases in recent years.[129] Essentially, these commentators allege that the federal government is "encouraging executions with little regard for the logics of federalism."[130]

Federal executions, however, are uncommon, and most of the states sending prisoners to federal death row have their own version of the death penalty.[131] In these states, residents are conditioned to the idea of executing those convicted of the most heinous crimes.[132] But in states such as Massachusetts, without the death penalty, the prospect of imposition of the sanction by the federal government is unusual, if not outright foreign, and arguably saddles the local citizenry with a legal and political quagmire wrought with Byzantine questions of federalism, sovereignty, and state prerogatives.[133]

Moreover, Massachusetts has been particularly robust in its historical opposition to the death penalty.[134] Such "resistant" states are said to have a "special salience" in national death penalty politics, where forces are constantly battling to enable the sanction for prosecutors, often in jurisdictions without the punishment.[135] Indeed, with no recent history of capital punishment, even the idea of prosecuting Gilbert under the federal death penalty statute was "a very big deal" to citizens of Massachusetts.[136]

This may help explain why a large percentage of summoned jurors in the Gilbert case reportedly "exhibited a somber demeanor" throughout *voir dire* proceedings.[137] And it certainly provides insight into why many in Massachusetts, including prominent members of the press, viewed the Gilbert prosecution with zealous cynicism and as little more than a federal encroachment on

129. *Id.* at 212.

130. *Id.* at 216. *See generally* Goldscheider, *supra* note 44.

131. Brigham, *supra* note 9, at 217.

132. *Id.*

133. *See generally id.* at 217–18.

134. *Id.* at 218–21 (providing historical context for the Commonwealth of Massachusetts's longtime opposition to the death penalty).

135. *Id.* at 220.

136. *Id.* at 221.

137. *Id.*

state prerogatives designed to assuage abolitionists and prepare the state for future executions.[138]

V. CONCLUSION

I have a fantasy of putting a big sign over the door to the federal courthouse in Springfield, which says: "Ponsor's Pretty Good Justice."[139]

In the end, whatever your perspective on capital punishment, and however you may feel about traditional notions of gender, race, and federalism in the context of federal death penalty jurisprudence, the ineluctable conclusion to the Gilbert saga is that an objective form of justice was served—"pretty good justice," as Judge Ponsor would put it.[140]

The legal, political, and social quandaries permeating the case were inarguably extraordinary and sometimes insoluble. The evidence presented during the trial was grisly, complex, voluminous, and often overwhelming (for judge, jury, lawyers, families, and defendant alike).[141] The victims—of all the individuals worthy of compassion and empathy—were, alas, defenseless American veterans. And after all this, a detestable and homicidal "angel of death," who ironically was entrusted to serve as a "guardian of life," sits in prison until her natural death, without even the faintest prospects for release.

But it is never quite this simple. We should know, or at least ask, whose "pretty good justice" is this? Does it belong to the families of the victims? How about the citizens of Massachusetts? Perhaps even the federal government, given that they secured a conviction, albeit at a lesser punitive threshold than they had hoped? We should also consider death penalty abolitionists, who, in their eyes, managed to shield Massachusetts, at least temporarily, from what they view as an abhorrent and deplorable pen-

138. *See, e.g.*, Goldscheider, *supra* note 44.

139. McNamara, *supra* note 8.

140. *Id.*

141. During the trial there were "three snow days, four sick days, and three medical emergency days; the defendant and two of the jurors got the flu, and one of the defense lawyers was briefly hospitalized with chest pains." Ponsor, *supra* note 6.

alty.[142] On the other hand, maybe supporters of capital punishment won the day, having witnessed the power of the "ultimate sanction" to cross lines of state sovereignty and challenge state prerogatives.

Clearly there is no definitive answer to such an obvious rhetorical query. Any response that could in fact be strewn together would invariably subsume elements of each of the Gilbert case's many "constituents." What *can* affirmatively be stated in response to the question, however, is that Judge Michael Ponsor dispensed his unique brand of "pretty good justice" throughout this case, marked by his legal acumen, evenhandedness, and enviable tenacity. Thus, his philosophy on the otherwise amorphous concept of "pretty good justice" carries significant weight here, and bears repeating, with the hope that its elegant simplicity may shed light on the idea of "justice" contemplated on these pages:

> By suggesting that what I try to dispense is "pretty good" justice I don't mean that I have a casual or halfhearted attitude toward my work. Playing a role in a system that ultimately provides "pretty good justice" means constantly attempting to dispense justice that is as good as it possibly can be. It is incredibly difficult, incredibly subtle work. It is a stretch towards an ideal of perfect justice that can never be reached. "Pretty good" justice is pretty darn hard.[143]

Perhaps this is the best we can hope for in a federal death penalty case like Kristen Gilbert's, the sheer magnitude of which the Commonwealth of Massachusetts had never before witnessed.

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142. My use of the word "temporarily" is pregnant with meaning here. On December 23, 2003, a federal jury in Massachusetts recommended the execution of Gary Lee Sampson, a drifter who confessed to carjacking and killing two men during a weeklong rampage in July 2001. Shelly Murphy, *Death for Sampson: Verdict Makes Him State's First Since 1947 to Face Execution*, BOSTON GLOBE, Dec. 24, 2003, at A1, *available at* 2003 WLNR 3417009; *see also* Laurel J. Sweet, *Coward Killer Begs for Mercy: Sampson Wants His Life Spared*, BOSTON HERALD, Oct. 5, 2006, at 2, *available at* 2006 WLNR 17279513. His sentence marked the first time a capital punishment verdict had been imposed in a federal death penalty prosecution in Massachusetts. *See* Murphy, *supra*. Furthermore, the verdict means that Sampson, who currently sits on federal death row in Terre Haute, Indiana, could become the first person to be executed for a crime in Massachusetts under *any* death penalty statute since 1947. *Id.*

143. McNamara, *supra* note 8.