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COLONIZING BY CONTRACT

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Since 1898, Puerto Rico has been a territory of the United States, meaning that Congress wields plenary power over the Island. Although scholars have highlighted the history and some modern manifestations of this power, conversations about how plenary power affects the territories have largely ignored constitutional criminal procedure.

This Article is the first to center the territory's criminal legal system within the broader debate over the exercise of plenary power. In doing so, it fills significant gaps in the constitutional and criminal law literature on the territories by uncovering how the federal government's plenary power affects local criminal adjudication. This Article maps out the general contours of what it terms the "territorial criminal legal system." That system allows Congress to intervene in local criminal affairs to a far greater degree than it could in any state. At the same time, the system imposes administrative constraints on local prosecutorial actions and poses an existential threat to the existence of local criminal systems. Further, in 2010, federal and local prosecutors in Puerto Rico signed a Memorandum of Understanding that funneled more cases into federal court, subjecting a growing number of Puerto Ricans to federal laws and procedures they had no say in creating. Sharing insights from over a dozen interviews, this Article uncovers how federal prosecutors circumvent protections embedded in Puerto Rican local law and

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constitutional text. Indeed, while the U.S. government may have granted Puerto Rico a greater semblance of home rule, colonial dominance has never left the Island.

INTRODUCTION

Puerto Rico, we are told, has a relationship with the United States that "has no parallel in our history."[1] For the last seventy years, the U.S. and Puerto Rican governments have maintained that while the Island[2] is a territory of the United States, as a matter of governance, it is akin to a state.[3] For most purposes, it is "an autonomous political entity, 'sovereign

1. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 596 (1976).

2. Puerto Rico is an archipelago consisting of various islands. Off. of the Gov't of P.R., Puerto Rico 5 (1951). It is commonly referred to as *la isla*, or the Island. This Article will do so throughout.

3. In 1953, representatives of the U.S. government conveyed to the United Nations that Puerto Rico had achieved a new constitutional relationship with the United States when the territory reached commonwealth status. Frances P. Bolton & James P. Richards, Report on the Eighth Session of the General Assembly of the United Nations, H.R. Rep. No. 83-

over matters not ruled by the Constitution.'"[4] It enjoys almost complete home rule, a popularly elected executive and legislative branches, and a complex and expansive governmental apparatus.[5]

But that is not exactly true. The federal courts have typically marshaled this narrative to shield explicitly colonial histories and outcomes. Indeed, the list of undesirable achievements related to the Island abound. Chief among them is that Puerto Rico remains one of five "unincorporated" territories,[6] meaning that Congress can, and does, treat

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1695, app. 9, at 241 (2d Sess. 1954). This status, according to federal agents, was "a compact of a bilateral nature whose terms may be changed only by common consent." Id. This, and other statements, prompted the General Assembly of the United Nations to express that Puerto Rico had achieved "a new constitutional status." G.A. Res. 748 (VIII), ¶ 2 (Nov. 27, 1953). In Puerto Rico, the meaning of the commonwealth status is a hotly contested issue on which the major political parties are divided, with the Partido Popular Democrático, the commonwealth party, believing that the Island is no mere territory. See Emmanuel Hiram Arnaud, Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico, 53 Colum. Hum. Rts. L. Rev. 882, 913–15 (2022) [hereinafter Arnaud, Llegaron los Federales] ("[T]he compact theory had become, and continues to be, the backbone of the Partido Popular Democrático, one of the two main political parties on the Island . . . ."); Christina D. Ponsa-Kraus, Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in *Aurelius*, 130 Yale L.J. Forum 101, 106 (2020), https://www.yalelawjournal.org/pdf/Ponsa-KrausEssay_z7qnqvjm.pdf [https://perma.cc/9QZA-TGN4] [hereinafter Ponsa-Kraus, *Aurelius* Concurrence] ("[C]ommonwealthers argue that Puerto Rico is no mere territory, but rather has a mutually binding bilateral compact with the United States, which elevates its status to something analogous to, but different from, that of a state.").

4. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (internal quotation marks omitted) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974)).

5. See Off. of the Gov't of P.R., supra note 2, at 20 (describing the evolution of Puerto Rico's government structure and degree of independence).

6. The Supreme Court of the United States created the "unincorporated territory category" in the Insular Cases of the early twentieth century. The concept first appeared in a law review article, and then in a judicial opinion in *Downes v. Bidwell* and was explicitly adopted as a constitutional doctrine in *Balzac v. Porto Rico*. See Abbott Lawrence Lowell, The Status of Our New Possessions: A Third View, 13 Harv. L. Rev. 155 (1899); see also Downes v. Bidwell, 182 U.S. 244, 287 (1901); Balzac v. Porto Rico, 258 U.S. 298, 305–06 (1922). Using explicitly racist narratives as guidance, the Court explained that unincorporated territories are those that are not on the path towards statehood and in which at least some parts of the Constitution (like the jury trial right or the Uniformity Clause) do not apply. See *Downes*, 182 U.S. at 287 ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible . . . ."); see also *Balzac*, 258 U.S. at 309 ("In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him."). Incorporated territories are on the path to statehood. See *Downes*, 182 U.S. at 252 ("This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a State, and postponed its incorporation into the Union to the pleasure of Congress."). Today, there are four other unincorporated territories: American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. R. Sam Garrett, Cong. Rsch. Serv., IF11792, Statehood Process and Political Status

it differently than the states, and its territorial status may continue in perpetuity without offending the federal Constitution.[7] Further, inhabitants of the territories remain politically powerless. They cannot vote for President or Vice President, nor can they elect a voting representative to Congress.[8] Importantly, in the 1950s, Congress invited Puerto Rico to draft a constitution of its own making—the first time a territory was asked to do so without a connection to statehood.[9] The creation of that constitution ostensibly heralded a new epoch in Puerto Rican history: the commonwealth. But soon after its creation, the practical consequences of the commonwealth status came into view. It did not, as major Puerto Rican political leaders, scholars, and federal judges professed, elevate Puerto Rico out of its territorial status.[10] All the new moniker did was give a stronger semblance of home rule with a fancy name to go along with it.[11] The federal government retained power to rule over the territory, including interfering in local affairs in ways it could never interfere with a state.

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of U.S. Territories: Brief Policy Background 1 (2024), https://crsreports.congress.gov/product/pdf/IF/IF11792 [https://perma.cc/G6QF-VTMV].

7. Most recently, the Supreme Court explained that Congress can extend fewer benefit programs to the territories than the states. See United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) (holding that Congress may make fewer Supplemental Security Income benefits available to residents of Puerto Rico than residents of states without violating the Fifth Amendment's equal protection clause).

8. Emmanuel Hiram Arnaud, A More Perfect Union for Whom?, 123 Colum. L. Rev. Forum 84, 87 (2023), https://columbialawreview.org/wp-content/uploads/2023/04/Arnaud-A_more_perfect_union_for_whom.pdf [https://perma.cc/WXV4-2Y9F] [hereinafter Arnaud, A More Perfect Union] (reviewing John F. Kowal & Wilfred U. Codrington III, The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union (2021)). Congress extended citizenship to inhabitants of Puerto Rico in 1917. See Jones Act, Pub. L. No. 64-368, ch. 145, 39 Stat. 951, 953 (1917).

9. See Mitu Gulati & Robert K. Rasmussen, Puerto Rico and the Netherworld of Sovereign Debt Restructuring, 91 S. Cal. L. Rev. 133, 150 (2017) (describing how Congress "retained a veto over any constitution" Puerto Rico proposed and required that the Puerto Rican Constitution contain a bill of rights).

10. See Arnaud, Llegaron los Federales, supra note 3, at 913–20 (recounting prominent arguments suggesting that the commonwealth status changed the relationship between Puerto Rico and the United States); Salvador E. Casellas, Commonwealth Status and the Federal Courts, 80 Revista Jurídica de la Universidad de Puerto Rico [Rev. Juris. U. P.R.] 945, 949 (2011) (arguing that the commonwealth status "set forth the basis for a new relationship between the people of Puerto Rico and the United States"); Pedro A. Malavet, Puerto Rico: Cultural Nation, American Colony, 6 Mich. J. Race & L. 1, 33–34, 36–37 (2000) (highlighting official statements made by federal officials suggesting that the commonwealth status changed the constitutional relationship between the United States and Puerto Rico).

11. Juan R. Torruella, Commentary, Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of "Territorial Federalism", 131 Harv. L. Rev. Forum 65, 85 (2018), https://harvardlawreview.org/wp-content/uploads/2018/01/vol131_Torruella.pdf [https://perma.cc/E63W-VB67] [hereinafter Torruella, A Reply] (referring to the commonwealth status as a "monumental hoax").

Puerto Rico's relationship with the federal government affects every facet of the Island's existence. But one of the most understudied aspects of Puerto Rico's relationship with the United States is the way its territorial status affects the adjudication of criminal offenses on the Island. To put it plainly, the federal government has significantly influenced the way criminal prosecutions are brought on the Island, from preventing local prosecutors from filing certain charges in local courts to authorizing federal prosecutors to prosecute what are essentially local offenses. One of the most recent manifestations of the federal government's ability and desire to intrude into local affairs came in 2010 when the U.S. Attorney's Office for the District of Puerto Rico (USAO) and the Puerto Rican Department of Justice (PRDOJ)—the entity tasked with local Island-wide criminal prosecutions—signed a confidential Memorandum of Understanding (MOU).[12] This agreement gave federal prosecutors primary jurisdiction over certain categories of offenses.[13] The local prosecutors, in effect, preemptively forfeited their ability to prosecute certain sets of cases, believing that the federal government would be able to do a better job. Their conception of collaboration allows the federal government, in some cases, to effectively replace local prosecutors.

This Article argues that prosecutorial arrangements like this one, fueled by a territorial relationship, are a modern manifestation of colonialism on the Island. These arrangements constrain local governmental capacity in ways that endanger criminal defendants and betray fundamental norms of democratic accountability and the ostensible promise of decolonization. This Article surveys this phenomenon through the lens of the MOU. This MOU, which has been altered in subsequent years, explained which offenses the USAO would prosecute federally, even though a local analogous statute applied and the PRDOJ remained ready to prosecute on its own. The offenses placed solely in the USAO's hands reflected violent crimes that had been increasing on the Island, like

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12. See Memorandum of Understanding Between the Department of Justice for the Commonwealth of Puerto Rico, The Puerto Rico Police Department, and the U.S. Attorney's Office for the District of Puerto Rico for the Referral and Handling of Cases Where There Is Concurrent State and Federal Jurisdiction, Feb. 2, 2010 (on file with the *Columbia Law Review*) [hereinafter 2010 MOU]. Although the MOU is confidential, federal and local public officials in Puerto Rico have talked about the document openly in various forums including media interviews, press releases, and press conferences. See Limarys Suárez Torres, Arma le Cuesta Siete Años de Cárcel, El Nuevo Dia (Oct. 18, 2011) [hereinafter Suárez Torres, Arma le Cuesta] (describing public statements by Judge José Fusté discussing the MOU); Luis J. Valentín Ortiz, Amplían Acuerdo Entre Gobierno y Agencias Federales para Combatir el Crimen, CB En Español (Feb. 1, 2017), https://cb.pr/amplian-acuerdoentre-gobierno-y-agencias-federales-para-combatir-el-crimen/ [https://perma.cc/F2CCVM83].

13. See 2010 MOU, supra note 12, at 1–7 (delegating some drug trafficking, carjacking, bank robberies, and child sexual abuse cases to federal prosecutors).

firearms offenses and carjackings.[14] The following pages uncover the history of the MOU and explore how such a simple agreement subverted procedural protections under Puerto Rican law and subjected a greater number of people accused of crimes in Puerto Rico to punishment by a government they had no say in electing, exposing a significant issue of representational criminal justice. By doing so, this Article aims to fill a gap in scholarship on the territories, which has given insufficient attention to criminal legal administration.

What prompted the federal government to intervene so aggressively in Puerto Rican affairs? The answer lies principally in the plenary power doctrine. As explained more fully below, plenary power refers to Congress's constitutional prerogative to rule over U.S. territories, allowing it to operate as both the federal and local legislature.[15] This, in turn, makes federal interventions customary and, as some scholars have proposed, creates a power dynamic in which only federal power in the territories is deemed legitimate and respectable.[16] The weight of the scholarship concerning the U.S. territories and Puerto Rico typically focuses on the historical trajectory of plenary power. For instance, scholars have long explored the origins of Congress's plenary power, linking it to the nation's practice of producing new states mainly from contiguous territories through war, peacetime treaties, and settler colonialism.[17] Plenary power is not new, and Congress has used that power to create and govern territories since the Founding.[18] After the Spanish–American War in 1898,

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14. See id. at 1 (stating that delegating the prosecution of certain violent offenses to federal prosecutors is necessary to effectively fight crime on the Island).

15. See infra section I.C.

16. See Eduardo J. Rivera Pichardo, John T. Jost & Verónica Benet-Martínez, Internalization of Inferiority and Colonial System Justification: The Case of Puerto Rico, 78 J. Soc. Issues 79, 82 (2022) ("[W]e hypothesize that pro-statehood sentiments . . . would reflect colonial forms of thinking (or colonial mentality) associated with system justification . . . and internalization of inferiority . . . ." (emphasis omitted)).

17. See Christina Duffy Burnett, Untied States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 816–17 (2005) (describing Congress's use of plenary power to legislate for new territories since the Founding); Juan F. Perea, Denying the Violence: The Missing Constitutional Law of Conquest, 24 U. Pa. J. Const. L. 1205, 1241–55 (2022) (describing the consequences of the Northwest Ordinance on patterns of territorial expansion); Bartholomew H. Sparrow, Empires External and Internal: Territories, Government Lands, and Federalism in the United States, *in* The Louisiana and American Expansion, 1803–1898, at 231, 233–34 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) (outlining the federal government's established pattern of territorial expansion). See generally Sam Erman, Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire (2018) (describing the role of the political branches in the acquisition and establishment of a territorial government in Puerto Rico); Aziz Rana, The Two Faces of American Freedom (2010) [hereinafter Rana, The Two Faces] (describing the federal Constitution's role in facilitating and justifying expansion and settler colonialism).

18. See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

however, the understanding of territorial governance changed. The United States suddenly held far-off territories like Puerto Rico, and nobody quite knew what to do with them.[19] The Supreme Court ultimately answered that question in the *Insular Cases*[20] of the early twentieth century, providing the federal government with the power to hold the new possessions for an indeterminate period without granting them statehood, while preserving deannexation as a possible outcome.[21] The *Insular Cases* left the federal government's plenary power over the territories intact but decimated the expectation of statehood and left the new possessions in a territorial limbo.[22] That, in large part, remains true today. Despite expansion of home rule in most territories,[23] it has become patently clear

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belonging to the United States . . . ."); see also Northwest Ordinance of 1787, 1 Stat. 51 (creating internal governance for the Northwest Territories).

19. The parameters for expansion were narrowed even further following the creation of what Professor Sam Erman refers to as the "Reconstruction Constitution," which stood in the way of acquiring foreign lands by entrenching the tradition that territorial acquisitions, even noncontiguous ones, were on the fast track to statehood. The Reconstruction Constitution represents the new post-reconstruction constitutional regime that, through the Reconstruction Amendments, guaranteed "near-universal citizenship, expanded rights, and eventual statehood. Specifically, all Americans other than Indians, regardless of race, were citizens." Erman, supra note 17, at 2. The promises of the Reconstruction Constitution, Erman explains, caused even the staunchest imperialists in the United States to think twice before supporting extraterritorial annexations. See id. (explaining how the "prospect of having to acknowledge so many nonwhite persons as citizens" effectively stopped U.S. expansion until 1898).

20. Juan R. Torruella, The *Insular Cases*: The Establishment of a Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283, 299–312 (2007). The acquisition of these territories also marked the nation's "imperial turn," which refers to the moment, in 1898, when the United States began holding noncontiguous territories for indefinite amounts of time without the promise of statehood. Id. at 287.

21. See Burnett, supra note 17, at 802 ("[T]he *Insular Cases* rejected the assumption that all U.S. territories were on their way to statehood, [but] the unprecedented implication of this reasoning was . . . that the United States could relinquish sovereignty over an unincorporated territory altogether."). Deannexation refers to processes by which the federal government could cut ties with a territory, such as by granting independence. Id.

22. See id. at 799 (explaining how the *Insular Cases* denied the territories "all but a few constitutional protections" while "denying them a promise of statehood"). To boot, not all constitutional rights and provisions applied to the newly minted "unincorporated" territories. Most notably, the jury trial right and the Uniformity Clause did not extend to these territories. Id. at 819; see also Balzac v. Porto Rico, 258 U.S. 298, 309 (1922) (holding that the Sixth Amendment jury trial right did not apply to Puerto Rico). Despite treating the territories with some trepidation, the federal government was in control of their internal governance.

23. See Rafael Cox Alomar, The Puerto Rico Constitution 35–37 (2022) ("On July 3, 1950, President Truman signed U.S. Public Law 600, providing 'for the organization of a constitutional government by the people of Puerto Rico.'" (quoting Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731 et seq. (2018)))); Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal 117–25 (1985) (discussing modest expansion of home rule and relevant Puerto Rican political movements in the early twentieth century); José Trías Monge, Puerto Rico: The Trials of the Oldest

that the federal government continues ruling the territories like the colonies of old. It exercises its plenary power to legislate freely over the territories, intruding into local affairs and producing constitutionally sanctioned inequality and disparate treatment.[24] Although the MOU did not emanate directly from Congress's plenary power, they interact to exacerbate the problem of federal intervention.

Further, the federal government's intervention in Puerto Rican criminal affairs prompts important criticisms about the federalization of criminal law throughout the United States. Scholars and advocates have long critiqued the federal government's intervention in areas of criminal law that were traditionally seen as being within the exclusive province of the states.[25] Critics view the criminalization of especially violent crimes by the federal government as an overstep largely because criminalizing those offenses exceeds Congress's enumerated powers and, as a result, violates commonly accepted understandings of federalism.[26] In the opposing camp, many scholars point out not only that the Constitution provides broad enumerated powers but also that the Founders had an expansive understanding of Congress's power to draft federal criminal statutes.[27]

Colony in the World 107–18 (1997) [hereinafter Trías Monge, Oldest Colony in the World] (discussing the establishment of the commonwealth status).

24. See United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) (holding that Congress may make fewer Supplemental Security Income benefits available to residents of Puerto Rico than residents of states without violating the Fifth Amendment's equal protection clause); Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 118 (2016) ("Puerto Rico [is barred] from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies."); Fitisemanu v. United States, 1 F.4th 862, 864–65 (10th Cir. 2021) (holding that citizens of American Samoa were not birthright citizens of the United States by virtue of the Fourteenth Amendment's Citizenship Clause); Cori Alonso-Yoder, Imperialist Immigration Reform, 91 Fordham L. Rev. 1623, 1634 (2023) ("The government is permitted by law to regulate racial minorities, but not to extend full legal protections to these same groups.").

25. See Gerald G. Ashdown, Federalism, Federalization, and the Politics of Crime, 98 W. Va. L. Rev. 789, 790–91 (1996) ("[T]he Tenth Amendment le[ft] the general police power and responsibility for criminal law enforcement in the hands of the states."); Stephen F. Smith, Federalization's Folly, 56 San Diego L. Rev. 31, 34–42 (2019) ("The daunting size and utter chaos in federal criminal law resulted principally from the fact that new criminal laws are continuously enacted by Congress year after year without periodic review and revision."). See generally Dick Thornburgh, Charles W. Daniels & Robert Gorence, The Growing Federalization of Criminal Law, 31 N.M. L. Rev. 135, 135–36 (2001) (recounting the history of the gradual federalization of criminal law).

26. See Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hastings L.J. 1135, 1165–67 (1995) (arguing that Congress has overstepped by passing laws in tension with state prerogatives and central tenets of federalism).

27. See Erin C. Blondel, The Structure of Criminal Federalism, 98 Notre Dame L. Rev. 1037, 1040 (2023) ("The Constitution, federal law, and federal norms give states almost unfettered control over their laws and officers, and having the police power provides strong incentives to maximize the reach of state law and enforcement."); Peter J. Henning, Misguided Federalism, 68 Mo. L. Rev. 389, 394–95 (2003) ("The Founders certainly

Indeed, Congress demonstrated a capacious understanding of its enumerated powers when it passed the earliest federal criminal statutes.[28]

Although federalism issues are broad, it is important to highlight that the territories represent, in many ways, the complete federalization of criminal law. Like the states, federal criminal statutes apply to the territories.[29] But because of Congress's plenary power over the territories, the typical constraints on federal action are absent. The federalization of crime in the territories entails the circumvention of local constitutional protections and the undemocratic adjudication of criminal offenses. Indeed, the continued federalization of crime in Puerto Rico and recent congressional actions like PROMESA—a 2016 act that created a presidentially appointed fiscal control board that governs the Island's budget and approves local laws[30]—show that there is no future for what

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envisioned that federal crimes could encompass conduct also subject to state prosecution."); Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1, 56 (1996) ("At the outset, the First Congress recognized that federal criminal law authority was not limited to the few explicit constitutional grants of authority to define punishments."); Tom Stacy & Kim Dayton, The Underfederalization of Crime, 6 Cornell J.L. & Pub. Pol'y 247, 262–63 (1997) ("[W]e argue that the constitutional objections to the current national crime fighting role are quite misplaced.").

28. Congress, for example, used the Postal Clause to create federal offenses against the stealing of mail. Kurland, supra note 27, at 58. See generally Dwight F. Henderson, Congress, Courts, and Criminals 7–10 (1985) (discussing the Crimes Act of 1790 and the initial structure of the federal criminal justice system).

29. See Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 320 (1st Cir. 2012) ("Whether and how a federal statute applies to Puerto Rico is a question of Congressional intent." (citing Jusino Mercado v. Puerto Rico, 214 F.3d 34, 40 (1st Cir. 2000))); United States v. Acosta-Martinez, 252 F.3d 13, 18 (1st Cir. 2001) (noting that unless otherwise stated, the "default rule" is that a federal statute applies to a territory because the territories are typically included in the jurisdictional section of federal criminal statutes). But the applicability of some federal criminal statutes to Puerto Rico is continually contested in federal courts. See, e.g., id. at 13 (concerning the Federal Death Penalty Act (FDPA)).

In contrast, some federal statutes explicitly do not apply to the territories. For example, Congress preempted the territories from creating their own municipal debt restructuring legislation. See *Franklin Cal. Tax-Free Tr.*, 579 U.S. at 117–18 (holding that Puerto Rico cannot authorize its municipalities to seek relief under Chapter 9 of the Bankruptcy Code). And Congress has exempted American Samoa and the Northern Mariana Islands from particular sections of immigration laws and the Fair Labor Standards Act. See Alonso-Yoder, supra note 24, at 1628 ("[The covenant] limited the applicability of the federal minimum wage provisions set forth in the Fair Labor Standards Act of 1938."); Arnold H. Leibowitz, American Samoa: Decline of a Culture, 10 Cal. W. Int'l L.J. 220, 248–51, 269 (1980) (explaining that Congress has created special immigration restrictions for American Samoa).

30. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114–187, §§ 101–212, 130 Stat. 549, 553–577 (2016) (codified as 48 U.S.C. §§ 2121–2152 (2018)).

some commentators call "territorial federalism."[31] The MOU provides a view of the effects of the federal government's power over the territories at a granular level, opening new chapters in debates concerning both the law of the territories and the federalization of crime. To this point, the scholarship on the federalization of criminal law has also overlooked the territories.

To be sure, the MOU was a calculated product of its time. Its creation stems from a major crime wave in Puerto Rico dating to the 1990s and early 2000s. Violent crime reached unprecedented levels, with the Island seeing the murder rate spike 229% from 1970 to 2009, hovering at three times the national average.[32] To combat these staggering numbers, the USAO and PRDOJ decided that federal prosecutors should lead the charge prosecuting violent crime. As a result of the MOU, criminal charges in the District Court of Puerto Rico increased dramatically.[33] But not everyone was happy with this new arrangement. Federal judges in Puerto Rico faced a surge of new cases driven by the U.S. Attorney's policies, and some of the judges expressed their frustrations. The former Chief Judge of the District of Puerto Rico, for example, chided federal prosecutors on several occasions, explaining that "the wholesale referral of cases for federal prosecution 'takes a heavy toll on the federal court, which is not designed or equipped to become a de facto state court.'"[34]

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31. See, e.g., Developments in the Law—The U.S. Territories, 130 Harv. L. Rev. 1616, 1632–33 & n.1 (2017) (arguing that the relationship between territories and the federal government has become more similar to the relationship between states and the federal government over time); see also Zachary S. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction, 113 Colum. L. Rev. 657, 665, 698 (2013) (suggesting a functional approach to federalism for territories and tribes by shifting the focus to the "practical reality of divided sovereignty," requiring a nuanced approach to the interterritorial division of governmental functions and accommodating local cultural norms). But see Torruella, A Reply, supra note 11, at 66–70 (arguing that "territorial federalism" is a repackaging of the same unequal colonial relationship that has been in place for over a century).

32. Dora Nevares-Muñiz, El Crimen 13–14 (2011) [hereinafter Nevares-Muñiz, El Crimen].

33. In 2008, the federal government secured a total of 754 convictions. That number increased to 1,478 convictions by 2015. See U.S. Sent'g Comm'n, Statistical Information Packet: Fiscal Year 2008: District of Puerto Rico (2008), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2008/pr08.pdf [https://perma.cc/F2R9-LPPJ]; U.S. Sent'g Comm'n, Statistical Information Packet: Fiscal Year 2015: District of Puerto Rico (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/pr15.pdf [https://perma.cc/8YV6-3E7L]; see also Interview with D (n.d.) (on file with the *Columbia Law Review*) (explaining that AUSAs were charging around two thousand defendants a year after the MOU but have begun charging fewer cases under current U.S. Attorney Stephen Muldrow).

34. United States v. Colon de Jesus, No. 10-251 (JAF), 2012 WL 2710877, at *4 (D.P.R. July 6, 2012) (quoting United States v. Sevilla-Ovola, 854 F. Supp. 2d 164, 170 (D.P.R. 2012), vacated, 770 F.3d 1 (1st Cir. 2014)).

By referring cases to federal court, the new arrangement raised fundamental questions about the criminal legal system on the Island, beginning with its legitimacy. Because Puerto Ricans lack representation in the federal system, the federal government prosecutes Puerto Ricans under statutes that they have never had a say in creating. The MOU exacerbates this democratic issue, creating downstream complications. In particular, one result of funneling enumerated offenses into the federal district courts is the circumvention of local constitutional protections. The Puerto Rican Constitution and Penal Code provide robust protections for people facing criminal charges, including the right to bail, prohibitions on wiretaps, required pretrial hearings, and strict adherence to speedy trial rules.[35] The strong protections offered by Puerto Rican criminal procedure should be respected as expressions of the community, particularly because this community's expression is excluded from the federal system. But supporters of the MOU have instead weaponized these very protections as justifications for relying on a federal process that is more beneficial to prosecutors.[36]

Moreover, because federal trials are conducted in English, federal jurors must speak English proficiently in order to participate.[37] Puerto Ricans mainly speak Spanish, and as a result, by some estimates, close to ninety percent of the Puerto Rican population is ineligible to serve on federal juries.[38] To add insult to injury, federal prosecutors have been

35. See P.R. Const. art. II, §§ 10–11; see also P.R.S. St. T. 34 Ap. II, Rule 109 ("A motion for continuance not complying with the foregoing provisions shall be denied flatly."). These provisions were adopted by the Puerto Rican constitutional convention and approved by the U.S. Congress without opposition. The wiretap prohibition found its inspiration in the vocal progressive and socialist wing of the constitutional convention which believed communication through cable, telegraph, and telephone to be "inviolable." José Trías Monge, 3 Historia Constitucional de Puerto Rico 191–92 (1982) [hereinafter Trías Monge, Historia Constitucional] (translation provided by author). The right to bail for all defendants emerged as a natural consequence of the constitutional prohibition against the death penalty. Under the Jones Act of 1917, there was a right to bail except for capital crimes in certain circumstances. As a result of the prohibition of the right to bail for capital cases, the right to bail was expanded to all defendants with minimal opposition by the conservative delegates of the convention. Id. at 196.

36. See Interview with D, supra note 33 (explaining that local procedural protections were one factor motivating the MOU); Interview with E (June 6, 2023) (on file with the *Columbia Law Review*) (same).

37. 28 U.S.C. § 1865(b)(2)–(3) (2018) (stating that a person is qualified for jury service unless they are "unable to speak the English language").

38. Jasmine B. Gonzales Rose, The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment Right in the Federal Courts of Puerto Rico, 46 Harv. C.R.-C.L. L. Rev. 497, 498 (2011) [hereinafter Gonzales Rose, Exclusion of Non-English Speaking Jurors].

historically aggressive in seeking the death penalty despite the Puerto Rican Constitution prohibiting that sanction.[39]

The following pages provide a deeper look into how the MOU exacerbates the deleterious consequences of Puerto Rico's territorial condition. To assist in this endeavor, this Article begins developing a descriptive framework—which this Article refers to as the "territorial criminal legal system"—to account for the unique problems created when the federal government employs its power to adjudicate criminal offenses in the territories. This framework captures the broad parameters of criminal adjudication in the territories, regardless of the existence of an MOU. Within the ambit of the territorial criminal legal system are two interrelated processes that facilitate increased federal participation. The defining feature of the territorial criminal legal system is Congress's use of plenary power. This power allows Congress to treat the territories differently than the states, act as both the federal and local (or territorial) legislature,[40] unilaterally apply new laws to the territories,[41] establish local governmental systems,[42] expand the jurisdiction of district courts to include offenses under local penal codes,[43] and create offenses that apply

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39. See Emmanuel Hiram Arnaud, A License to Kill: State Sponsored Death in the Oldest Colony in the World, 86 Rev. Juris. U. P.R. 295, 311, 315–19 (2017); Interview with J (July 20, 2023) (on file with the *Columbia Law Review*) (describing how the United States has repeatedly ignored Puerto Rico's prohibition on the death penalty).

40. The Supreme Court has explained on many occasions that in "legislating for [the territories], Congress exercises the combined powers of the general, and of a state government." Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828). The Court would speak in even clearer terms a few decades later, stating that

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. . . . The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States . . . .

Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879).

41. See Dora Nevares Muñiz, Evolution of Penal Codification in Puerto Rico: A Century of Chaos, 51 Rev. Juris. U. P.R. 87, 104–09 (1982) [hereinafter Nevares Muñiz, Evolution of Penal Codification] (describing the process by which Congress replaced the local Puerto Rican Penal Code with the California Penal Code in 1902).

42. From the Founding, Congress has used its plenary power to create rules of internal governance, known as organic acts, for territories acquired by the United States. Emmanuel Hiram Arnaud, Dual Sovereignty in the U.S. Territories, 91 Fordham L. Rev. 1645, 1659–63 (2023) [hereinafter Arnaud, Dual Sovereignty] (explaining that Congress used its plenary power to establish local governments in newly acquired territories beginning with the Northwest Ordinance in 1787).

43. In the U.S. Virgin Islands, federal prosecutors have the statutory power to file charges under the local penal code in the federal district court. See id. at 1661; see also

specifically to the actions that occur within the territories without affecting a broader federal interest.[44] The plenary power doctrine interacts with criminal legal doctrines in important ways. One of the most striking examples is through another feature, the dual sovereign doctrine. Under this doctrine, only the federal government or the local territorial government may prosecute someone for the same offense.[45] This means that if law enforcement refers certain cases to one entity—say, the federal government—the other entity (the local government) is preempted from pursuing that same case. The MOU and the federal government's superior resources funnel violent crime to the federal courtroom, sometimes leaving the local government's interests unfulfilled. Ultimately, the territorial criminal legal system is a manifestation of the federal government's ability to control or influence local affairs when it so chooses.[46]

Part I traces the evolution of federal prosecutorial power in Puerto Rico. Specifically, it discusses the creation of the federal district court for Puerto Rico, the USAO that came with it, and the Puerto Rican Department of Justice, which was created to prosecute local crimes. Part II unearths the history of the MOU, focusing on its origins, the purpose of the agreement, its practical consequences, and the important procedural protections for criminal defendants under local law. This effort is informed by confidential interviews of attorneys, academics, and judges possessing personal knowledge of the MOU.[47] Part III discusses how the

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United States v. Gillette, 738 F.3d 63, 70–71 (3d Cir. 2013) (explaining that under the U.S.V.I. Organic Act, local courts have original jurisdiction in all criminal acts but "Congress specifically provided that the District Court would retain concurrent jurisdiction over charges alleging local crimes that are related to federal crimes").

44. Arnaud, Llegaron los Federales, supra note 3, at 886–91.

45. Grafton v. United States, 206 U.S. 333, 355 (1907) ("[W]e adjudge that . . . a soldier in the Army[] having been acquitted of the crime of homicide . . . by a military court of competent jurisdiction . . . could not be subsequentially tried for the same offense in a civil court exercising authority in [the territory of the Philippines]."); see also Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62 (2016) ("In this case, we must decide if . . . Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct. We hold they may not, because the oldest roots of Puerto Rico's power to prosecute lie in federal soil."); Arnaud, Dual Sovereignty, supra note 42, at 1652 (contrasting the several states' independent sovereign powers with the territories' derivative powers, which come from the federal government).

46. The criminal legal systems of the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, and Guam function differently than that of Puerto Rico in practice. Arnaud, Dual Sovereignty, supra note 42, at 1659–63. The author will discuss the unique dynamics of those criminal legal systems in subsequent pieces.

47. Many parts of this Article rely on interviews with attorneys practicing criminal law in Puerto Rico. The author interviewed former and current prosecutors, defense attorneys, judges, and academics on the Island who have personal knowledge of the Memorandum of Understanding and who have extensive practice experience in Puerto Rico. The author asked each person open-ended questions about the historical backdrop of the MOU, the purpose of the agreement, their perception of the agreement, and their experiences with

MOU is a manifestation of the federal government's plenary power over the territories. Through the MOU, the federal government accomplished the important goal of prosecuting violent offenders but, in doing so, circumvented important local procedural protections for defendants and subjected an increasing number of Puerto Ricans to a criminal legal system that does not represent them.[48] Finally, this Article compares Puerto Rico's type of arrangement to that of other jurisdictions and offers a way forward.

Ultimately, this is a story about how the most powerful democracy on earth continues to perpetuate a colonial system that delegitimizes local authority and deprives Puerto Ricans of democracy and self-determination. This story focuses on criminal prosecutions on the Island and highlights the extent to which the U.S. government continues intervening in local affairs. In doing so, the federal government circumvents Puerto Rican constitutional protections and subjects millions to foreign laws.

I. PROSECUTORIAL POWER IN PUERTO RICO

The United States has been in the business of territorial expansion since the Founding.[49] The drafters of the federal Constitution created mechanisms for the administration of current and future territorial possessions and believed that the federal government had a special interest in not only acquiring new territories but also absorbing them into the Union.[50] As part of that tradition, the federal government has always enjoyed power over local affairs in the territories, including the

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criminal adjudication on the Island. These interviews were conducted on the condition of anonymity. Citations to those interviews will be marked as "Interview with [letter]" with the letter corresponding to the order in which the interview took place. All interviews are on file with the *Columbia Law Review*.

48. The MOU moves a significant group of offenses to federal court, where local criminal procedure rules do not apply. In the states of the Union, this is orthodox in the sense that state laws and procedures do not exist in the federal district court of those states. But here, the PRDOJ and the USAO entered into an agreement that was motivated in part by the conscious desire to free what otherwise are local prosecutions from the protections of the Puerto Rican Constitution and rules of criminal procedure. Moreover, the agreement subjects more Puerto Ricans to federal laws and procedures they have not had a say in crafting.

49. See The Declaration of Independence para. 9 (U.S. 1776) ("He has endeavoured to prevent the population of these States; for that purpose . . . raising the conditions of new Appropriations of Lands."); Northwest Ordinance of 1787, art. IV (providing for the governance of newly acquired territories); see also Perea, supra note 17, at 1241–44 ("In essence, the Northwest Ordinance created the blueprint for the conquest of the United States . . . .").

50. See U.S. Const. art. IV, § 3, cl. 1 (explaining how new states will be admitted). The Continental Congress included similar mechanisms in the Articles of Confederation. See Perea, supra note 17, at 1231–36 (explaining how the Framers sought to address the Articles of Confederation's barriers to territorial expansion).

adjudication of criminal offenses.[51] That power generally flows from the Territorial Clause of the U.S. Constitution, which provides Congress with the power to make "needful Rules and Regulations" for the nation's territories.[52] Beginning with the very first territories, Congress created their internal governmental structures, including territorial courts, and commanded the recently formed local governing bodies to enact criminal offenses.[53] The federal government had a special interest in organizing new territories in preparation for their eventual admission to the Union as states.[54]

But for some territories, including Puerto Rico, that historically implied promise of statehood vanished. It soon became clear that those territories would remain in territorial purgatory absent political will or unrest to the contrary.[55] As a result, Puerto Rico's internal governance evolved over time in ways that provided Puerto Ricans more power over

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51. See Frederick S. Calhoun, The Lawmen: United States Marshals and Their Deputies 1789–1989, at 143–58 (1989) ("[T]he lines of authority between territorial and federal lawmen, who were often the same man, were frequently confused and laxly respected."); Lawrence M. Friedman, Crime and Punishment in American History 261 (1993) ("All the states outside of the original ones had had their larval periods as 'territories,' and territorial law was federal; territorial courts were federal courts.").

52. U.S. Const. art. IV, § 3, cl. 2. Congress also exercises plenary authority over the District of Columbia. U.S. Const. art. I, § 8, cl. 17.

53. See Northwest Ordinance of 1787, §§ 5, 8 ("The governor and judges . . . shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary . . . .").

54. See Stanley K. Laughlin, Jr., The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa, 13 U. Haw. L. Rev. 379, 384, 389 (1991) ("In order to make these [territorial] arrangements mutually beneficial, however, careful crafting of political and legal structures is imperative."). The Northwest Ordinance provided a three-stage process for new states to be admitted from the Northwest Territory. The Ordinance stated that the territory would be "temporary," and that Congress would "provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest." Northwest Ordinance of 1787, §§ 1, 13, art. V.

55. Since the Founding, the federal government has acquired territories with the aim of admitting them as new states. See Shively v. Bowlby, 152 U.S. 1, 49 (1894) ("[T]he territories acquired by congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States . . . ."). But following the Spanish American War of 1898, not all territories, particularly the former Spanish colonies, were destined for statehood; instead, they were to be held as territories in perpetuity. See Christina Duffy Burnett & Burke Marshall, Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 1, 4–5 (Christina Duffy Burnett & Burke Marshall eds., 2001) ("[A]nti-imperialists did not object to the acquisition of territories . . . . [T]hey objected to the idea that arose with respect to the former Spanish colonies: that Congress could subject them to *permanent* territorial status, without intending ever to admit them into the Union as full and equal member states.").

local affairs.[56] Today, the Island has a local government that, for the most part, functions independently from the federal government and looks just like any state of the Union. But appearances can be deceiving. While Puerto Rico's local government may appear to command the same respect as other local authorities, the federal government has made clear that the notions of federalism that define its relationship with states are absent with respect to the U.S. territories.[57] Accordingly, the federal government intrudes in local criminal affairs in ways that are unique to the territories. This Part describes the presence of federal prosecutorial power and its local analog to better understand the unique relationship between the Puerto Rican and federal governments. This Part reveals that the federal government has intruded in local Puerto Rican criminal affairs from the moment U.S. troops first landed on the Island.

A. *Federal Prosecutorial Power*

The United States acquired Puerto Rico from Spain in 1898 following the Spanish–American War.[58] While the belligerents negotiated peace, the United States governed the Island by military rule. The parties signed the Treaty of Paris, which formally ended the war, on December 10, 1898, and Congress ratified the treaty on February 6, 1899.[59] The U.S. military, however, continued its military rule on the Island from the initial occupation in 1898 until 1900.[60]

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56. See Igartua De La Rosa v. United States, 229 F.3d 80, 87–88 (1st Cir. 2000) (Torruella, J., concurring) ("[T]he civil rights of United States citizens residing in Puerto Rico . . . have remained dormant at best . . . . The granting of so-called 'Commonwealth' status in 1952, itself an enigmatic condition which merely allowed the residents of Puerto Rico limited self-government, did nothing to correct Puerto Rico's fundamental condition . . . ." (footnote omitted)); Trías Monge, Oldest Colony in the World, supra note 23, at 105–07 (explaining that Congress gave Puerto Ricans the ability to elect members of the Puerto Rico legislature, vote for their Governor, and make a constitution of their own, and allowed the Puerto Rico governor to appoint justices of the Puerto Rico Supreme Court).

57. For example, in 2016, the U.S. Congress unilaterally created a fiscal control board that was placed within Puerto Rico's government. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114–187, 130 Stat. 549 (2016) (codified as 48 U.S.C. §§ 2101–2241); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1661 (2020) (explaining that members of the fiscal control board were territorial, rather than federal, officers because, even though the board was created by Congress, the board lived within the Puerto Rican government and performed territorial duties).

58. See Treaty of Paris of 1898, Spain–U.S., arts. I–III, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343 (entered into force Apr. 11, 1899).

59. Manuel Del Valle, Puerto Rico Before the United States Supreme Court, 19 Rev. Juris. U. Interamericana P.R. 13, 17–18 (1984).

60. See Pedro A. Malavet, The Inconvenience of a "Constitution [that] Follows the Flag . . . But Doesn't Quite Catch Up With It": From *Downes v. Bidwell* to *Boumediene v. Bush*, 80 Miss. L.J. 181, 213 (2010).

Those two years brought drastic changes to the organization of the local Puerto Rican government and judiciary. Initially, General Nelson Miles, who was in command of the Island on behalf of the United States during its invasion, expressed a desire to protect local customs and laws.[61] In July 1898, he issued General Order 101, in which he proclaimed that even though military decrees were the supreme law of the land,

> [T]he municipal laws of the conquered territory, such as those which affect individual's rights and property rights and provide for the punishment of crime, are considered continuing in force, so far as they are compatible with new order of things, until they are suspended or superseded by the occupying belligerent . . . .[62]

This position was in keeping with General Miles's appreciation of local customs and likely genuine belief that the United States brought the "blessings of liberty" to the Island and that they arrived in Puerto Rico to "bring . . . protection . . . to promote your prosperity and bestow upon you the immunities and blessings of the liberal institutions of our [g]overnment."[63]

Nevertheless, the military government quickly modified local laws and governmental structures. The military government reorganized the local court system, in some cases narrowed the jurisdictional reach of local courts, and ordered that local judges could stay in their posts only if they pledged allegiance to the federal government.[64] Importantly, under the purview of the third military governor, General Guy V. Henry, Puerto Rican courts were barred from hearing cases in which civilians were accused of crimes against members of the U.S. military.[65] Instead, those cases were heard by specially created military tribunals.[66]

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61. See Del Valle, supra note 59, at 21 ("The local law of the conquered territory and those laws governing private rights remained in force during military occupation except where suspended by the military authorities.").

62. General Order 101, July 13, 1898, reprinted in Guillermo A. Baralt, History of the Federal Court in Puerto Rico: 1899–1999, at 69–70 (Janis Palma trans., 2004).

63. Trías Monge, Oldest Colony in the World, supra note 23, at 30 (internal quotation marks omitted) (quoting Documents on the Constitutional History of Puerto Rico 55 (Off. Commonwealth P.R. in Washington, D.C. ed., 2d ed. 1964)).

64. See Baralt, supra note 62, at 69–70 (Janis Palma trans., 2004); Nevares Muñiz, Evolution of Penal Codification, supra note 41, at 103 (highlighting and explaining some of these actions). General Davis reorganized the local court system through General Order 114 of August 7, 1899. Baralt, supra, at 105.

65. See Baralt, supra note 62, at 87 (explaining that military commissions were in "charge of the Seditions Bands cases and the defendants charged with acts of violence"). Henry's predecessor, General Brooke, had also prohibited local courts from hearing arson or murder cases. Noting that local courts were not acting with sufficient severity or promptness, he reasoned that ad hoc military tribunals could do a better job. See José Trías Monge, El Sistema Judicial de Puerto Rico 49 (1978) [hereinafter Trías Monge, El Sistema].

66. There was Supreme Court precedent prohibiting the prosecution of civilians by court martial/military commission during peacetime. See, e.g., Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (asserting that when "the [civilian] courts are open," martial rule is

Chief among the changes to Puerto Rico's internal governance was the creation of a federal district court for Puerto Rico. The creation of this court was exceptional.[67] The federal district court for Puerto Rico was not initially created by an act of Congress.[68] Instead, General George W. Davis, the fourth Military Governor of Puerto Rico, created a federal provisional court of the United States on June 27, 1899, through military decree.[69] A confluence of interests prompted the creation of the provisional court. First, there was a perceived rise in local criminal activity that, to many Spanish and Puerto Rican aristocrats on the Island, was not being dealt with properly by local authorities.[70] Second, the local Puerto Rican courts had seemingly proven ineffective for Spaniards, who had willingly stayed in Puerto Rico to defend their financial interests in court.[71] Finally, for the Americans, the creation of a district court had the added benefit of beginning the process of cultural assimilation. From an empire-building perspective, the federal court provided a forum, in English, for the litigation of cases that involved federal interests on the Island. One of General Davis's official reports puts this point clearly: "The influence of this court is destined to be a [potent agent] in Americanizing the Island, and is certainly one of the best measures instituted since the Spanish evacuation."[72]

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improper). But General Henry reasoned that since the armistice protocol had been signed but not the peace treaty, they were still technically at war. Baralt, supra note 62, at 86–87.

67. Indeed, it was exceptional that there was a federal district court in a territory. Throughout most of U.S. expansion, a single trial court heard cases arising under territorial and federal law: the territorial court. See Gregory Ablavsky, Federal Ground: Governing Property and Violence in the First U.S. Territories 129 n.74 (2021). These territorial courts often had similar jurisdictional parameters as federal district courts along with the power to hear cases arising under local territorial law. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 544–45 (1828). But in Puerto Rico, Congress allowed for local Puerto Rican courts and the federal district court to exist simultaneously. Burnett, supra note 17, at 837–38.

68. See Baralt, supra note 62, at 91 (describing General Order No. 88, June 27, 1899, which established the federal District Court of Puerto Rico).

69. Id. Not everyone welcomed the creation of the provisional federal court. For example, the leader of the prominent Federal Party, Luis Muñoz Rivera, expressed his fierce opposition. Id. at 96. To these opponents, the federal court was a sign of legal subordination which flew in the face of the Federal Party's main objective of more autonomy with respect to local rule. Id. at 130. Moreover, the court was established in the face of stark opposition from notable local government leaders like the Puerto Rican Secretary of Justice, Puerto Rican Supreme Court justices, and many of the Island's leading attorneys. The opposition feared the very Americanization that General Davis relished. Id. at 87, 96; Trías Monge, El Sistema, supra note 65, at 52.

70. Baralt, supra note 62, at 81–92.

71. Id. at 96.

72. Carmelo Delgado Cintrón, Historia de un Desproposito, Prologo [Foreword] to Alfonso L. García Martinez, Idioma y Politica: El Papel Desempeñado por los Idiomas Español e Inglés en la Relación Politica Puerto Rico–Estados Unidos 5, 9–10 (1976) (internal quotation marks omitted) (quoting Report of Brigadier-General George W. Davis, U.S.V., on Civil Affairs of Puerto Rico 212 (1899)).

Practically, the court was like any other district court. Its jurisdictional powers closely tracked that of the other U.S. district courts, and all proceedings were conducted in English.[73] But there were also important differences. For example, the federal court had jurisdiction over any criminal matter—local or federal.[74] Further, unlike the other district courts, appeals from the provisional court went directly to the Supreme Court of the United States through the certiorari process.[75]

Within a year, it was Congress's turn to act. In 1900, Congress passed the Foraker Act, formally ending the military rule on the Island.[76] The Foraker Act was the Island's first organic act—a congressional statute aimed at organizing a territory's internal governmental structure.[77] It established a presidentially appointed Executive Council, a popularly elected House of Representatives, an entirely new judiciary system for the Island (including a new Supreme Court), and a nonvoting delegate to Congress known as the Resident Commissioner.[78] The Foraker Act also

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73. Nevares Muñiz, Evolution of Penal Codification, supra note 41, at 103.

74. Governor Henry provided this expansive jurisdiction in criminal cases due to distrust in the local judicial system. Trías Monge, El Sistema, supra note 65, at 52.

75. Baralt, supra note 62, at 93. The provisional court consisted of three judges, the first being attorney Noah Brooks Kent Pettingill. Id. at 91–94. Majors Eugene D. Dimmick and Earl D. Thomas of the U.S. Cavalry served alongside Pettingill as the first associate judges of the provisional court. Id. at 94. The first criminal jury trial under the provisional court was held on September 20, 1899. Id. at 97. Originally, the judges of the district court served for fixed terms until 1966, when Congress granted the judges life tenure. Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (1966) (codified in 28 U.S.C. § 134 (2018)). The Supreme Court acknowledged this change in *Examining Board v. Flores de Otero*, stating that the district court in Puerto Rico now "possesses the same jurisdiction as that conferred on the federal district courts in the several States" and the judges in that district also now have life tenure. 426 U.S. 572, 594 n.26 (1976). These changes, several courts and commentators have suggested, converted the District Court of Puerto Rico from a legislative court to an Article III court. See Gustavo A. Gelpí, A Legislative History of the District of Puerto Rico Article III Court, Fed. Law. 18 (July 2016); see also Igartua-De La Rosa v. United States, 417 F.3d 145, 166 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) ("An Article III District Court sits [in Puerto Rico] . . . ."); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 385 n.69 (D.C. Cir. 1987) ("Puerto Rico has an Article III district court . . . ."); United States v. Santiago, 23 F. Supp. 3d 68, 70 (D.P.R. 2014) (Gelpí, J.) (finding that the District of Puerto Rico is now organized under Article III). The district courts of Guam, the U.S. Virgin Islands, and the Northern Mariana Islands are organized under different sections. See 48 U.S.C. §§ 1424b(a), 1614(a), 1821(b) (2018). The judges of those courts, unlike those in the fifty states and Puerto Rico, do not enjoy life tenure. Id.

76. Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. § 731); see also Diane Lourdes Dick, U.S. Tax Imperialism in Puerto Rico, 65 Am. U. L. Rev. 1, 28 (2015) ("The Foraker Act . . . ended military rule and installed a civilian colonial government.").

77. These congressional statutes that organized U.S. territories are known as organic acts. See Organic Act, Black's Law Dictionary (4th ed. 1968) (defining an organic act as one that constitutes the government of a newly organized territory).

78. Foraker Act, §§ 18–35, 39, 31 Stat. 77, 81–86.

statutorily authorized the Puerto Rican federal district court,[79] bringing its jurisdictional reach into conformity with all other federal district courts.[80] The appeals from the district court continued being heard by the Supreme Court of the United States until 1915, when Congress gave the U.S. Court of Appeals for the First Circuit jurisdiction over appeals from the District Court of Puerto Rico.[81]

Along with the creation of the district court came a post for the representative of the U.S. government in that forum: the United States Attorney.[82] The President of the United States appointed the first United States Attorney of Puerto Rico when the provisional court was created in 1899.[83] The President authorized the U.S. Attorney to bring cases in violation of civil and criminal federal statutes and cases in violation of any general orders issued during military rule. Just like the U.S. Attorneys on the mainland, the U.S. Attorney in Puerto Rico also represented the United States in all suits to which it was a party in that district.[84]

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79. Id. ch. 191, § 34, 31 Stat. 77, 84; see also James T. Campbell, Note, Island Judges, 129 Yale L.J. 1888, 1909 (2020) ("The original district court in Puerto Rico hardly resembled the court Congress sought to reform in 1966."). Litigants challenged the propriety and power of the federal district court throughout the twentieth century. *Santiago v. Nogueras* represents one of the earliest challenges. 2 P.R. Fed. 467 (1907), aff'd, 214 U.S. 260 (1909). The plaintiffs in that case challenged a default judgment against them resulting from unpaid promissory notes. Id. at 471. The default judgment was issued by the provisional court and executed by the district court created under the Foraker Act. Id. at 471–72. In response to the judgments, Plaintiff alleged, in part, that the district court was unauthorized to proclaim its judgment because it was improperly constituted and therefore lacked jurisdiction over the original suit. Id. at 472. The court rejected the arguments, explaining that the Executive's war powers allowed it to create the provisional court and, based on prior cases, those provisional courts retain their power to hear cases until Congress modifies them. Id. at 476, 488–89. As a result, the district court in both its iterations—the provisional court and the district court created by Congress—retained the power to hear the underlying suit concerning the unpaid notes.

80. Foraker Act § 34; Monge, El Sistema, supra note 65, at 61.

81. In 1915, Congress placed the district court within the First Circuit Court of Appeals—the court that hears appeals from the district court to this day. Act of Jan. 28, 1915, ch. 22, § 1, 38 Stat. 803, 803 (codified at 28 U.S.C. § 41 (2018)).

82. Or the United States District Attorney, as the U.S. Attorneys were referred to at that time. See Foraker Act § 34 ("The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years, unless sooner removed by the President.").

83. See Baralt, supra note 62, at 91–92.

84. Id. at 92 (describing General Order 88, June 27, 1899, which assigned the duties of the U.S. Attorneys). J. Marbouh Keedy served as the first Provisional United States Attorney, but he did not last long. Id. at 94; Eulalio A. Torres, The Puerto Rico Penal Code of 1902–1975: A Case Study of American Legal Imperialism, 45 Rev. Juris. U. P.R. 1, 76 (1976) [hereinafter Torres, Case Study]. Noah Brooks Kent Pettingill, the first district court judge of the provisional court, replaced Keedy as the first U.S. Attorney for Puerto Rico in the post-Foraker Act district court. Pettingill served as the U.S. District Attorney before being fired by Theodore Roosevelt. See Judges' Info, U.S. Dist. Ct. for the Dist. of P.R., https://www.prd.uscourts.gov/judges-info [https://perma.cc/T4AJ-EUBT] (last visited

Today, the USAO for the District of Puerto Rico is one of ninety-three U.S. Attorneys representing ninety-four districts.[85] Internally, there are close to sixty Assistant U.S. Attorneys in the office, and just under half of them are native-born Puerto Ricans.[86] Additionally, there are about five Special Assistant U.S. Attorneys—attorneys in different Puerto Rican governmental agencies that are on loan, or in *destaque*, to the U.S. Attorney.[87] The office is extremely busy with one of the highest cases per attorney rates in the country.[88]

B. *Local Prosecutorial Power*

Puerto Ricans exercised local prosecutorial power while under Spanish rule.[89] On the eve of the Spanish–American War, mounting political pressure in Puerto Rico and Cuba convinced Spain to grant those territories greater autonomy.[90] In 1897, the Crown instituted the *Carta Autonómica de Puerto Rico*—or Autonomic Charter—granting the Island a greater level of home rule.[91] As a part of the charter, the Crown created a

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Aug. 13, 2024) (noting that Pettingill was the first provisional judge); Letter from Theodore Roosevelt, President of the U. S., to Charles F. Stokes, (Dec. 5, 1906), https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record/ImageViewer?libID=o197452 [https://perma.cc/X7X2-JMPQ] ("To my great regret your letter reached me nearly a week after I had removed Mr. Pettingill."). A Puerto Rican would not serve on the district court until Judge Clemente Ruíz Nazario joined the bench in 1952. See Judges' Info, supra ("On January 28, 1952, President Harry S. Truman nominated Clemente Ruiz Nazario to be the first native-born Puerto Rican United States district judge.").

85. Court Role and Structure, U.S. Courts, https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/JV68-Z3A9] (last visited Aug. 13, 2024).

86. Interview with B (n.d.) (on file with the *Columbia Law Review*); Interview with E, supra note 36. About eight AUSAs do appellate work, and some others do civil work. Interview with E, supra note 36. The percentage of the office doing violent crime or gun cases is around ten percent. Id. The addition of around ten SAUSAs was seen as a "huge increase" in personnel. Id. The USAO started hiring more people from the mainland in the late 1990s and early 2000s. Id. The PRDOJ used to offer competitive salaries compared to the AUSAs, which posed a problem for local recruitment. Id. Another issue is the need for English speakers. Id. As one person explained, local prosecutors might not feel comfortable writing or arguing in English. Id. As a result, there is a smaller pool to recruit from. Id.

87. See DOJ, United States Attorneys' Annual Statistical Report 4, 19 tbls. 1 & 4 (2023), https://www.justice.gov/usao/media/1343726/dl?inline [https://perma.cc/LS52-SME8] (depicting the total caseload of the U.S. Attorneys' Offices through 2023).

88. Interview with B, supra note 86 (noting that the office handles more cases per attorney than most offices).

89. Carta Autonómica de 1897 de Puerto Rico, art. 45 (creating the Secretary of Justice).

90. See Burnett, supra note 17, at 873 n.327 (2005) ("Proponents of a compact also cite Puerto Rico's Charter of Autonomy of 1897, enacted by Spain in a futile attempt to quell the then-raging war for independence in Cuba by granting increased autonomy to Cuba and Puerto Rico.").

91. Id.

local Secretary of Justice who was tasked with prosecuting criminal offenses on the Island.[92] A year later, the United States acquired the Island.[93]

During the U.S. military rule, the military governor created a new Department of Justice tasked with enforcing the local Puerto Rican Penal Code.[94] The military governor tinkered with the Department's focus to match the existing Attorney General Office structures on the mainland, christened the head of the Department the Attorney General, and left the general enforcement of local criminal offenses in the hands of the newly created Department of Justice.[95] The role of the Attorney General underwent slight modifications in the Foraker Act of 1900 and again in the federal government's imposition of the Puerto Rican Political Code of 1902.[96] Ultimately, the Attorney General remained the local government's representative in criminal matters and also played a role in the internal administration of the local Puerto Rican courts.[97]

The Puerto Rican Penal Code has existed in some form since 1902.[98] From 1900 to 1902, the federal government commissioned several committees to study the existing Puerto Rican Penal and Civil Code and make suggestions for their improvement.[99] Although initially supportive of the existing Penal Code, the last commission to study the code suggested a complete overhaul.[100] The U.S. Congress obliged, replacing the Puerto Rican Penal Code not with a specially curated set of statutes that represented the voice of the local population but instead with the slightly altered Penal Code of California of 1873.[101] The California code, according to the Commission, had a special "punitive character, proper of a code of a frontier community under rapid economic development."[102] More importantly, however, the California Penal Code was readily available in both English and Spanish, considerably diminishing the necessary workload for the Commission.[103] That same Penal Code

92. Carta Autonómica de 1897 de Puerto Rico, art. 45 (creating the Secretary of Justice).

93. Off. of the Gov't of Puerto Rico, supra note 2, at 8.

94. Act No. 205 of Dec. 9, 2004, Statement of Motives, 2004 P.R. Laws 235, 235 (describing General Order No. 12, February 6, 1899).

95. Baralt, supra note 62, at 104–07 (describing General Order No. 98, July 15, 1899).

96. Foraker Act, ch. 191, §§ 8, 16, 31 Stat. 77, 79, 81 (1900); Ley Núm. 205 de 9 de Agosto de 2004, at 2 (2004), http://www.justicia.pr.gov/wpcontent/uploads/2021/02/Ley-Orgánica-del-DJ-205-2004-actualizada-2021-febrero.pdf [https://perma.cc/TW79-FLSB].

97. Ley Num. 205 de 9 de Agosto de 2004, supra note 96, at 2.

98. Dora Nevares-Muñiz, Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico, Elec. J. Compar. L., May 2008, at 1, 2 [hereinafter Nevares-Muñiz, Recodification of Criminal Law].

99. Torres, Case Study, supra note 84, at 3–4, 10–20.

100. Id. at 17, 19–20.

101. Nevares Muñiz, Evolution of Penal Codification, supra note 41, at 104–07, 111; Nevares-Muñiz, Recodification of Criminal Law, supra note 98, at 5.

102. Nevares-Muñiz, Recodification of Criminal Law, supra note 98, at 5.

103. Id.

remained in effect with some amendments for seven decades. In 1974, the Puerto Rican legislature instituted major reforms to the Penal Code. This Code attempted to combine the common law tradition of the California Penal Code with the original civil law tradition of the Island.[104] The Puerto Rican legislature would go on to adopt an entirely new Penal Code in 2004.[105]

The Puerto Rican Department of Justice—the entity that today is tasked with representing the local government in its courts—was created in 1952 as part of Puerto Rico's most recent organic act.[106] In 1950, Congress passed Public Law 600, which allowed Puerto Ricans to write and adopt a constitution of their own making.[107] Puerto Ricans held a constitutional convention and, in 1952, ratified their constitution after Congress made some changes and approved the final version.[108] In their new constitution, Puerto Ricans provided for a Department of Justice under the direction of a Secretary of Justice.[109] Puerto Rico's new Congress retained the power to reorganize the PRDOJ and did so immediately after the constitution's ratification by transferring the role and responsibilities of the previously existing Attorney General to the Secretary of the PRDOJ.[110] The Office of the Chief District Attorney was then established as the criminal enforcement wing of the PRDOJ. Within that office, there are thirteen district attorneys who each oversee their corresponding district in Puerto Rico.[111] These district attorneys are charged with prosecuting violations of the Puerto Rican Penal Code.

C. *Plenary Power*

A common theme in the story of Puerto Rico's governmental structure is the presence of the federal government. Despite the creation of parallel local and federal prosecutorial structures, Puerto Rico's relationship to the federal government is not like that of a state. Indeed, the federal government was essential to the creation of the Puerto Rican prosecutorial apparatus. Specifically, the PRDOJ would not have existed but for Congress approving the Puerto Rican Constitution. Moreover, although Puerto Rico enjoys a robust local prosecutorial office, the people

104. Id. at 7 (citing Puerto Rico Penal Code, Law No. 116 (1974) (codified as amended, 33 L.P.R.A. § 3001 et seq. (2003))).

105. Id. at 8.

106. P.R. Const. art. IV, § 6.

107. Alomar, supra note 23, at 35–36.

108. Id. at 36.

109. P.R. Const. art. IV, § 6. The Secretary of the Department of Justice is the territorial equivalent of the Attorney General of the United States.

110. Ley Núm. 6 de 24 de julio de 1952.

111. Departamento de Justicia de Puerto Rico, Estructura Organizacional (Mar. 20, 2023), https://www.justicia.pr.gov/wp-content/uploads/2023/04/20230320__organigrama.pdf [https://perma.cc/8Q3K-M998?type=image].

of the Island are not the ultimate source of prosecutorial power, as Puerto Rico's power to enact and prosecute criminal laws comes from the federal government. Consequently, the federal government has the final say in the structure, mechanisms, and laws that apply to the Island.

How can it be that Congress continues to wield complete authority over a territory in this day and age? The answer rests in Congress's plenary power. The federal government's plenary power over the territories is as old as the Constitution itself.[112] The Constitution provides Congress with "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[113] As the Supreme Court explained, plenary power means that Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."[114]

To a large degree, plenary power over the territories was a practical necessity. Following the ratification of the Constitution in 1788, the United States was left in possession of the Northwest Territories, and the former colonists were keen on continuing their westward expansion.[115] To facilitate the governance and organization of current and future territories, the federal government passed laws, known as organic acts, which provided for a territory's internal governance along with certain markers that would trigger expanded autonomy within the territory.[116] These organic acts were meant to be temporary and facilitated the territory's purported march towards statehood.[117] In so doing, "Congress exercise[d] the combined powers of the general, and of a state government."[118] In other words, Congress inhabited a strange space as

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112. There were different provisions concerning the treatment of territorial expansion in the Articles of Confederation as well. See Perea, supra note 17, at 1231–36.

113. U.S. Const. art. IV, § 3. As Maggie Blackhawk has recently made clear, the development and use of the plenary power doctrine in continental expansion and subordination of marginalized people—including Indigenous and colonized people—played a central role in creating the "Constitution of American Colonialism." See Maggie Blackhawk, Foreword: The Constitution of American Colonialism, 137 Harv. L. Rev. 1, 22–26 (2023).

114. De Lima v. Bidwell, 182 U.S. 1, 196 (1901) (internal quotation marks omitted) (quoting Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1880)).

115. Rana, The Two Faces, supra note 17, at 109.

116. See Burnett, supra note 17, at 816–17 ("Congress passed organic acts establishing governments with congressionally appointed governors, partially elected legislatures, and untenured judges; reserved the right to annul territorial laws; and limited each territory's federal representation to one nonvoting delegate in the U.S. House of Representatives.").

117. Developments in the Law: The U.S. Territories, 130 Harv. L. Rev. 1632, 1644–45 (2017) [hereinafter Developments in the Law].

118. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828); see also *County of Yankton*, 101 U.S. at 133 ("The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme . . . ."); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840) ("Congress has the same power over [a territory] as over any other property belonging

both the federal legislature and the legislature for the new territories. The practical effect was that Congress could not only create organic acts but also pass subsequent statutes that affected the internal governance of those territories. This remains true to this day, with Congress having passed several organic acts for the U.S. Virgin Islands, Guam, and Puerto Rico.[119] The only difference is that these territories, unlike the ones before them, were never truly on the path towards statehood and are therefore perpetually subject to Congress's legislative powers.

In the twenty-first century, Congress's plenary power continues producing results that offend the United States' purported anti-imperialist origins and perceptions of the United States as a bastion of freedom.[120] For example, the federal government, relying on its plenary power, discriminates against the territories without offending the U.S. Constitution and with the Supreme Court's blessing. Congress has provided people in the mainland United States greater financial assistance under federal programs than those in the territories.[121] Similarly, because the Supreme Court held that the territories are not subject to the Uniformity Clause,[122] Congress charged different duties for goods imported into the territories.[123] Congress has also excluded the territories from federal bankruptcy laws, again, with the Supreme Court's blessing.[124] Moreover, wearing its hat as both the federal and local legislature,

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to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest.").

119. Congress has not passed an organic act for American Samoa, and the legislative body entered into a covenant with the Northern Mariana Islands. Michael Milov-Cordoba, Territorial Courts, Constitutions, and Organic Acts, Explained, State Ct. Rep. (Aug. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/territorial-courts-constitutions-and-organic-acts-explained [https://perma.cc/668G-ATNF].

120. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, The Constitution of Difference, 137 Harv. L. Rev. 133, 144–54 (2024) (explaining how the Insular Cases and the doctrine of territorial incorporation are in tension with some of the values embodied by the Constitution); Aziz Rana, Colonialism and Constitutional Memory, 5 U.C. Irvine L. Rev. 263, 269 (2015) (explaining how the expansion of the constitutional acquisitive power to include the holding of colonial possessions contradicts the accepted American liberatory creed); see also Rana, The Two Faces, supra note 17, at 3 (explaining "how a uniquely American ideal of freedom entailed imperial frameworks, which over time undermined the very promise of this ideal").

121. For example, Congress does not have to, nor does it, make Supplemental Security Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the States. United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022).

122. See supra note 6.

123. Downes v. Bidwell, 182 U.S. 244, 247–48 (1901). Congress passed tariffs aimed at the territories to protect stateside agriculture, especially sugar production, to the detriment of the new territories. Dick, supra note 76, at 29–32 (2015).

124. Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 117–18 (2016).

Congress recently explicitly placed a fiscal control board within Puerto Rico's local government.[125]

Congress's use of its plenary power also extends the jurisdictional reach of federal criminal statutes, authorizing the government to prosecute offenses that occur within a territory without the offense necessarily affecting a federal interest. Section 2423(a) of the Mann Act prohibits someone from transporting a person under the age of eighteen "in any commonwealth, territory or possession of the United States" for the purposes of committing a sex crime.[126] Despite this section applying to actions within states only when the victim is transported in interstate or foreign commerce, the First Circuit has explained that Congress has the ability to go further with respect to the territories and to criminalize activities occurring solely within a territory.[127] Similarly, Section 1951(b)(3) of the Hobbs Act defines "commerce" as "commerce within the District of Columbia, or any Territory or Possession of the United States."[128] These statutes make more sense when viewed from the lens of plenary power. Since the territories are essentially a creation of Congress, and Congress sits as a federal and local legislature for the territories, all actions within the territories affect federal interests.[129] Accordingly, even though the federal government has expressed a desire to respect local autonomy, there is simply no constitutional constraint preventing Congress from intruding further into local affairs.

Plenary power not only sanctions the federal government's ability to encroach into local affairs by prosecuting local offenses, but it also acts as a constraint on local prosecutorial power. The Supreme Court's double jeopardy jurisprudence is a perfect example of this reality. The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution forbids placing a person twice in jeopardy for the same offense.[130] But that does not prevent two sovereign entities from prosecuting someone for the same offense. As the Supreme Court has made patently clear, the term "offense" means a transgression against the law, and someone may certainly

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125. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. 1649, 1661 (2020).

126. 18 U.S.C. § 2423(a) (2018).

127. See United States v. Cotto-Flores, 970 F.3d 17, 35 (1st Cir. 2020) (holding that the Mann Act applies to a defendant who transported his or her victim solely within Puerto Rico); see also Arnaud, Llegaron los Federales, supra note 3, at 889 ("[T]he federal government maintains the unfettered ability to meddle in what are otherwise local criminal activities on the Island.").

128. 18 U.S.C. § 1951(b)(3). The Hobbs Act prohibits robbery or extortion that affects interstate commerce. Id. § 1951(a).

129. See United States v. López-Martínez, No. 15-739 (PAD), 2020 WL 5629787, at *26 (D.P.R. Sept. 21, 2020) (noting that "Puerto Rico is an 'unincorporated territory' of the United States subject to the Territorial Clause" and therefore falling "within the intra-territory provision" of the Hobbs Act), rev'd in part, vacated in part by United States v. Falcon-Nieves, 79 F.4th 116 (1st Cir. 2023).

130. U.S. Const. amend. V.

transgress the law of more than one sovereign with one action.[131] Therefore, two separate sovereigns may prosecute someone for the same offense because the underlying action offends both sovereigns.

That rule—known as the dual sovereign doctrine—has significant implications on the ground. For example, local prosecutors in New Jersey and an Assistant U.S. Attorney (AUSA) for the District of New Jersey can prosecute someone under their respective penal codes. If the AUSA fails to convict, the local prosecutors can still try the defendant subsequently or concurrently. If the two entities are not separate sovereigns, however, one failed prosecution forecloses a successive prosecution by either sovereign. Otherwise, the same sovereign, under the guise of a different name, could again prosecute someone for the same offense.

The U.S. territories and the federal government, unlike a state, are not separate sovereigns.[132] The power to prosecute in territories ultimately emanates from the creation of the federal Constitution.[133] The Supreme Court most recently affirmed this proposition in *Puerto Rico v. Sanchez Valle*.[134] There, it explained that for purposes of determining whether an entity is a separate sovereign for double jeopardy, courts must determine the ultimate source of the entity's prosecutorial power.[135] Puerto Rico, the Court found, drew its power to prosecute not from the people of the Island, but rather from the federal government, which gave it the ability

131. Moore v. Illinois, 55 U.S. 13, 19 (1852).

132. This was not always the case. As discussed elsewhere, in the early nineteenth century the Supreme Court suggested that territories were dual sovereigns in Moore v. Illinois, 55 U.S. (14 How.) 13 (1852). Multiple territorial supreme courts relied on those expressions in finding that they were dual sovereigns for double jeopardy purposes, and the Attorney General of the United States, Caleb Cushing, expressed that legal conclusion in various court martial opinions. Arnaud, Dual Sovereignty, supra note 42, at 1654–55 ("The twenty-third U.S. attorney general, Caleb Cushing, to whom military court-martial cases were appealed, similarly believed that territories were a separate sovereign for double jeopardy purposes. Cushing made this point most clearly in *Howe's Case*."). The Supreme Court, however, would change course in a case dealing with one of its new insular possessions, the Philippines. Grafton v. United States, 206 U.S. 333, 354–55 (1907) (finding that the territory of the Philippines was not a dual sovereign for double jeopardy purposes); see also Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) (same with respect to Puerto Rico). The Court of Appeals for the First Circuit would make a contrary finding many years later when it found that Puerto Rico became a separate sovereign because its internal governance now resembled that of a state. See United States v. Lopez Andino, 831 F.2d 1164, 1167–68 (1st Cir. 1987). The Supreme Court reversed that ruling in Puerto Rico v. Sanchez Valle, 579 U.S. 59 (2016).

133. Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999) ("The Framers split the atom of sovereignty. . . . The resulting Constitution . . . establish[ed] two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." (internal quotation marks omitted) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring))).

134. 579 U.S. at 75–77.

135. Id. at 68.

to create a local constitution and criminal legal system.[136] The effect? Only one entity can prosecute a person for the same offense—either the federal government or the local government.

Congress's plenary power is an important and unexplored aspect of the federal police power. Although local prosecutors in the territories carry out the bulk of prosecutions, the federal government can intervene in local affairs in ways that it could not do in states.[137] Further, the Double Jeopardy Clause acts as a constraint on local power. As discussed further below, the combination of these two circumstances often significantly undermines democratic accountability and circumvents important rights for defendants under local law.

One way in which both the federal and local governments navigate this unique reality is through constant communication. Over time, the two governments have worked ever closer on investigations and establishing prosecutorial priorities.[138] There perhaps is no better example of the close tie between the two governments than the Memorandum of Understanding between the USAO and PRDOJ.

II. THE MEMORANDUM OF UNDERSTANDING

In 2010, the PRDOJ and the USAO for the District of Puerto Rico entered into an agreement that referred various types of offenses to the USAO for prosecution.[139] Those offenses, "which are prosecuted as state crimes virtually everywhere else in the United States," could have been prosecuted by the PRDOJ under local law.[140] Nevertheless, the USAO and the PRDOJ felt a need for these cases to be prosecuted federally. While it

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136. Id. at 73.

137. See, e.g., 2010 MOU, supra note 12, at 1–2 (noting that while "DOJ-PR and PRPD shall have primary prosecutorial and investigative jurisdiction in all cases involving the possession . . . of controlled substances" in ports of entry, the "USAO-PR and federal law enforcement agencies . . . shall have primary jurisdiction in" cases based on the amount of drugs in possession).

138. See, e.g., Press Release, DOJ & Drug Enf't Admin., Caribbean Corridor Strike Force Dismantles Drug Trafficking Organization Responsible for Transporting Drugs and Money Between Puerto Rico–Culebra–St Thomas, Drug Enforcement Administration (Apr. 1, 2014), https://www.dea.gov/press-releases/2014/04/01/caribbean-corridor-strike-force-dismantles-drug-trafficking-organization (on file with the *Columbia Law Review*) (describing a joint task force consisting of federal officers and Puerto Rico Police Department agents).

139. United States v. Colon-de-Jesus, No. 10–251 (JAF), 2012 WL 2710877, at *4 (D.P.R. July 6, 2012).

140. See id. ("[T]he wholesale referral of cases for federal prosecution 'takes a heavy toll on the federal court, which is not designed or equipped to become a de facto state court by recycling failed state prosecutions.'" (quoting United States v. Sevilla-Ovola, 854 F.2d 164, 170 (D.P.R. 2012), vacated, 770 F.3d 1 (1st Cir. 2014))); see also 2010 MOU, supra note 12, at 1 (discussing Puerto Rico and DOJ as having "concurrent jurisdiction" over crimes involving "the possession, transportation or seizure of controlled substances within and through ports of Puerto Rico").

is true that similar arrangements exist elsewhere,[141] the MOU in Puerto Rico is fundamentally different because of its breadth and local consequences. The MOU does not cover a discrete set of offenses, but rather it covers six different categories of offenses: certain types of drug trafficking cases in airports, carjackings, bank robberies, firearms cases, Hobbs Act cases, and certain sex offenses.[142] Further, as discussed below, one of the main purposes of the MOU in Puerto Rico was to circumvent local procedural protections.[143] By doing so, it subjects more people to criminal statutes that they never had a say in creating, furthering the democratic void in the territories.

The first MOU was signed in 2010. But the origins of this agreement date back to the beginning of a familiar crime wave in the 1990s.

A. *Crime in Puerto Rico*

Beginning in the 1990s, Puerto Rico witnessed a steady rise in its crime rate.[144] Violent crimes, particularly murders and firearm-related offenses, accounted for much of the increased activity.[145] From 1970 to 2009, the murder rate alone increased a whopping 229%, placing the murder rate at three times the average in the United States.[146] The Island, which has a population hovering around three million people, had 600 reported murders in 1990. By 1994, there were over 800 reported murders—27.5 murders per 100,000 people.[147] Many of these murders were connected to drug trafficking on the Island, which had become endemic by the mid-1990s.[148] And with the drug trade came firearms.[149] By the 1990s, Puerto

141. See infra notes 333–336 and accompanying text.

142. 2010 MOU, supra note 12, at 1–7.

143. See infra notes 249–254 and accompanying text.

144. See Héctor Tavárez & Ricardo R. Fuentes-Ramírez, Economic Development, Environmental Disturbances, and Crime: The Case of Puerto Rico, 11 J. Socioecon. Rsch. 55, 58 (2023) (stating that crime rates in Puerto Rico peaked in the early 1990s).

145. Although incidents of murder were quite high in Puerto Rico, other violent crimes like rape, burglary, and property crimes were low compared to the rest of the United States. According to the FBI's statistics, the average violent crime rate in the mainland was almost double that of Puerto Rico. Compare FBI: UCR Table 1, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-1 (on file with the *Columbia Law Review*) (last visited Aug. 12, 2024), with FBI: UCR Table 5, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-5 (on file with the *Columbia Law Review*) (last visited Aug. 12, 2024).

146. Nevares-Muñiz, El Crimen, supra note 32, at 13–14.

147. Id.

148. Ivelaw L. Griffith, Drugs and Democracy in the Caribbean, 53 Mia. L. Rev. 869, 870 (1999).

149. There are no firearm manufacturers on the Island. As a result, virtually all firearms in Puerto Rico have been imported. This fact has been increasingly important as, even without the MOU, any offenses involving a firearm necessarily involve interstate commerce. Interview with J, supra note 39.

Rico had become a central drug trafficking hub in the Caribbean. Some drugs stayed on the Island, of course, but Puerto Rico was mainly a transfer point, allowing people to traffic drugs into and out of the mainland United States.[150] As a result, tensions rose between drug trafficking agents on the Island. In 1997, for example, 83.3% of murders were reportedly connected to drug trafficking in some way.[151]

The Puerto Rican government's response to the rising crime rate was similar in many respects to responses to rising crime throughout the mainland: get tough on crime.[152] Tough-on-crime policies in Puerto Rico, referred to as *la mano dura contra el crimen* (the iron fist against crime), were enacted to punish offenses more harshly than before and to send a clear message to would-be offenders that crime would not be tolerated.[153] The resulting policies increased terms of incarceration for certain offenses and promoted aggressive police tactics throughout the Island.[154] For example, then-Governor Pedro Juan Rosselló[155] signed legislation restricting access to public housing, known as *caserios*, in an attempt to curb the rising crime rate.[156] Public housing projects were seen as a hub of

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150. Nevares-Muñiz, El Crimen, supra note 32, at 151–52 (2008).

151. Patricio G. Martínez Llompart, In the Custody of Violence: Puerto Rico Under la Mano Dura Contra el Crimen, 1993–1996, 84 Rev. Juris. U. P.R. 447, 449–50 (2015).

152. See Alfredo Montalvo-Barbot, Crime in Puerto Rico: Drug Trafficking, Money Laundering, and the Poor, 43 Crime & Delinq. 533, 535 (1997) ("Echoing the federal 'war on drugs,' the government of Puerto Rico has implemented a series of crime control policies aimed at eradicating the use of the island for drug trafficking and money laundering.").

153. José Caraballo-Cueto, Policing Life and Death: The Perverse Consequences of an Iron Fist Policy Against Crime, Crim. L. & Crim. Just. Books (March 2020), https://clcjbooks.rutgers.edu/books/policing-life-and-death-the-perverse-consequences-of-an-iron-fist-policy-against-crime/ [https://perma.cc/R7KZ-A2YB] (reviewing Marisol LeBrón, Policing Life and Death: Race, Violence, and Resistance in Puerto Rico (2019)).

154. See Marisol LeBrón, Policing Life and Death: Race, Violence, and Resistance in Puerto Rico 114–15, 144–45 (2019) [hereinafter LeBrón, Policing Life and Death] (describing criticism of the tough-on-crime approach and police violence around student-led protests).

155. Rosselló served as governor from 1993 to 2001. Former Governors—Puerto Rico, Nat'l Governors Ass'n, https://www.nga.org/former-governors/puerto-rico/ [https://perma.cc/GJ25-AZQL] (last visited Sept. 30, 2024).

156. The Puerto Rican Congress passed legislation in 1987 allowing people to control private residential communities. Ley de Control de Acceso, Ley Núm. 21 del 20 de Mayo de 1987, 23 LPRA §§ 64-6411. Following the new legislation signed by Rosselló, private communities saw a spike in the creation of security checkpoints in their communities. The result was physical segregation, with wealthy private gated communities on one hand and poor gated public housing communities on the other. Llompart, supra note 151, at 464–65. Moreover, it bears noting that Puerto Rico is a poor territory, with about forty percent of the population living under the poverty line. The median household income is about $24,000. QuickFacts: Puerto Rico, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/PR/PST045221 [https://perma.cc/3LBT-CJM8] (last visited Aug. 12, 2024). For context, in Mississippi, the poorest state in the Union, only roughly nineteen percent of people live under the poverty line and the median household income is approximately $53,000. U.S. Census Bureau, QuickFacts: Mississippi, United States

criminal activity.[157] According to political leaders, many drug traffickers and gang members either lived or were harbored there.[158] According to the theory, restricting access by sealing off the projects and having one or two security checkpoints could curb crime.[159] Further, Rosselló went as far as activating the Puerto Rican National Guard to help implement and run those security checkpoints, making these public housing complexes feel like warzones.[160]

As was true nationwide,[161] the tough-on-crime policies enacted by the local government were largely ineffective. Although there was a spike in criminal charges, as well as a rise in the jail and prison population at the local and federal levels, violent crime persisted.[162] And despite increasingly aggressive police tactics—tactics that later forced the U.S. DOJ to investigate the Puerto Rico Police Department, condemn their tactics, and institute reforms[163]—*caserios* are still considered "hotspots for drug activity and gang violence."[164]

Well into the twenty-first century, violent crime remained a major issue for the Island. In 2011, there were over 1,000 murders and non-

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https://www.census.gov/quickfacts/fact/table/MS/PST045222 [https://perma.cc/VFT5-MLQV] (last visited Aug. 12, 2024).

157. LeBrón, Policing Life and Death, supra note 154, at 52.

158. Id.; Llompart, supra note 151, at 462.

159. See Marisol LeBrón, Puerto Rico's War on Its Poor, Bos. Rev. (Dec. 12, 2018), https://www.bostonreview.net/articles/marisol-lebron-puerto-rico-war-poor/ (on file with the *Columbia Law Review*) [hereinafter LeBrón, War on Its Poor]; see also Llompart, supra note 151, at 464 ("For [those] who grew up in the island during the 1990s, . . . private communities invoke safety and order, while public spaces remain the realm of danger and violence.").

160. See LeBrón, War on Its Poor, supra note 159 (describing the militarized Mano Dura approach to policing public housing). Notably, apart from its tough on crime approach, the Puerto Rican Congress attempted to meet the persistent crime wave by reorganizing the PRDOJ in 2004. In doing so, Congress attempted to streamline communication between the internal departments and cut out unnecessary bureaucratic obstacles. Ley Núm. 205 de 9 de Agosto de 2004, supra note 96.

161. See, e.g., Elaine R. Jones, The Failure of the "Get Tough" Crime Policy, 20 U. Dayton L. Rev. 803, 803–04 (1995).

162. See LeBrón, War on Its Poor, supra note 159 ("While Rosselló's administration officially celebrated a decrease in the number of robberies and carjackings, Puerto Rico experienced an increase in the murder rate as *Mano Dura* intensified battles between rival gangs over turf.").

163. See DOJ, C.R. Div., Investigation of the Puerto Rico Police Department 5 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf [https://perma.cc/T984-S5VT].

164. See Puerto Rico: Security Overview and Travel Assessment, Armada Global 11 (2015), https://amizade.org/wp-content/uploads/2014/09/PuertoRico-WebVersion.pdf [https://perma.cc/SU3G-TTVG].

negligent manslaughters on the Island.[165] Puerto Rico outnumbered the murders in Chicago (433) and the entire state of Illinois (721) that year.[166] By 2011, Puerto Rico was in the midst of the most violent crime wave in its history.[167] Indeed, for Puerto Rico, the first two decades of the twenty-first century looked a lot like the last decades of the twentieth century in terms of crime and violence—except that today, the Island must also contend with unconstitutionally aggressive police tactics, a government sponsored physical segregation in *caserios*, and a fearful populace. While it is possible that *la mano dura* might eventually stem the tide of violence, the USAO was not inclined to wait.

B. *The U.S. Attorney Steps In*

The USAO was well aware of the increase in drug-related violent crime throughout the Island. Indeed, the federal docket reflected a rise in both drug-related crimes and offenses involving firearms. For example, from 1994 to 2000, the percentage of cases resulting in conviction and sentencing for drug-related crimes increased from 51.9% to 62.4% of the docket.[168] The docket also shows a steady increase in the share of firearm-related offenses handled by the federal prosecutors. In the 1990s, firearm offenses accounted for just 2–3% of concluded cases. By the year 2008, however, firearms offenses accounted for twelve percent of offenses[169] and steadily increased until reaching a high of thirty-two percent of cases in 2015.[170]

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165. Crime in the United States by State, 2011, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-5 [https://perma.cc/5C8P-GCKZ] (last visited Aug. 12, 2024).

166. Id.; Chicago Police Dep't, Chicago Murder Analysis 2 (2011), https://home.chicagopolice.org/wp-content/uploads/2014/12/2011-Murder-Report.pdf [https://perma.cc/KF97-S3FM].

167. Lymaris Suarez, Plan Contra el Aficionado a Halar Gatillo, El Nuevo Dia (Sept. 21, 2011) (on file with the *Columbia Law Review*).

168. U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (1995), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/1995/PR95.pdf [https://perma.cc/2MWS-THXD]; U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (1998), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/1998/PR98.pdf [https://perma.cc/4KV7-ZZ3L]; U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (2000), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2000/pr00.pdf [https://perma.cc/99PH-2CSD].

169. U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (2008), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2008/pr08.pdf [https://perma.cc/U3B9-72ZH].

170. U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/pr15.pdf [https://perma.cc/KA95-RFT7].

This steady increase in drug-related and firearm prosecutions at the federal level paralleled the rise in violent crime throughout the Island. Unsurprisingly, both the federal and Puerto Rican governments determined that something had to be done to reduce the incidence of violent crime on the Island. In that spirit, the newly minted U.S. Attorney, Rosa Emilia Rodríguez-Vélez,[171] and the PRDOJ Secretary Guillermo A. Somoza Colombani, agreed to work together and find a more efficient mechanism to combat crime on the Island. Their answer was to give the federal government more responsibility in prosecuting cases and to increase collaboration between federal and local law enforcement agencies and prosecution offices.[172] Three main factors motivated that decision. First, the local government had been unable to reduce the incidence of violent crime, and in particular the murder rate, since the turn of the century.[173] Second, prosecutorial authorities were frustrated by key protections granted to criminal defendants under the Puerto Rican Constitution and rules of criminal procedure.[174] And third, officials believed that the superior resources of the federal government could assist tremendously in lowering the crime rate.[175]

Their strategy would be to lower the murder rate by targeting people with firearm-related offenses. The murder rate was, indeed, a problem. In the lead up to the signing of the MOU, there were calendar years in which the Island saw over a thousand murders.[176] The understanding within the government was that the vast majority of murders in high-crime areas were related to drug trafficking. This was especially true in the metropolitan areas like San Juan, Carolina, and Ponce.[177] If the federal government could imprison people believed to possess firearms illegally, then it would

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As explained below, the increase in adjudication of firearm offenses was in large part due to the 2010 MOU.

171. Rodríguez-Vélez, a native-born Puerto Rican, served as the U.S. Attorney for the District of Puerto Rico from 2007 to 2019. She previously worked both as a local prosecutor in the PRDOJ and as an AUSA for the District of Puerto Rico, offering her insight and particular familiarity with crime on the Island. Although nominated by President George W. Bush, she was never confirmed by the Senate and instead was confirmed and reappointed by the judges of the federal District of Puerto Rico. During her tenure, the USAO ramped up public corruption cases, notably prosecuting the sitting Puerto Rican Governor, Aníbal Acevedo Vilá, for campaign finance violations. He was acquitted after a trial. Andrew Scurria, Justice Department Seeks Ouster of Top Puerto Rico Prosecutor, Wall St. J. Online (May 16, 2018), https://www.wsj.com/articles/justice-department-seeks-ouster-of-top-puerto-rico-prosecutor-1526489580 (on file with the *Columbia Law Review*).

172. Interview with D, supra note 33; Interview with K (Jan. 2, 2024) (on file with the *Columbia Law Review*).

173. Interview with D, supra note 33.

174. Id.; Interview with E, supra note 36.

175. Interview with K, supra note 172; Interview with E, supra note 36; Interview with D, supra note 33.

176. Interview with D, supra note 33; Interview with E, supra note 36.

177. Interview with D, supra note 33.

simultaneously disable much of the drug trade. Accordingly, the main focus of the MOU was directed at firearms offenses, especially targeting felons in possession of a firearm.[178]

Relatedly, many federal officials viewed the Puerto Rican Constitution and local criminal procedure rules as a significant barrier to lowering the crime rate.[179] Three sections of the Puerto Rican Constitution provide particularly robust protections to people facing criminal charges. First, the constitution has a near-absolute prohibition on wiretapping and an exclusionary rule to enforce it.[180] Prosecutors have long argued that this prohibition stunts investigations and precludes local police from securing important evidence. Second, the Constitution provides a right to bail and prohibits pretrial incarceration exceeding six months.[181] Especially in the lead up to the MOU, officials saw the right to bail not as an important protection for defendants but as a get-out-of-jail-free card. In their view, the right to bail allowed gang members and other people accused of violent crimes to leave jail and commit further violent acts while their case was pending.[182] Finally, the Puerto Rican Constitution prohibits the death penalty.[183] While federal prosecutors in Puerto Rico use the death penalty to pressure defendants to plead guilty, this tool is unavailable in the local court system.[184]

Puerto Rico's local criminal procedure code also provides robust pretrial requirements. Two rules are worth noting. The first rule is the

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178. Interview with E, supra note 36.

179. Interview with B, supra note 86; Interview with D, supra note 33; Interview with E, supra note 36; Interview with K, supra note 172.

180. P.R. Const. art. II, § 10. "Only the consent of the telephone call's participants, accompanied by a supporting court order, can trump the explicit prohibition." Alomar, supra note 23, at 86 (citing Pueblo v. Santiago Feliciano, 139 P.R. Dec. 361 (1995)). This prohibition, however, does not prevent the admission of recorded telephone conversations in federal court. See United States v. Quinones, 758 F.2d 40, 43 (1st Cir. 1985).

181. P.R. Const. art. II, § 11. The prohibition of pretrial detention exceeding six months was a watershed moment for the Puerto Rican Constitution. Unlike many other provisions, the six-month prohibition was not imported from the previous organic acts or the U.S. Constitution. Instead, it was created as a direct reaction to the local prosecutors' practice of keeping people in pretrial detention by simply filing successive criminal complaints. This new rule would protect defendants from prosecutorial abuse. The provision would be accepted after some debate at the Constitutional Convention but was uncontested by the federal Congress. Trías Monge, Historia Constitucional, supra note 35, at 196.

182. See Interview with D, supra note 33 (explaining that the new bill would allow defendants to be set free on bail after six months); Interview with E, supra note 36 (explaining how the right to bail for murders requires greater collaboration between federal officers and local ones); Interview with G (Apr. 10, 2023) (on file with the *Columbia Law Review*) (describing how if someone commits murder, they only have to post ten percent of the bail amount to be released).

183. P.R. Const. art. II, § 7.

184. See Interview with J, supra note 39 (discussing how the death penalty interacts with the federal system in Puerto Rico).

speedy trial right.[185] The strict adherence to speedy trial rules by local tribunals attracted criticism for leading to dismissals of cases, with prejudice, after prosecutors fail to bring cases to trial in a timely fashion.[186] The application of the rule in local courts is seen as too strict, particularly by not allowing continuances for reasons typically granted in federal court. The second local rule governs the initial hearing.[187] In Puerto Rico, once someone is arrested and accused of a felony, the defendant is granted an initial hearing. This hearing is not a simple arraignment—defendants in Puerto Rico get that too.[188] But in Puerto Rico, the accused person gets an additional full hearing,[189] called the initial hearing, where the prosecution presents the charges against the defendant along with supporting evidence that is then contested or refuted by defense counsel. If a judge finds that the prosecutors did not establish probable cause to charge the alleged offenses, the charges are dismissed.[190] These hearings are not pro

185. The speedy trial right is also found in the Puerto Rican Constitution, but enforcement measures are set out in the Puerto Rican criminal procedure code. The constitutional provision found its origins in article II of the Organic Act of 1917, which also tracked the Sixth Amendment of the federal Constitution. The delegates to the Puerto Rican constitutional convention were aware of serious issues with the speed of the criminal process on the Island, but felt that enforcement mechanisms were of a legislative, not constitutional, nature. Trías Monge, Historia Constitucional, supra note 35, at 193.

186. See Interview with D, supra note 33 (explaining how the need for speedy trials leads to dismissals); Interview with E, supra note 36 (discussing how the federal officers have a much larger time frame during which to act than the local prosecutor). The speedy trial right is found both in the Puerto Rican constitution and in the local code of criminal procedure. P.R. Const. art. II, § 11; 34 LPRA Ap. II, 64(n)(4); see also Pueblo v. Custodio Colon, 192 P.R. Dec. 567, 580 (2015) ("Nuestra sociedad tiene un interés vigoroso en evitar la demora en los procesos criminales contra personas acusadas de violar sus leyes." ["Our society has a strong interest in avoiding delays in criminal proceedings against persons accused of violating its law."]).

187. See Interview with A (July 10, 2022) (on file with the *Columbia Law Review*) (explaining that people who were arrested have a right to appear quickly before a magistrate judge); Interview with F (n.d.) (on file with the *Columbia Law Review*).

188. An arraignment occurs in Puerto Rico almost immediately following the arrest. At the arraignment, the trial judge needs to find probable cause for the defendant's arrest. P.R. S. St. T. 34 Ap. I., § 22(a); P.R. Const. art. II, § 10. The constitutional requirement for a judicial order of arrest was seen as an "excellent contribution to the cause of civil rights in Puerto Rico" because up to that point arrest warrants could be issued by judges and district attorneys, "a situation that was clearly not desired and facilitated arrests en masse" of nationalist sympathizers in the 1950s. Trías Monge, Historia Constitucional, supra note 35, at 191 (author trans.). This change was also suggested by the progressive wing of the constitutional convention.

189. Etapas del Encausamiento Criminal Para Delitos Graves, Poder Judicial, https://poderjudicial.pr/Documentos/Educo/temas-legales/Procedimiento-judicial-criminal/Etapas-del-Encausamiento-criminal-delitos-graves.pdf [https://perma.cc/3L5G-RRJQ] (last visited Sept. 28, 2024); see also Nunzio Frattallone di Gangi, Comment, La Vista Preliminar, 16 Revista de Derecho Puertorriqueño [Rev. Der. P.R.] 231, 231–33 (1976).

190. P.R.S. St. T. 34 Ap. I, § 23. If the defendant successfully argues lack of probable cause, the district attorney then gets to reargue the merits of the case in front of another judge within the trial court. P.R.S. St. T. 34 Ap. I, § 24(c). See Luis Rivera Román, Los

forma and have produced controversial results. Recently, Puerto Rican Judge Rafael Villafañe Riera[191] courted controversy by dismissing charges against five defendants accused of murdering the beloved Puerto Rican boxer and former heavyweight champion Hector Macho Camacho,[192] citing misgivings about the veracity of the witnesses' statements during the initial hearing.[193]

The Puerto Rican Constitution and criminal procedure code provide robust protections for people accused of crimes, and those protections should be respected.[194] But supporters of the MOU use those very protections as justifications for pivoting to a federal process that is far less favorable to defendants and far more favorable to prosecutors. Importantly, criminal defendants have none of the aforementioned protections at the federal level, making the district court an ideal forum for prosecutions.

Given these important differences between the federal and local criminal legal apparatus, it is not altogether surprising that the USAO and PRDOJ decided that the federal government's superior resources, combined with the Federal Rules of Criminal Procedure and federal Constitution, could help lower the crime rate. The federal government was free to use all tools at its disposal in the investigation and prosecution of people suspected of criminal activity and was not at the mercy of local

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Derechos de los Acusados en los Procedimientos Penales Bajo la Constitución de Puerto Rico y los Estados Unidos, 46 Rev. Juris. U. Interamericana P.R. 417, 431–32 (2011–2012).

Some of the Puerto Rican procedural protections were inherited from Spain, including gathering sworn statements from witnesses and producing them to the other party. This, many argue, cannot meet the needs of law enforcement today because it gives too much information to potentially dangerous defendants. See Interview with D, supra note 33 (discussing how the requirement of listing witness information may result in witness intimidation and in prosecutors losing their witnesses). As one person explained, PRDOJ district attorneys are required to provide the name, address, and telephone numbers of the witnesses for initial hearings. When that happens, this opens the door for witness intimidation. There is a fear that some may get murdered, scared out of testifying, or start changing their testimony. As a result, cases may get delayed and prosecutors at the local level may lose witnesses. Id.

191. Interestingly, after Riera's finding in the Camacho case, the Supreme Court of Puerto Rico decided to not recommend him for a position on the Puerto Rico Court of Appeals in 2022. See Letter from Maite D. Oronoz Rodríguez, Chief Judge of the P.R. Sup. Ct., to Hon. Pedro R. Pierluisi Urrutia, Governor of P.R. (Nov. 2, 2022), https://poderjudicial.pr/Documentos/Supremo/Evaluacion/Ascenso-y-renominacion/2022/Rafael-A-Villafane-Riera.pdf [https://perma.cc/H3GB-H386].

192. Alex Figueroa Cancel, Encuentran No Causa Para Juicio en el Caso Por el Asesinato de Héctor "Macho" Camacho, El Nuevo Dia (Oct. 4, 2022), https://www.elnuevodia.com/noticias/tribunales/notas/encuentran-no-causa-para-juicio-en-el-caso-por-el-asesinato-de-hector-macho-camacho/ [https://perma.cc/V3D5-8WXN].

193. Lo Se Todo TV, No Causa Contra los Imputados por el Asesinato de Macho Camacho, Youtube, at 2:24 (Oct. 5, 2022), https://www.youtube.com/watch?v=3UfTicDIaI8 (on file with the *Columbia Law Review*).

194. See supra notes 179–190 and accompanying text.

rules of procedure, the Puerto Rican Constitution, or localized politics. In the words of one Puerto Rican jurist, "From a legal point of view, we were basically federalizing the island completely. Local courts weren't doing their job."[195] At the same time, there was a growing consensus that the proper administration of justice in local courts, too, was an obstacle to successful prosecutions. The "local government had to concede and accept that they did not have the resources, the money, power, nor the procedural mechanisms to deal with what was going on."[196] The people of Puerto Rico were demanding justice, and the federal government was ready to provide it.

1. *The MOU and Subsequent Amendments.* — The conversations between the PRDOJ and USAO resulted in the signing of a Memorandum of Understanding between the entities in 2010 with the primary goal of decreasing the murder rate and other violent offenses. The MOU attempted to achieve that goal by giving federal prosecutors primary jurisdiction over certain offenses and streamlining communication between the federal and local police and prosecutors.

According to the MOU,[197] the USAO would gain primary jurisdiction over certain weapons offenses, drug trafficking offenses, carjackings, robberies, and sex offenses.[198] But federal prosecutors still retained discretion over which cases to accept or decline. For example, one provision of the MOU provided that nothing in the agreement precludes the USAO from declining a case over which it has primary jurisdiction.[199] Other provisions offer nonbinding guidelines for accepting or declining a case, which was intended to provide federal prosecutors discretion to return a case to local prosecutors. And while the MOU is not legally binding, the parties agreed to act in accordance with its terms, and should a dispute arise as to which entity should take a case, there is an understanding within the USAO that the document will prevail.[200]

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195. Interview with G, supra note 182.

196. Id.

197. The current version of the MOU is confidential. One attorney with internal knowledge expressed hesitancy to publicize the MOU in fear of the text being used against the federal and local prosecutors. They noted that "defense counsel can get creat[ive]." Interview with E, supra note 36.

198. Mariana Cobián, Con Refuerzos Fiscalía Federal Para el 2014, El Nuevo Dia (Dec. 29, 2013) (on file with the *Columbia Law Review*); Interview with D, supra note 33. It bears noting that the PRDOJ had made a prior agreement for the federal government to prosecute carjackings involving death since at least 2001. See U.S. DOJ, The Federal Death Penalty System: A Statistical Survey (1988–2000), at 4 (2000), https://www.justice.gov/archives/dag/survey-federal-death-penalty-system (on file with the *Columbia Law Review*). The lack of transparency with respect to the MOU is perplexing. This is a document that represents the objectives of both federal and local governments, yet the entities keep it under lock and key.

199. Interview with E, supra note 36.

200. Id.

The MOU also streamlined collaboration between federal and state investigatory agencies.[201] Before the MOU, for example, the Puerto Rico Police Department (PRPD) conducted initial investigations and later referred the case to a federal agency. That still happens to a certain extent. But under the MOU, the PRPD is instructed to contact the relevant federal agency as soon as it has any indication that there could be federal jurisdiction.[202] That change allows the federal agency to take over the investigation from the outset. Further, the MOU provides several point persons for communication between the entities. If the PRDOJ needs to discuss a matter with the USAO, the MOU will direct the PRDOJ to the exact person that covers those types of cases or issues. Apart from streamlining investigations, officials hope that the MOU can increase collaboration between the prosecutorial entities.

Shortly after signing the MOU, U.S. Attorney Rodríguez-Vélez would make clear that it was not set in stone. In fact, she announced that "new initiatives" were in the pipeline and the enumerated offenses assigned to federal authorities would change over time.[203] The confidential MOU has been updated on several occasions, including in 2017 and in 2020.[204] Of note, the 2017 MOU expanded a prior practice wherein the PRDOJ and other local governmental entities loaned out some of their attorneys to the USAO. Those attorneys serve as Special Assistant United States Attorneys (SAUSA) and have the same roles and responsibilities of AUSAs. The only difference is that Puerto Rico, not the federal government, pays their salaries.[205] By loaning out these government attorneys, the Puerto Rican government bolsters the resources and prosecutorial power of the federal government while draining its own financial and human resources.

In 2020, the PRDOJ and USAO signed an amended MOU in which the PRDOJ decreased its commitment of Puerto Rican government attorneys on detail to the USAO from ten attorneys to five.[206] The contents

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201. There has always been plenty of cooperation between the federal and local governments in Puerto Rico. Throughout the 2010s, they continued their involvement in several strike forces that focused on violent crime like the Caribbean Strike Force. There was also a committee on fraud, waste and abuse, and public corruption. Interview with D, supra note 33.

202. Limarys Suárez Torres, Refuerzo Federal a la Lucha Contra el Crimen, El Nuevo Dia (Feb. 3, 2010) (on file with the *Columbia Law Review*).

203. Osman Pérez Méndez, Más Iniciativas Contra el Crimen, El Nuevo Dia (Oct. 15, 2011) (on file with the *Columbia Law Review*) (author trans.).

204. Puerto Rico y el Gobierno Federal Firman Acuerdo Para Reforzar la Lucha Contra el Crimen, Microjuris al Día (Feb. 1, 2017), https://aldia.microjuris.com/2017/02/01/puertorico-y-el-gobierno-federal-firman-acuerdo-para-reforzar-la-lucha-contra-el-crimen/ [https://perma.cc/W6BC-ADBD]; Interview with E, supra note 36.

205. Arnaud, Llegaron los Federales, supra note 3, at 891–92.

206. Interview with E, supra note 36. According to one person, the PRDOJ had budget issues and did not have enough prosecutors to loan out. Id. The USAO welcomes SAUSAs

of the MOU otherwise stayed mostly the same.[207] The USAO continued establishing formal points of contact and obligations between the entities. The offices created interagency coordinators between USAO and PRDOJ providing points of contact related to major areas like drug trafficking cases.[208] This facilitates the federal government's pursuit of Hobbs Act or carjacking cases when there is violence or someone has been killed. Likewise, the MOU now provides an easier process for local officials to alert the federal government when there is a killing or kidnapping, and guarantees that, per the MOU, federal prosecutors can evaluate whether a case should be a federal or local one.[209]

The MOU between the USAO for the District of Puerto Rico and the Puerto Rican Department of Justice was the product of a rise in violent crime, a perceived need for federal assistance and resources to better prosecute cases, and a desire to circumvent local procedural protections.[210] As expected, the MOU resulted in a significant increase in federal prosecutions and a much heavier criminal docket at the federal district court, causing even seasoned federal judges to express concern for the practice. In the words of federal district Judge José Fusté: "On September 20 [of 2010], this Court was surprised . . . [to hear that we] would now be state judges. Do you know why? Because there is now a Memorandum of Understanding between federal and state authorities that will transfer all firearm cases" to the federal district court.[211]

2. *The MOU in Action: Firearm Offenses*. — The Memorandum of Understanding incorporated a new strategy for targeting firearms offenses as a means of reducing the murder rate.[212] In a nutshell, every potential firearms case would be evaluated by federal authorities and, if possible,

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to supplement their staffing. But not all of the SAUSA spots have been filled. By one count, the PRDOJ had yet to fill four SAUSA positions. Interview with D, supra note 33.

207. There was not a large expansion in the types of offenses under the MOU because so many were already included. The MOU covers categories of offenses like drug trafficking, firearms offenses, Hobbs Act robberies, bank robberies, human trafficking, sexual exploitation of children, sex offender registration, Medicaid fraud, elder justice fraud, and misappropriation of federal funds cases. Interview with E, supra note 36; see also Interview with D, supra note 33.

208. Interview with E, supra note 36.

209. Id.

210. In the words of one federal official, "This was a cry for help"—local officials were desperate to do something about the crime rate, and the federal government was able to assist. Interview with D, supra note 33.

211. Suárez Torres, Arma le Cuesta, supra note 12 (quoting Judge Fusté). A member of the defense bar made a formal ethical complaint against Judge Fusté, alleging that his criticisms of the local courts and public statements about criminal adjudication violated the judicial code of conduct. Order at 1–2, In Re Complaint No. 01-10-90030 (1st Cir. Jud. Council 2011). The First Circuit found no wrongdoing. Id.

212. Interview with B, supra note 86; Interview with D, supra note 33. Although the murder rate on the Island has decreased, the role that the MOU played in that reduction is an open question.

taken by federal prosecutors.[213] This marked a significant change in the way those cases would be prosecuted. Firearm offenses had, up to this point, been considered local offenses, tried by local prosecutors in local courts under local law.[214] But with the federal prosecutors aggressively pursuing those cases under the MOU, most of those cases would end up in federal court.[215]

Take, for example, the "classic case" of the MOU in action: a felon in possession of a firearm.[216] The case usually begins with a traffic stop by the PRPD. While they run the person's name through their system, they observe or otherwise find that the detained person has a weapon on them. Not only do they have a weapon, but the name search shows that the person also has a state or federal felony conviction. The PRPD officer then immediately contacts the federal agency as delineated in the MOU (in this case, most likely the Bureau of Alcohol, Tobacco, Firearms and Explosives). That person is then taken into federal custody and charged with a federal crime.[217] Once upon a time, this same offense would have been charged locally, but under the MOU, most firearm possession cases are now directed into federal court. Once the PRPD contacts the federal authorities, they begin an investigation which is unmoored from the Puerto Rican Constitution, criminal procedure code, and local customs. The detainee, now facing federal charges, can be detained without bail, remain in jail during the entirety of pretrial proceedings, and is more likely to plead guilty.[218] Through this strategy, federal prosecutors would be able to get the person "off the street for two to three years while the process lasted."[219]

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213. Interview with B, supra note 86.

214. See id.; Interview with D, supra note 33.

215. Interview with B, supra note 86. The USAO and PRDOJ implemented the policy slowly at first. With the deliberate, slow start, the entities hoped to evaluate the new policy and gain some insight into more efficient strategies. The USAO primarily concentrated in San Juan, Carolina, and Ponce to see how the experiment went. The new strategy went so well (with an alleged fifty percent drop in murders in some areas) that they decided to expand it throughout the Island. Interview with D, supra note 33.

216. Interview with A, supra note 187.

217. See Interview with A, supra note 187; Interview with B, supra note 86; Interview with D, supra note 33.

218. Interview with D, supra note 33.

219. Id. Prosecutors would also take cases with botched investigations to achieve the same purpose. See id. (noting that the USAO would sometimes take on cases that "had problems" because "the [defendant] was so bad"). In other situations, federal agents would receive tips about potential criminal activity. Federal agents would then surveil the suspect, and when they thought their investigation established that they had weapons or drugs, a marked patrol car would follow the individual until they violated the state motor vehicle law. At that point, the officer would talk to the person, search them, and if they had a firearm, they would take them in and alert federal agents. See id.

While the PRDOJ essentially delegated firearms offenses to the federal government in 2010, the USAO scaled back prosecutions of firearm offenses a decade later in order to focus on other crimes like public corruption, which is likewise covered by the MOU.[220] This shift reveals that federal prosecutors are generally satisfied with the effect of the MOU. There has been a drop in murders on the Island, which some prosecutors attributed to the MOU and the more aggressive posture on firearms cases.[221]

C. *Territorial Federalism?*

To this point, the elucidation of the problematic consequences of federal prosecutions in Puerto Rico and the MOU has focused on the Island's territorial condition. But this story inevitably raises questions pertaining to a related doctrine: federalism. As explained below, federalism as a constitutional constraint is not applicable to the U.S. territories. Nevertheless, some commentators suggest that a doctrine of "territorial federalism"—a guiding principle that urges courts to respect local territorial governance as if they were states—could help ameliorate concerns with the representational chasm.[222] As argued here, federalism, and especially territorial federalism, does little, if anything, to ameliorate the troubling characteristics of the territorial criminal legal system.

Our system of federalism places the power to enact and enforce criminal offenses in at least two[223] entities: the states and the federal government. That much is clear. What is less clear is the extent to which those entities' prosecutorial prerogatives interact without offending constitutional principles. That tension has been subject to countless studies and has invigorated a sustained debate on the federalization of criminal offenses.[224] Traditionally, scholars, commentators, and even the

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220. See id. (noting that the PRDOJ is now more interested in public corruption cases); see also Interview with B, supra note 86 (noting AUSAs increased selectivity in choosing cases after the 2010s).

221. See Interview with B, supra note 86.

222. Developments in the Law, supra note 117, at 1623–32.

223. In some states, local municipalities enact and enforce their own criminal laws. See Brenner M. Fissell, Local Offenses, 89 Fordham L. Rev. 837, 854 (2020). For double jeopardy purposes, however, local municipalities are treated as part of the state governments. See supra notes 130–132 and accompanying text.

224. Dominant concerns about the federalization of crime focus mainly on either constitutional and historical arguments of the proper realms of federal-state jurisdiction or how prosecutorial discretion can be a mechanism for which the federalization of local crime can be increased or curtailed. See, e.g., Rachel E. Barkow, Our Federal System of Sentencing, 58 Stan. L. Rev. 119, 121–23 (2005) (discussing constitutional and policy limitations on federal crime enforcement); Brickey, supra note 26, at 1137–41 (explaining the historical increase in federal involvement in criminal law "extending beyond direct federal interests"); Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Just. 377, 382–90 (2006) (describing the federal historical

Supreme Court[225] have described the states and federal government as functioning in two exclusive spheres of influence. The traditional narrative suggests that the power to prosecute crime rests primarily with the states and not the federal government. Some parts of the Constitution certainly suggest as much. The Constitution does not explicitly create a general police power for the federal government, instead reserving that unenumerated power to the states.[226] Further, the Constitution prescribes power to the national government regarding specific criminal offenses. The Constitution gave the federal government power to "define and punish Piracies and Felonies committed on the high Seas, and [offenses] against the Law of Nations" along with the power to punish treason.[227] What readers will not find in the Constitution is an explicit power to define and enforce general criminal laws. Indeed, the Court "can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[228] Accordingly, under this

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government's involvement with violent crime); Michael A. Simons, Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization, 75 N.Y.U. L. Rev. 893, 899 (2000) (suggesting that prosecutorial discretion is the best vehicle for curbing federalization of crime enforcement). The focus of this debate on prosecutorial discretion and congressional overreach, however, has not only overlooked the territories—where federal power is synonymous with local power—but also largely overlooked democratization as a potential solution, especially for the territories.

225. See Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." (citing Jerome v. United States, 318 U.S. 101, 105 (1943))).

226. See Patterson v. New York, 432 U.S. 197, 201–02 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." (citation omitted)); United States v. Lamont, 330 F.3d 1249, 1252–53 (9th Cir. 2003) ("The Supreme Court has recently spoken with unusual force regarding the need to reserve to the states the exercise of the police power in traditional criminal cases . . . ." (citing United States v. Morrison, 529 U.S. 598, 618 (2000))); The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

227. U.S. Const. art. I, § 8, cl. 10 (piracies and felonies); id. art. III § 3, cl. 1 (treason). The Constitution also mentions the crime of bribery, but the crime is not defined, and the federal government is not explicitly given the power to define it. Instead, it is denoted as a ground for impeachment. U.S. Const. art. II, § 4. At least one scholar argues that the mention of bribery in this context signaled "that the federal government possessed a power to enact federal criminal legislation which extended far beyond the narrow explicit constitutional grants." Kurland, supra note 27, at 46–49.

228. *Morrison*, 529 U.S. at 618.

standard account, the administration of criminal laws rests primarily with the states.[229]

But that is not the whole story. It is true that the Constitution clearly placed the power to prosecute specific criminal offenses in the hands of the federal government. But the Constitution also implicitly provided the federal government with considerable latitude in creating federal criminal statutes. This power was well understood during the early republic. Take, for instance, the Necessary and Proper Clause.[230] The Clause makes no mention of criminal offenses. Yet the First Congress used the Clause to enact a series of offenses that were not described in the Constitution.[231] In the 1790 Crimes Act, Congress created criminal statutes proscribing bribery, perjury, the falsifying of court records, and obstruction of justice.[232] Moreover, Congress also used the Postal Clause[233] to enact a series of criminal offenses—including stealing mail[234]—all of which went well beyond any explicit grants of power.[235] The Commerce Clause would become the source of a litany of federal criminal statutes, many with no direct relation to any of the federal government's enumerated powers.[236]

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229. Congress, unlike the states, can create crimes against the United States only when it "act[s] within the scope of those [aforementioned] delegated powers." United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting *Screws*, 325 U.S. at 109); see also Kurland, supra note 27, at 3 n.6, 19 n.56, 54 ("Some Antifederalists asserted the narrow literal position that, except for the categories of crimes expressly enumerated in the Constitution—treason, counterfeiting, piracy, and offenses against the law of nations—there was no other federal criminal authority under the Constitution."); Smith, supra note 25, at 34–35 ("[T]he federal government had no inherent power but only limited, enumerated powers.").

230. U.S. Const. art. I, § 8, cl. 18 (noting that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

231. See Collection Act of 1789, ch. 5, §§ 34–35, 1 Stat. 29, 46–47 (repealed 1790) (prohibiting officers from receiving bribes or conniving at a false entry); Act of Sept. 1, 1789, ch. 11, § 36, 1 Stat. 55, 65 (prohibiting fraudulent certificates of records for ships and vessels); Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (codified as amended in scattered sections of 31 U.S.C.) (prohibiting members of the Treasury from personal financial connections to certain industries or property).

232. Crimes Act of 1790, ch. 9, § 14, 1 Stat. 112, 116–17 (stealing or falsifying court records); id. § 18 (perjury); id. § 21 (bribery); id. § 22 (obstruction of justice); see also David P. Currie, The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791, 61 U. Chi. L. Rev. 775, 833 (1994) (listing crimes defined in the Crimes Act of 1790).

233. U.S. Const. art. I, § 8, cl. 7.

234. Act of Feb. 20, 1792, ch. 7, § 17, 1 Stat. 237.

235. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) (acknowledging Congress's power to create criminal offenses under the postal clause); Peter J. Henning, Misguided Federalism, 68 Mo. L. Rev. 389, 417 (2003) (noting that there is no express grant of power under the Postal Clause to adopt criminal laws).

236. U.S. Const. art. I, § 8, cl. 3; see, e.g., Gonzales v. Raich, 545 U.S. 1, 22 (2005) (permitting Congress to prohibit the local cultivation and use of marijuana under the Commerce Clause). But see United States v. Lopez, 514 U.S. 549, 551 (1995) (finding that

In the words of Chief Justice John Marshall, "The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given."[237]

Although the first and subsequent Congresses used various constitutional provisions to create federal criminal offenses that were not specifically provided for in the text of the Constitution, it was not until after the Civil War[238] that the federal apparatus began expanding into the massive force it is today.[239] Since then, Congress has displayed a consistent commitment to creating new federal crimes concerning subjects like drug trafficking,[240] lotteries, interstate theft,[241] organized crime, international drug production and transportation, and, most recently, terrorism statutes and offenses targeting violent crime.[242] Some scholars and Supreme Court

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the 1990 Gun-Free School Zones Act exceeded Congress's power to legislate under the Commerce Clause because it was not sufficiently related to commerce).

237. *McCulloch*, 17 U.S. (4 Wheat.) at 417.

238. The federal criminal code remained rather small and subject to a decentralized federal prosecutorial body through much of the early republic. The Judiciary Act of 1789 provided for the appointment of the very first Attorney General of the United States as well as the appointment of U.S. Attorneys for each federal judicial district. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93. But there was not much for the Attorney General to do. He got paid less than any of the other cabinet members, essentially functioned as a counselor to the executive branch, and even had to find part-time work in order to keep his house warm. Moreover, it was not clear that the Attorney General was in charge of the U.S. Attorneys. See Jed Handelsman Shugerman, The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service, 66 Stan. L. Rev. 121, 130–32 (2014) ("In the very beginning, the Attorney General had no power over district attorneys or their appointment process."). The result was a disorganized system with several federal district attorneys acting in isolation.

239. See Blondel, supra note 27, at 1068–70 (discussing the increase in federal criminal enforcement after the Civil War). Congress has passed many criminal statutes, by some counts reaching over three thousand distinct offenses. John S. Baker, Jr., Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes, 54 Am. U. L. Rev. 545, 551 (2005). Another study puts the number closer to five thousand. GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson & Liya Palagashvili, The Heritage Found., Count the Code: Quantifying Federalization of Criminal Statutes 4 (2022), https://www.heritage.org/sites/default/files/2024-05/SR251.pdf [https://perma.cc/96CP-F3BC]. Some scholars argue that despite the large amount of criminal offenses, federal prosecutions have a nominal effect on criminal justice enforcement as compared to the states. See Susan R. Klein & Ingrid B. Grobey, Debunking Claims of Over-Federalization of Criminal Law, 62 Emory L.J. 1, 5 (2012) ("[I]n spite of the large increase in the number of federal criminal statutes, this growth itself has caused almost no impact on federal resources, nor has it destabilized the traditional balance of power between state and federal courts.").

240. See, e.g., Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, 551–56 (repealed 1970).

241. See, e.g., Carlin Act, Pub. L. No. 62-377, 37 Stat. 670 (1913) (codified as amended at 18 U.S.C. § 659 (2018)).

242. See Thornburgh et al., supra note 25, at 135–36. Notably, by some measures, "forty percent of all the federal criminal laws passed since the Civil War have been enacted since 1970." Id.

Justices have seen many of those federal crimes created after the Civil War as an encroachment into areas traditionally reserved to the states.[243]

Nevertheless, in practice, federal and state criminal law have overlapped in significant ways for a long time.[244] Moreover, much evidence suggests that the Founders may have even welcomed federal and state collaboration. For example, at the Founding, "Congress . . . left to the State Courts concurrent jurisdiction with the Federal Courts over certain offenses against the criminal and penal statutes of the United States . . . ."[245] Today, there may not be concurrent jurisdiction for criminal matters, but federal and state law enforcement authorities constantly collaborate on issues ranging from drug trafficking and kidnapping to terrorism.[246] Indeed, the realms of federal and state criminal law overlap significantly today, and the line between federal and state jurisdiction is a blurred one.

The enormity of the federal criminal legal apparatus is felt throughout the United States, and the territories are no exception. Puerto Rico in particular has felt the full brunt of the federalization of criminal law, similarly triggering discussions about the appropriate level of intervention by the federal government into local affairs.

Although the effects of expanded federal authority in Puerto Rico evoke concerns stemming from the modern debate on federalism, ultimately, the Island—and the other territories—rest on very different

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243. Id. at 145 ("Congress needs to understand that in federalizing criminal law—in essence providing concurrent state and federal jurisdiction—it's giving extraordinary discretion and power to prosecutors. That's the practical effect of many of these 'crime [du] jour, bill [du] jour' statutes becoming law."). Another argument is that Congress has ceased being concerned with crimes of national interest and instead focuses on crimes that are local in nature but concern high-profile events or perceived surges in crime—the crime du jour. How does Congress justify enacting statutes aimed at offenses with tenuous connections to national interests? The answer, critics posit, is a mistaken understanding of federalism. Id. at 138.

244. See Blondel, supra note 27, at 1069–70 ("This era also saw the first drug regulations, which . . . emerged locally and federally simultaneously."). For example, federal statutes criminalizing the use and production of certain drugs emerged almost simultaneously with state analogues. Indeed, "[f]rom the outset, federal agents partnered with the locals to enforce federal laws"—a relationship that exists to this day. Id.

245. Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 545 (1925). This was due in part to Congress's hesitance to create inferior federal courts. The thought process was that state courts were able to adjudicate federal questions, and those decisions could then be appealed to federal tribunals. This practice fell out of favor after Congress created local federal courts. Congress also eventually gave sole jurisdiction, by statute, over federal criminal offenses to the federal district courts. See 18 U.S.C. § 3231 (2018).

246. See Bridget A. Fahey, Data Federalism, 135 Harv. L. Rev. 1007, 1018 (2022) (explaining how federal and state law enforcement officials sometimes "agree to share data they gather about a target being investigated for both federal and state crimes" or "form joint policing task forces to collaboratively investigate an area of criminal activity . . . and share their corresponding information").

ground. As discussed above, Congress's plenary power over the territories provides a unique twist to the debate on the federalization of crime. For the territories, federal power is not a new phenomenon but rather the lifeblood of the territorial condition. In this instance, the effects of a complete federal police power emerge through the portal of plenary power over the territories. We must begin from the proposition that all prosecutorial power in the territories flows from the federal government. The Supreme Court has made this point patently clear: "Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors . . . ."[247] Because Congress is the ultimate source of prosecutorial power, and therefore has the ultimate say in approving Puerto Rican criminal law, it follows that the federal government has a constitutional prerogative to prosecute offenses in Puerto Rico in ways in which it cannot do in the states.[248] Once there is an interest to intervene, the federal government is constitutionally empowered to do so as much as it wants.

Federalism as a guiding principle, then, can only be useful in the territories insofar as the federal government chooses to respect local governance. Indeed, that is precisely the animating ethos of what some commentators call territorial federalism.[249] Territorial federalism stands for the proposition that if the federal government recognizes that the territories in many ways mimic states, then federal courts could apply federalism constraints to the federal government as if the territories were states.[250] But applying federalism constraints to the territories in this manner is wholly deficient for at least two reasons. First, although the theory purports to have decolonial aims (mainly by spurring local

247. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 76–77 (2016).

248. Indeed, it does just that in the District of Columbia and in the U.S. Virgin Islands.

249. See Developments in the Law, supra note 117, at 1627 ("Territorial federalism . . . describes Puerto Rico's structural and functional progression toward a state-like level of self-governance."); cf. Price, supra note 31, at 665, 698 ("Tribes and territories . . . should enjoy the same autonomy in enforcing their own laws that states do in enforcing theirs."). For a discussion concerning consequences of repurposing the *Insular Cases* and the promise of more inventive statesmanship, see Christina Duffy Ponsa-Kraus, The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories, 131 Yale L.J. 2449 (2022) (arguing that the *Insular Cases* are an illegitimate and undesirable doctrinal vehicle for preserving the cultural practices of the people living in the unincorporated territories); Torruella, A Reply, supra note 11, at 104 ("'Territorial federalism' without political power is not federalism. It is just another hollow and meaningless name for the same colonial inequality to which the inhabitants of Puerto Rico have been subjected . . . ."(footnote omitted)).

250. Developments in the Law, supra note 117, at 1649, 1652–54 ("[A]n alternative approach begins to take shape . . . [u]nder this approach, the courts—cognizant of the vulnerability of unincorporated territories to politics in which they lack voting representation . . . —would recognize and protect territorial federalism through the application of a robust form of judicial review.").

governmental evolution), its effect would be to further delay any decolonial action by simply introducing a new experiment in territorial governance for another indeterminate period.[251] Second, the application of territorial federalism could be abandoned as quickly as it was applied, still leaving the territories at the whim of the federal government. As Professor David Helfeld, former Dean of the University of Puerto Rico School of Law, explained many years ago, the federal government can make promises to the territories, but those pledges do not entail an abdication of its constitutional power over the territories.[252] Furthermore, as explained above, the U.S. government has already treated Puerto Rico like a state in some ways, for example, by creating a parallel criminal legal system on the Island.[253] Nevertheless, the federal government continues to aggressively intervene on the Island. The experiment in territorial federalism, then, has in a sense already failed before it started.[254]

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251. Torruella, A Reply, supra note 11, at 67–68 (arguing that "territorial federalism" is not an acceptable solution to rectify the "egregious violation of [Puerto Ricans'] civil rights").

252. David M. Helfeld, The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico, 21 Rev. Juris. U. P.R. 135, 150 (1952) ("No more than a pledge of respect for unrestricted self-rule was possible, since it is doubtful if Cong[]ress could in perpetuity formally abdicate its plenary Constitutional power over the territories.").

253. In the words of the Supreme Court, Congress has "delegated" many of its powers to the territories, including Puerto Rico. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 75 (2016) ("[L]ocal prosecutors . . . exercised only such power as was 'delegated by Congress' . . . . Their authority derived from, rather than pre-existed association with, the Federal Government." (quoting Brief for Petitioner at 28, *Sanchez Valle*, 579 U.S. 75 (No. 15-108), 2015 WL 7294879)). Nevertheless, "the delegator cannot make itself any less so—no matter how much authority it opts to hand over." Id. at 77. But see Anthony M. Ciolli, United States Territories at the Founding, 35 Regent U. L. Rev. 73, 77 (2023) (explaining that Congress has never completely delegated their powers over the territories to territorial governments).

254. Indeed, the creation of the Commonwealth of Puerto Rico was essentially what supporters of territorial federalism are asking for. There was, at least superficially, a promise of non-intervention into local affairs. See, e.g., Arnaud, Llegaron los Federales, supra note 3, at 915 ("[R]epresentatives at the Constitutional Convention of Puerto Rico adopted resolutions explaining that Puerto Rico was not 'a state which is free of superior authority in the management of its own local affairs . . . .'" (quoting Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 40 (1st Cir. 1981))). But that promise held true only insofar as the federal government thought it prudent. See id. at 918–19 ("The rest of the legislative record reflects Congress' understanding that they were not, in fact, relinquishing control over Puerto Rico . . . . Rather, Congress imposed upon itself, at best, an aspirational goal of staying out of Puerto Rican local affairs, without creating a legal prohibition against doing so."); Torruella, A Reply, supra note 11, at 81–82 ("It soon became apparent that congressional perception about the entire matter centered on the general view that Congress's function was one of substantive oversight, not just one of rubber-stamping approval."). Nothing short of independence, statehood, or a true free association can force the federal government to completely respect a territory's home rule. Id. at 77–89 (discussing various ways in which Congress has exerted oversight of Puerto Rico's governance).

III. TERRITORIAL EXCEPTIONALISM IN CRIMINAL LAW?

The MOU was lauded by politicians, commentators, and prosecutors alike, although there was a contingent of less vocal dissenters. Those who supported the creation of the MOU saw the federal government as the only entity capable of lowering the crime rate, especially in the face of a local system that was perceived as inadequate and corrupt.[255] Some supporters viewed the MOU as a way to ensure that accused people would be imprisoned.[256] By freeing prosecutors from the protections of Puerto Rican law, federal prosecutors would be able to use the force of federal resources to ensure jail time for folks charged with federal offenses.

The fact that the federal government took on a greater role in prosecuting localized offenses did not violate any established norms.[257] In fact, it was quite the opposite. There seemed to have been an expectation that the federal government would step in once the local government could not deal with the rising crime rate. As one local intellectual leader described it, this is simply an outgrowth of the "colonial mentality" that is sometimes experienced on the Island.[258] On this view, the federal government is a competent entity that can solve important issues, while the local government is not.[259] As a result, federal interventions are not just common but welcomed.

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255. See Interview with B, supra note 86 (discussing corruption in the local system); Interview with I (n.d.) (on file with the *Columbia Law Review*) (discussing the local implementation of MOUs); see also United States v. Rivera-Ruiz, 43 F.4th 172, 176 (1st Cir. 2022) (racketeering conviction based on "corrupt group of PRPD officers who habitually stole money from the subjects of traffic stops and narcotics investigations, among other abuses"); United States v. Martínez-Mercado, 919 F.3d 91, 96–97 (1st Cir. 2019) (charges against former Puerto Rico Police officers/ATF Task Force officer for conspiring with other officers to break into an apartment to steal money and drugs); United States v. Díaz-Maldonado, 727 F.3d 130, 134–35 (1st Cir. 2013) (highlighting "Operation Guard Shack" charging seventeen law enforcement agents); United States v. Flecha-Maldonado, 373 F.3d 170, 172 (1st Cir. 2004) (discussing "widespread corruption within the Puerto Rico Police Department"). Claims of corruption or political nepotism in the judicial and criminal legal system are not new. Scholars and commentators have long criticized the highly politicized nature of choosing local judges on the Island. See, e.g., Trías Monge, El Sistema, supra note 65, at 174–75 (explaining that the political process plays an outsized role in the appointment of local judges).

256. See Interview with D, supra note 33 (explaining that even a failed federal prosecution would ensure incarceration of a person for several years pending proceedings).

257. Congress has recently, for example, created a fiscal control board in Puerto Rico that oversees and, to a large extent, controls the Puerto Rican government's budget decisions and approves local laws. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. 114-187, 130 Stat. 549, 553, 563–68, 570–73 (2016) (codified at 48 U.S.C. § 2101 (2018)).

258. Interview with C (n.d.) (on file with the *Columbia Law Review*).

259. Trías Monge, El Sistema, supra note 65, at 173–74 (cautioning against reliance on foreign influences in judicial administration and adjudication).

The perception of the MOU within the general public was a bit different. Oddly, the MOU is rarely discussed outside political circles and the Puerto Rican bar.[260] Crime has been the biggest worry on the Island for quite some time, and Puerto Ricans are concerned about violent crime in particular. The perception, then, is that most Puerto Ricans are indifferent to the manner in which criminal offenses are adjudicated as long as some entity does it.[261] Despite the MOU being mainly absent from the local political discourse, as explained below, increased federal prosecutions in Puerto Rico produce problematic consequences that bolster the neocolonial project.

A. *Territorial Criminal Legal System*

In the territorial criminal legal system, the federal government retains full power to intervene in local affairs while also retaining, and at times using, its capability to prevent local actors from prosecuting cases.[262] It is one in which, with or without an MOU, people are punished under laws they never had a say in creating, and at times disagree with. This system at times accommodates competing interests but is ultimately an expression of the federal government's power over local affairs. It is a violent embodiment of the territorial condition. By funneling cases to the federal district court, the MOU exacerbates key features of the territorial criminal legal system by subjecting even more people to an entirely different adjudicative landscape. Specifically, federal prosecutors are able to work around local constitutional protections,[263] subject defendants to a jury that is not representative of the Puerto Rican population, and seek punishments specifically prohibited under local law.[264] Further, federal prosecutors accuse people under statutes that they never had a say in creating. Lastly, the Double Jeopardy Clause and constraints on resources act as obstacles for local prosecutors seeking to vindicate local interests after a case makes it to the federal district court.[265]

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260. See Interview with F, supra note 187 (noting a lack of discussion about the MOU among the public).

261. See id. (discussing positive public perceptions of federal prosecutions); Interview with G, supra note 182 (noting public approval of federal law enforcement agencies' involvement).

262. See Arnaud, Llegaron los Federales, supra note 3, at 892–93 n.33 ("Puerto Rico is not only subjected to the general expansion of prosecutions . . . on the Island, but Puerto Ricans have no say in the creation of those laws nor in their enforcement. People in the mainland could ostensibly limit those types of prosecution through legislation . . . .").

263. See id. at 927–28 n. 217 ("The authority to treat Puerto Rico different is also manifested in the supremacy of federal statutes over the Puerto Rican Constitution even with respect to local matters.").

264. See id. at 885 n.1 ("Despite . . . specifically prohibiting the penalty in their Constitution, inhabitants of Puerto Rico are subject to the federal death penalty.").

265. The existence of the MOU and federal power on the Island produces palpable tensions, which are highlighted in this Article. Among these is a tension between effective

1. *Circumventing Local Rules.* — Local district attorneys' offices typically work with the federal government on investigations and federal prosecutions. What is unique to Puerto Rico, however, is that one of the explicit motivating factors for the MOU was the circumvention of local rules of criminal procedure.[266] The federal government's ability to disregard expressions of the local community through formal agreements speaks directly to the type of relationship the federal government has with its territories.

As previously explained, the Puerto Rican Constitution and local criminal procedure code provide accused people broader protections than available in the federal system. There are prohibitions on wiretaps, stricter speedy trial rules, and multiple robust pretrial hearings at crucial stages of proceedings.[267] These procedural protections have frustrated local officials who feel like they are working with their hands tied. The local rules add "more work" to prosecutors, purportedly leading to dismissals of cases or loss of witnesses.[268]

Another incentive for federalizing offenses was that most of those local procedural protections do not exist in federal court. As a result, many prosecutors laud the MOU precisely because the federal system lacks the broad protections available at the local level. As one prosecutor explained, the "general feel is that federal cases [are] more consistent in terms of delivering justice[,]"[269] and one of the primary reasons for this is because the local system has several procedural factors, like the initial hearing, that the federal prosecutor does not have to deal with.[270] There is also a prohibition on wiretaps and one-party recordings on the Island that makes it harder to gather evidence.[271] Prosecutions are easier on the federal side while many cases get dismissed for lack of probable cause at the local

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prosecutions at the federal and state level and the understanding that more prosecutions do not necessarily lower crime rates. This Article is not advocating for an increase in prosecutions. Indeed, a greater investment in Puerto Rico's infrastructure and the eradication of pernicious and outmoded federal laws like the Jones Act would bolster the Island's economic prosperity—objectives that are often tied to lower crime rates. The manner in which prosecutions occur on the Island today highlights the utter lack of democratic accountability, raises significant issues of representational criminal justice, and promotes the territorial condition.

266. Interview with A, supra note 187; Interview with D, supra note 33; Interview with E, supra note 36; Interview with G, supra note 182.

267. See supra notes 179–190 and accompanying text.

268. Interview with F, supra note 187.

269. Interview with B, supra note 86.

270. See id. (explaining the differences between the federal system and the local system, including the fact that the federal process implicates grand juries).

271. Id. (explaining how the wiretap ban on the island makes it more difficult to obtain a conviction).

level.[272] "Generally, federal cases work better. That's one of the reasons for trying to take on those gun cases."[273]

Not only does the MOU benefit prosecutions by placing them in federal court but federal prosecutors use bail as a system of incarceration. Take, for example, a person who is charged at the local level with several murders. That person will eventually be released pending trial under the local rules. But, if the federal government is also interested in that person, the federal government can charge them with "some discrete federal offenses," like a firearms offense, so they can keep the person incarcerated.[274] To be sure, the officials in the Puerto Rican government acknowledge that some local protections may stymie prosecutions. Nevertheless, the people of the Island remain supportive of those robust protections. For example, in 2012 then-Governor Luis Fortuño attempted to push a bill that would change the state constitution and eliminate the right to bail. The bill was soundly rejected, leaving the constitutional protection in place.[275]

In sum, through the MOU the federal government ignores the value expressions of the local criminal procedure code, and instead subjects Puerto Ricans to a federal system with deficient procedural protections for defendants.

2. *Juries.* — Another consequence of the MOU was that defendants in federal tribunals would now be subject to a substantively different jury than at the local level. To serve as a juror in federal court, a person must have a certain level of English proficiency—a level of proficiency that few Puerto Ricans possess. Some estimates suggest that somewhere between ten to fifteen percent of the local population possesses the requisite English proficiency, and those folks tend to be wealthy and white Puerto Ricans.[276] As a result, there is a perception that federal juries in Puerto Rico are not a jury of one's peers but instead a jury of the elite.[277] This

272. Id.

273. Id.

274. Interview with E, supra note 36.

275. Puerto Ricans Reject Constitutional Changes in Upset Vote, Reuters (Aug. 19, 2012), https://www.reuters.com/article/business/puerto-ricans-reject-constitutional-changes-in-upset-vote-idUSL2E8JK007/ (on file with the *Columbia Law Review*). In 2019, Governor Ricardo Roselló similarly attempted to impose legislative limitations on bail. This attempt also failed. Javier Colón Dávila, Insistirá en Limitar la Fianza, El Nuevo Día (Jan. 14, 2019), https://www.elnuevodia.com/noticias/locales/notas/rossello-insistira-en-limitar-la-fianza/ (on file with the *Columbia Law Review*).

276. See Gonzales Rose, Exclusion of Non-English Speaking Jurors, supra note 38, at 498, 509 (explaining the correlation between English language abilities and socioeconomic backgrounds in Puerto Rican communities).

277. Interview with C, supra note 258.

"elite" jury pool also tends to be more supportive of the federal government and more punitive than local juries.[278]

Prosecutors, on the other hand, tend to dismiss these criticisms as overbroad. It is undeniable, as one prosecutor explained, that you will likely not find "the kid who grew up in the projects and doesn't speak English" or any of the folks in that person's community in the federal jury pool.[279] But the English proficiency requirement is seen as a necessary evil, because it assures language conformity across the United States district courts.[280] Others expressed that the federal jury pool may actually be more beneficial to the community because "what you end up with is an educated jury pool. You have to speak English, which means you have education above high school."[281] Moreover, there is a perception that an increase in younger bilingual Puerto Ricans is transforming the jury pool.[282] In any event, prosecutors have a high degree of confidence in the existing jury pool and the procedures in place to choose them.[283]

Despite that degree of confidence, the English proficiency requirement fundamentally undermines one of the most democratic aspects of the criminal legal system: community condemnation. The constitutional right to a jury, as Laura Appleman explains, refers not only to a defendant's right to a jury of their peers but also to the community's right to be represented in a jury.[284] Indeed, "the right to a jury trial is grounded in the community's central role in deciding punishment for criminal offenders and in its ability to determine moral blameworthiness."[285] The community's right is central to adjudicating

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278. For example, interviewee C expressed such sentiments in an interview:

> Feds probably like it because it's good for the law enforcement people. Good for the pro-government people. The attorneys have a monopoly. A lot of local attorneys don't feel comfortable trying cases in English. Sometimes they speak Spanglish. The elite issue is a class thing. This a court for the good people. The elite, the toughest attorneys. But being tried by your peers means a totally different thing. If you look at the juror's income, social background, their race, their relation to the feds—that's not Puerto Rico. That's like 5% of the population.

Interview with C, supra note 258.

279. Interview with E, supra note 36.

280. Id.

281. Interview with D, supra note 33.

282. See Interview with E, supra note 36 (explaining how some people have observed an increase in younger jurors who are bilingual).

283. Interview with D, supra note 33; Interview with E, supra note 36. In the words of one interviewee, "I just want smart people connected to the community" on the jury. Interview with E, supra note 36.

284. Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 Ind. L.J. 397, 405 (2009).

285. Id.; see also U.S. Const. art. III, § 2; Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 11 (1998) (explaining that Article III's formulation of the jury trial right has a collective dimension).

criminal offenses because, as a historical matter, "liberal, democratic decision making vested in the jury's determination of blameworthiness relied on the community's role in linking punishment to the crime committed, so that the offender would feel more responsibility for her actions."[286] Indeed, the criminal jury is a quintessential civic duty at the very heart of a participatory democracy. The jury is an institution of democratic deliberation by which jurors "become active participants in governance—commanding the law to respond to the citizen's vision as the citizen seeks to conform to its strictures." [287] In the Federal District Court of Puerto Rico, however, most Puerto Ricans are prohibited from serving this vital democratic function.

It is no surprise, then, that the eligibility requirements and subsequent composition of the federal jury pool in Puerto Rico is controversial and the subject of much litigation.[288] The most common challenge is that the jury pool does not represent a fair cross section of the community, in violation of the Sixth Amendment's jury trial right. But the First Circuit has been patently clear that, even assuming that large portions of the population are systematically excluded from the jury pool, the interest in having all federal proceedings in English is paramount.[289] Put differently, Congress has instructed, and federal courts have accepted, that language uniformity in federal court proceedings is more important than the fairness of those proceedings. Subjecting more Puerto Ricans to federal trials, then, places them in courtrooms built upon the exclusion of their people.

3. *Double Jeopardy.* — The dual sovereign doctrine is another prominent part of the territorial criminal legal system that interacts with the MOU. In Puerto Rico, the MOU, in conjunction with the dual sovereign doctrine, can prevent local prosecutors from seeking concurrent or successive prosecutions. Moreover, as made clear by the history of the local penal code and *Sanchez Valle*, the entire existence of

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286. Appleman, supra note 284, at 404 (citing Blakely v. Washington, 542 U.S. 296, 309 (2004)).

287. Jenny Carroll, The Jury as Democracy, 66 Ala. L. Rev. 825, 829–30 (2015).

288. See Gonzales Rose, Exclusion of Non-English Speaking Jurors, supra note 38, at 518–24.

289. United States v. Gonzalez-Velez, 466 F.3d 27, 40 (1st Cir. 2006) (explaining that the English proficiency requirement is "justified by 'the overwhelming national interest served by the use of English in a United States court'" (quoting United States v. Aponte-Suárez, 905 F.2d 483, 492 (1st Cir. 1990))); United States v. Benmuhar, 658 F.2d 14, 18–20 (1st Cir. 1981) ("We consequently decide that the national language interest is significant[] [and] [a]ppellant therefore was not denied a representative jury in violation of the Sixth Amendment."); accord United States v. Candelario-Santana, 356 F. Supp. 3d 204, 207–08 (D.P.R. 2019). Apart from being deprived of a jury of their peers, many Puerto Rican defendants, who also do not speak English well, experience the entirety of their proceedings through the voice of an interpreter, further alienating the defendant and feeding the notion that they are being judged by a foreign entity that does not represent their community.

Puerto Rico's criminal legal system is still at the mercy of the federal government.[290] The dual sovereign doctrine, then, both constrains local prosecutorial capacity and also highlights the specter of federal intrusion into local criminal practice.

As previously explained, Puerto Rico is not a dual sovereign for double jeopardy purposes, which means that if a person is charged and prosecuted for a crime in federal court, local prosecutors cannot charge that person with the same offense and vice versa. Prosecutors do not seek successive prosecutions often, but they have certainly occurred. Indeed, *Sanchez Valle* is a perfect example. In that case, Puerto Rican prosecutors charged Sanchez Valle with selling a firearm. Shortly thereafter, federal prosecutors charged him under analogous federal statutes.[291] The inverse has also occurred. Take, for example, a case currently making its way through the First Circuit—*Núñez Pérez v. Rolon Suarez*.[292] In that case, defendant Núñez Pérez was charged by federal prosecutors with a carjacking resulting in death.[293] A few months later, Puerto Rican prosecutors charged him under corresponding carjacking and manslaughter statutes.[294]

Although the Double Jeopardy Clause certainly poses a legal obstacle for successive or concurrent prosecutions, collaboration between the PRDOJ and USAO, including the MOU, functions as a potential guard against unlawful prosecutions after *Sanchez Valle*. As one prosecutor explained, "*Sanchez Valle* hasn't been a big deal,"[295] although it has made it even more important for federal and local officials to work together.[296] Moreover, the MOU already channels many cases to the federal system. Unlawful successive prosecutions have not been problematic in practice because the MOU provides clear guidelines as to how the investigations of certain cases occur and what federal investigatory bodies should be alerted by local authorities. If the crime is covered by the MOU, then the local police will call the designated authority so that the federal government can

290. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 76–77 (2016).

291. Id. at 65.

292. 618 F. Supp. 3d 49 (D.P.R. 2022).

293. Id.

294. Id. at 55–56. The parties in that case agreed that the offenses were the same but disagreed about the retroactivity of *Sanchez Valle*. Id. at 69. Several other cases making their way through the First Circuit seeking the retroactive application of *Sanchez Valle* provide a sense of how often successive or dual prosecutions occurred on the Island. See, e.g., Rodriguez-Mendez v. United States, 16-cv-2683CCC, 2019 WL 4875301, at *1–2 (D.P.R. Sept. 30, 2019); Lopez-Rivera v. United States, 12-cr-656 (ADC), 2018 WL 5016399, at *2 (D.P.R. Oct. 16, 2018); Santana-Rios v. United States, 235 F. Supp. 3d 386, 387–88 (D.P.R. 2017), aff'd on other grounds, No. 17-1199, 2019 WL 13202902, at *1 (1st Cir. Apr. 1, 2019). On the ground, *Sanchez Valle* has also provided a vehicle for people who had been convicted of analogous crimes at the federal and local level to seek relief.

295. Interview with A, supra note 187.

296. Interview with E, supra note 36.

evaluate the case initially. If the federal agency is interested in the case, then it will arrest the suspect and federal prosecutors will charge them with a federal crime. If it is not interested, then the local police department and prosecutors handle the case. Because of this arrangement, a person now seldom gets prosecuted for the same crime in both jurisdictions.[297]

Moreover, from the federal prosecutor's perspective, the double jeopardy bar has not proven problematic because prosecutors can simply file different charges stemming from the same offense.[298] Prosecutors must only ensure that any subsequent charges consist of crimes with different elements under the low bar established by the Supreme Court in *Blockburger v. United States*.[299] AUSAs have, on occasion, "recycle[d]" failed local prosecutions by simply charging a person federally with different crimes.[300] For example, several members of a gang were acquitted in local court for multiple murders in the infamous *massacre de Pájaros*. Once the local proceedings ended, federal agents arrested the acquitted defendants on federal charges. They all pleaded guilty to federal drug trafficking charges soon thereafter.[301]

Further, the Double Jeopardy Clause does not prevent federal prosecutors from using state convictions as predicate offenses. For example, federal felon in possession of a firearm charges often stem from cases in which the defendant had a state conviction. Another common

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297. Interview with A, supra note 187; Interview with B, supra note 86. Further, even before the MOU, the federal and local governments cooperated substantially. For example, many federal investigations are done by local Puerto Rican police officers on *destaque*, or on detail, with different federal agencies. Other times, officers on joint task forces, composed of both local and federal police officers, conduct the investigations. There have been long-standing task forces like the Organized Crime Drug Enforcement Task Force (OCDETF) and the High Intensity Drug Area program (HIDA). These are ways to encourage joint coordinated efforts to combat drug trafficking and violent crime. Interestingly, on these task forces, many local officers work alongside federal agents. The federal agents have a four-year tour, so there is a turnaround. But the local police officers have longevity, and as a result, are the "lifeblood" of the task force. Because of their longevity, local folks on the task force know the culture and the Island better. Given the considerable overlap, local and federal investigators are constantly exchanging information. As a result, when charges are filed, people in other agencies will invariably find out about the case. Interview with A, supra note 187. Now with the MOU in place, there is also added coordination between prosecutors.

298. United States v. Almonte-Núñez, 963 F.3d 58, 70–71 (1st Cir. 2020) (finding that federal offense of brandishing a firearm during a crime of violence and Puerto Rican offense of intentionally aiming a firearm towards another person were separate offenses); Interview with D, supra note 33; Interview with G, supra note 182.

299. 284 U.S. 299, 304 (1932).

300. Interview with G, supra note 182. As one person explained, prosecutors still want to be cautious when filing subsequent cases to prevent creating inconvenient precedent. As a result, whenever there is a close call regarding elements being similar, the prosecutorial entities communicate with each other. Interview with D, supra note 33.

301. Limarys Suárez Torres, El Juez Fusté Arremete Contra Cortes Boricuas, El Nuevo Dia (Nov. 13, 2010); see also Interview with E, supra note 36; Interview with G, supra note 182.

example is conspiracies. A person may plead guilty to charges under local law, and federal prosecutors can charge a long-term RICO conspiracy and include those state convictions as overt acts.[302]

Importantly, *Sanchez Valle* certainly served to clarify Puerto Rico's territorial status. The Court explained that Puerto Rico remains a territory and that its power to prosecute local crime derives from the federal government.[303] The Court noted that Puerto Rican prosecutorial "authority derived from, rather than pre-existed association with, the Federal Government" and that although "the Commonwealth's power to enact and enforce criminal law now proceeds" from the Puerto Rican Constitution, that only made Puerto Rico "the most immediate source of such authority."[304] The federal government permitted Puerto Ricans to create a constitution that Congress then amended and approved. "That makes Congress the original source of power for Puerto Rico's prosecutors."[305] The Court's doctrine exudes an air of control that perpetuates the colonial mentality that the federal government remains the most legitimate authority on the Island.[306] Further still, the Court's language confirmed that Puerto Rico's entire criminal structure emanates from Congress. Under this logic, even local laws are ultimately expressions of the same sovereign: the federal government.[307] Consequently, the federal government holds ultimate control over Puerto Rican criminal affairs. Although it is unlikely that the federal government would intervene to such an extent as to alter local criminal laws, Congress's recent creation of the fiscal control board in Puerto Rico[308] is a reminder that even unlikely events may come to pass in moments of crisis.

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302. Interview with E, supra note 36.

303. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 75–76 (2016). In a recent case, Justice Clarence Thomas suggested that the Court's characterization of Puerto Rico's sovereignty extended well beyond the Double Jeopardy Clause. The rest of the Court's territorial jurisprudence certainly supports that suggestion. See Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, 143 S. Ct. 1176, 1188 (2023) (Thomas, J., dissenting).

304. *Sanchez Valle*, 579 U.S. at 75–76.

305. Id. at 76.

306. See Arnaud, Dual Sovereignty, supra note 42, at 1666–68.

307. Although Congress approved of Puerto Rico's internal governance, suggesting that those rules are, in essence, federal laws, absent when a court sits in diversity jurisdiction, local laws and rules of procedure only apply in local courts. Federal prosecutors are not bound by them because, like in the states, prosecutions in federal district court are subject to the federal rules of civil and criminal procedure. United States v. Long, 118 F. Supp. 857, 859 (D.P.R. 1954).

308. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114–187 (2016). This statute created a presidentially appointed fiscal control board that has total control over the Island's budget and laws. The board members are territorial officers who do not need to be appointed with the advice and consent of the Senate. They also answer to the President, not the Governor of Puerto Rico, despite the control board technically forming part of the Puerto Rican government. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1666 (2020).

Taken together, the MOU interacts with the dual sovereignty doctrine in ways that limit local prosecutorial power and justify future federal intervention in local criminal practice. The MOU increases cooperation between federal and local authorities and ensures that a person accused of certain violent offenses is only prosecuted in one venue (federal court), producing the effect of largely avoiding double jeopardy violations. Although this is certainly a normatively beneficial result in the context of limiting mass incarceration, this practice effectively preempts certain local prosecutions, subjecting more people accused of violent crimes to the federal forum that does not represent local voices. Further, the Supreme Court's dual sovereignty jurisprudence continues emphasizing the federal government's power to unilaterally intervene in local criminal practice if it deems it necessary.

4. *Representative Criminal Justice.* — Another important aspect of the territorial criminal legal system that is exacerbated by the MOU is that of representative criminal justice. There is a representational chasm between federal criminal statutes and the people of Puerto Rico. That chasm exists principally because Puerto Ricans lack federal voting rights, and consequently, they have never had a say in the application of any federal criminal statutes.[309] That representational void persists because the federal government refuses to extend federal voting rights to any of the territories.[310] The MOU exacerbates this issue by imposing the federal system onto a greater number of Puerto Ricans.[311] The representational chasm is clearly manifested through the mismatch between federal and local expressions of the community through criminal sanctions and procedures. Although local and federal statutes prohibit much of the same misconduct, the sentences vary, in some cases significantly. Moreover, the

309. On the ground, the issue of representative criminal justice is far from the public eye. Most people "don't care who the FBI is or the AUSAs . . . [they] don't see the colonialism in that sense. They see it more in the not voting for president . . . ." Interview with C, supra note 258.

310. Arnaud, A More Perfect Union, supra note 8, at 100–09. There is a vein of criminal procedure scholarship examining democracy as a major tool for criminal justice reform. This democratizing literature is crucial for interrogating the modern role and limits of public participation in criminal law. One powerful argument sees an increase in public participation in the criminal legal system as a check on an excessively punitive system. E.g., Joshua Kleinfeld, Manifesto of Democratic Criminal Justice, 111 Nw. U. L. Rev. 1367, 1397–1400 (2017). Another equally incisive observation argues that our current criminal legal system produces antidemocratic results by limiting those who can participate in it, and democratizing that system would provide marginalized communities with an arrangement that is fairer along racial and class lines. Jocelyn Simonson, Radical Acts of Justice: How Ordinary People Are Dismantling Mass Incarceration, at xiii–xvi (2023); Jocelyn Simonson, Democratizing Criminal Justice Through Contestation and Resistance, 111 Nw. U. L. Rev. 1609, 1610–11 (2017). This is an important debate that is relevant to the U.S. territories and provides helpful warnings about the pitfalls that a facially democratic criminal legal system faces. Although helpful, at the moment, the federal criminal legal system in Puerto Rico is not a forum that is subject to effective democratic governance to begin with.

311. Interview with G, supra note 182.

local penal code is a manifestation of the Puerto Rican community,[312] while federal statutes have been imposed on the Island.

One of the clearest examples of the representational chasm is seen through the application of the death penalty in federal courts. Federal prosecutors seek the death penalty in Puerto Rico,[313] even though it has not been applied on the Island since 1927 and was abolished by the local legislature in 1929.[314] Although the death penalty is still a permissible sanction at the federal level, it is prohibited under the Puerto Rican Constitution. The majority of Puerto Ricans are undoubtedly against the death penalty.[315] And the rejection of that sanction plays out in the federal courts. For example, in 2013, federal prosecutors sought the death penalty against Alex Candelario-Santana, who had been convicted of killing eight people and an unborn child at the grand opening of a bar called *La Tómbola*.[316] Candelario-Santana and some accomplices arrived at the bar and immediately opened fire on the crowd outside of the establishment.[317] Candelario-Santana then entered the bar and let the patrons know that nobody was getting out alive.[318] He opened fire on the crowd inside the bar.[319] Despite the grisly details of what would be known as the Tómbola massacre, a Puerto Rican federal jury declined to impose the death

312. See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 406–14 (1958) (explaining how legislatures frame their criminal laws to reflect societal moral values); Erik Luna, Principled Enforcement of Penal Codes, 4 Buff. Crim. L. Rev. 515, 537 (2000) ("Law expresses the values and expectations of society; it makes a statement about what is good or bad, right or wrong.").

313. United States v. Pedró-Vidal, 991 F.3d 1, 3 (1st Cir. 2021); Interview with I, supra note 255.

314. Ricardo Alfonso, The Imposition of the Death Penalty in Puerto Rico: A Human Rights Crisis in the Path Towards Self-Determination, 76 Rev. Juris. U. P.R. 1077, 1085 (2007). Although a Puerto Rican jury in federal court has never sentenced someone to death, the threat of death is significant. As one person explained, defense counsel would never advise a defendant to gamble on their life, even in Puerto Rico. If DOJ certifies the death penalty in a case, it would be unethical for defense counsel to instruct their client that the possibility of receiving death is zero. As a result, the specter of receiving the death penalty is an important factor when considering a plea deal. Interview with J, supra note 39.

315. See Adam Liptak, Puerto Ricans Angry that U.S. Overrode Death Penalty Ban, N.Y. Times (July 17, 2003), https://www.nytimes.com/2003/07/17/us/puerto-ricans-angry-that-us-overrode-death-penalty-ban.html (on file with the *Columbia Law Review*) ("In general, Puerto Ricans are massively against the death penalty . . . ." (quoting Puerto Rican Senator Kenneth McClintock)); see also United States v. Acosta-Martinez, 252 F.3d 13, 19 (1st Cir. 2001) (acknowledging "Puerto Rico's interest and its moral and cultural sentiment against the death penalty").

316. Press Release, DOJ, Puerto Rico Man Sentenced to Life in Prison for 2009 Mass Shooting (Aug. 28, 2013), https://www.justice.gov/usao-pr/pr/puerto-rico-man-sentenced-life-prison-2009-mass-shooting [https://perma.cc/75HF-FP2G].

317. Id.

318. Id.

319. Id.

penalty.[320] Though this federal jury didn't impose the death penalty, it remains a potent bargaining chip for federal prosecutors.[321]

Next, take the sentences for carjackings—a crime covered by the MOU. The sentences vary substantively between the Puerto Rican Penal Code and federal statutes. If a person is convicted in federal court for a carjacking that results in death, the defendant can face life without parole or even death.[322] Under Puerto Rican law, a person convicted of a violent carjacking faces a fixed term of 25 years in prison and can never face the death penalty because it is explicitly prohibited under their constitution.[323] These differences are significant because "[w]hen the law fails to mirror the community's values, this lack of alignment undermines the law's moral credibility"[324] and "weakens the law's ability to dictate proper conduct."[325]

Apart from the incongruence of federal sentencing, funneling criminal offenses to the federal district courts also degrades the local criminal legal system.[326] While it is true that the PRDOJ and the USAO believed it was necessary to sign the MOU in 2010, the collateral damage on the reputation of the local courts and PRDOJ is manifest. Take, for example, one of the most recent high-profile cases on the Island: the 2023 murder of banking executive Maurice Spagnoletti. The federal interest in the case, at first, seemed odd. The prosecution's initial theory was that the defendants killed Spagnoletti after he had cancelled a work contract with them.[327] The murder occurred on a highway near San Juan while Spagnoletti was driving home from work. Nevertheless, federal prosecutors decided to take the case. The PRDOJ could have prosecuted the case themselves. But there is a perception that the local system

320. Jury Declines to Impose Death Penalty in Puerto Rico Murders, Reuters (Mar. 23, 2013), https://www.reuters.com/article/us-usa-deathpenalty-puertorico/jury-declines-to-impose-death-penalty-in-puerto-rico-murders-idUSBRE92N02020130324 (on file with the *Columbia Law Review*); Interview with J, supra note 39.

321. Interview with J, supra note 39 ("[T]he specter of death will always be a factor for pleas.").

322. 18 U.S.C. § 2119 (2018).

323. P.R. Laws Ann. tit. 9, § 3217 (2022) (defining carjacking as a third-degree felony).

324. Kevin K. Washburn, Federal Criminal Law and Tribal Self-Determination, 84 N.C. L. Rev. 779, 841 (2006).

325. Id. (internal quotation marks omitted) (quoting Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law 201–02 (Routledge 2018) (1995)). "The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years illustrates how a criminal law like this may effectively displace a policy choice made by the State." Jones v. United States, 529 U.S. 848, 859–60 (2000) (Stevens, J., concurring) (citation omitted).

326. Interview with G, supra note 182.

327. Jim Wyss, NJ Banker's Murder Case Ends With Guilty Verdict for Two Men, Bloomberg (May 11, 2023), https://www.bloomberg.com/news/articles/2023-05-11/nj-banker-s-murder-case-ends-with-guilty-verdict-for-two-men#xj4y7vzkg (on file with the *Columbia Law Review*). The contract was with a cleaning company that was charging an absurd monthly fee. It turns out that the cleaning company was involved in the drug trade.

currently lacks the resources to deal with these cases, as opposed to the federal one.[328] This in turn, "unfairly malign[s]"[329] the local system because it is seen as incompetent and subservient to federal power. Further, "[e]xcessive use of federal jurisdiction diminishes the prestige of local law enforcement authorities and thus may interfere with their development of responsibility for and capacity to handle complex matters or detract from the distinctive role states play as 'laboratories of change.'"[330]

From the local prosecutor's perspective, the local forum makes it more difficult for them to prosecute. And from the perspective of the general public, the PRDOJ is subservient and inferior to federal power.[331] From the defense perspective, the Puerto Rican government has chosen to forsake local community expressions and subject the people of Puerto Rico to the federal forum.[332] All the while, Puerto Rican community expressions are nonexistent at the federal level.

B. *Similar Arrangements*

The federal government has been present in what are typically considered local affairs for quite some time. Congress at the Founding passed criminal laws that overlapped with state offenses, and today federal and local agencies work closely together in the investigation and prosecution of criminal offenses. Dozens of task forces allow federal and local agencies to cooperate on issues like drug trafficking, firearm trafficking, and public corruption. But not all arrangements are created equal.

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328. Interview with G, supra note 182.

329. See Interview with E, supra note 36.

330. Brickey, supra note 26, at 1173 (citation omitted). Trust in the local criminal legal system in Puerto Rico has certainly eroded in part because of the federal government's interventions. See Wapa TV, ¿Se Puede Confiar en el Departamento de Justicia de Puerto Rico?, YouTube (Nov. 23, 2022), https://www.youtube.com/watch?v=M9M7LpdTl2E&t=187s [https://perma.cc/XAF6-4PUE]. Moreover, administrative issues in Puerto Rican courts have hurt the image of the local judicial system, although courts have worked hard with what they have. See Trías Monge, El Sistema, supra note 65, at 183–84.

331. Putting aside the constitutional arguments, the federal government's handling of Puerto Rico's bankruptcy bolsters the perception that the federal government is supreme on the Island. "[The] federal court has become the law of the land. Which is good from a social point of view, but terrible from a standpoint of state-federal relationship and horrible from a standpoint of mutual respect the systems should have for each other." Interview with G, supra note 182.

332. See Interview with J, supra note 39 (noting that Puerto Rico "has a newer constitution that is informed by a vision of human rights that's missing from the U.S. Constitution" and the "need to acknowledge that people in Puerto Rico understand their problems"); see also 2010 MOU, supra note 12, at 1.

The MOU in Puerto Rico resembles major policy strategies by the U.S. Department of Justice elsewhere. In 1991, the Attorney General for the United States initiated the nationwide Project Triggerlock whereby U.S. Attorneys and federal law enforcement agencies worked with local prosecutors and investigatory agencies to identify cases with federal firearms violations.[333] When local police officers identified a person with a possible firearm violation, they would alert the FBI or ATF. Federal prosecutors could then take the case and subject the defendant to harsher penalties under the federal sentencing guidelines. Much like the MOU in Puerto Rico, firearms cases in the 1990s were being funneled into the federal system. But, unlike the territories, the states were represented in creating federal law and related policies[334] and the local district attorney's office could still bring successive state prosecutions.[335] Even though the federal policy affected local prosecutions, it did not prevent local district attorney offices from prosecuting cases, nor did it subject defendants to statutes that did not represent their community's expressions.[336] While

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333. Ultimately, just a handful of jurisdictions implemented Project Triggerlock. The policy was extremely efficient in bringing successful federal prosecutions in the jurisdictions that implemented it. Emma Luttrell Shreefter, Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities, 21 CUNY L. Rev. 143, 160–62 (2018); see also Thornburgh et al., supra note 25, at 146 ("Operation Triggerlock . . . was designed to, in close cooperation between federal and state prosecutors, identify the most egregious gun violators and throw the book at them.").

334. Whether the states are adequately represented in federal policymaking as a practical matter is, at times, an open question. Some representatives may have their state's interests in mind, while others may answer to the interests of their financial contributors instead. The Supreme Court has taken the position that as a general matter, representatives in Congress do adequately represent their states. See Garcia v. San Antonio Metro. Transit Auth., 469 US 528, 551–53 (1985). But see Printz v. United States, 521 U.S. 898, 919–22 (1997) ("[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people . . . ."). The territories, however, do not have even the semblance of adequate representation in the political branches.

335. The Triggerlock policy is making a comeback recently. See Ian Marcus Amelkin, Don't Make a Federal Case out of Gun Possession; It Harms Black and Latino New Yorkers, Daily News (Feb. 3, 2022), https://www.nydailynews.com/opinion/ny-oped-federal-gun-possession-adams-biden-20220203-iwxrvaigivhvdhkluofjo7jqxq-story.html (on file with the *Columbia Law Review*) (last updated Feb. 4, 2022) ("Mayor Adams' plan for curbing gun violence . . . would expand a Department of Justice initiative launched in the 1990s called 'Project Triggerlock.'"); Larry Celona, Feds Helping N.Y. Put Heat on Gun Thugs, N.Y. Post (Sept. 25, 2000), https://nypost.com/2000/09/25/feds-helping-n-y-put-the-heat-on-gun-thugs/ [https://perma.cc/KUK7-F8RF] (praising Project Triggerlock for its punitive and deterrent effects in New York City).

336. Another agreement in 1997, Project Exile, is perhaps even more similar to the MOU. To combat the rising murder rate in Richmond, Virginia, the U.S. Attorney for the Eastern District of Virginia and the Richmond Commonwealth Attorney's Office worked

initiatives like Project Triggerlock are focused on narrow issues, the federal government is omnipresent in the territories.

Moreover, not all arrangements are agreements. Take, for example, Congress's actions with respect to Indigenous Nations.[337] The 1885 Major Crimes Act placed certain felonies that occurred in Indian Country within the jurisdiction of the federal government, exclusive of states.[338] The Act was and is a unique statute. It specifically directs the federal government to prosecute offenses that occurred within tribal lands and by an Indigenous person.[339] Arguably, "[T]ribes retain[ed] concurrent jurisdiction over those offenses, limited to the maximum sentence allowed under the Indian Civil Rights Act," and the Tribal Law and Order Act.[340] Nevertheless, the Act was a significant incursion into tribal sovereignty and deviated greatly from the weight of authority on federal Indian criminal law at the time which had "preserved exclusive tribal jurisdiction over

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together to prosecute felon in possession cases in federal court. As the official communiqué explained:

> The U.S. Attorney's Office, along with a Richmond Assistant Commonwealth's Attorney who is cross-designated as a [S]pecial Assistant U.S. Attorney, reviews cases involving felons with guns, drug users with guns, guns used in drug trafficking, and gun/domestic violence referrals and prosecutes these cases in Federal court when a Federal nexus exists and State prison sentences or pretrial detention is insufficient.

Off. of Juv. Just. & Delinq., DOJ, Project Exile, U.S. Attorney's Office—Eastern District of Virginia, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/gun_violence/profile38.html [https://perma.cc/RM5C-M5T9] (last visited Aug. 12, 2024).

337. Federal criminal statutes apply to actions that occur on Indigenous land. Jurisdictional questions concerning criminal adjudication in Indian Country are notoriously complicated—a "jurisdictional maze" in the words of Robert Clinton. Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 504 (1976). When a crime occurs on Indigenous land, deciphering which entity gets to prosecute is largely driven by whether the defendant or the victim are Indigenous or not. For example, if a crime occurs between Indigenous persons, the prosecution may be exclusively in the hands of the federal government, if it is a major crime, or the tribal government when not a major crime. See 18 U.S.C. § 1153 (2018) (listing "murder, manslaughter, kidnapping, . . . , felony child abuse or neglect, arson, burglary, robbery," and more as crimes "within the exclusive jurisdiction of the United States"). If a non-Indigenous person commits a crime against an Indigenous person, however, the federal government and the state government have concurrent jurisdiction. Id. § 1152; Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022). This jurisdictional maze is not only confusing but also diminishes the sovereignty of Indigenous nations and their power to confront harms that occur on their land. As an added wrinkle, Indigenous nations are considered as separate sovereigns for purposes of the Double Jeopardy Clause, potentially subjecting Indigenous persons to successive or concurrent prosecutions. Denezpi v. United States, 142 S. Ct. 1838, 1843 (2022).

338. 18 U.S.C. § 1153 (2018).

339. Id.

340. M. Brent Leonhard, Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds, 47 Gonz. L. Rev. 663, 674–75, 678–79 (2012).

intra-tribal crimes."[341] When we compare the law to the Puerto Rican MOU, however, there are some significant differences. First, the Major Crimes Act was not a negotiated outcome. The Major Crimes Act was foisted onto Indigenous people after a Supreme Court decision prevented the Dakota territory from prosecuting an Indigenous person.[342] Second, the process for prosecuting cases can be different. For example, an offense that occurs in Indian Country that is covered under the Major Crimes Act could first be reported by tribal officials to federal ones, and then accepted or declined by the USAO.[343] The USAOs covering Indian Country notoriously decline to prosecute referrals, declining around half of all cases between fiscal years 2005 and 2009[344] and are more prone to declining the case if it involves an adult sex crime.[345]

Puerto Rico's arrangement exists somewhere between policies like Project Triggerlock and the forced acquiescence to federal prosecutions in Indian Country. The government could have taken a similar route to the Major Crimes Act and simply instructed the PRDOJ of a new policy requiring more federal prosecutions. But instead of acting unilaterally, the federal government opted for collaboration. Taking this route is facially beneficial because it shows respect between the federal and Puerto Rican government. But the federal government's efforts in this regard appear insincere when considering the conscious objective of circumventing local law to effectuate its goals. Further, when viewing the MOU within the context of the territorial criminal legal system, it becomes clear that the PRDOJ is not meant to be the face of crime enforcement, even though they handle most prosecutions on the Island. Puerto Rico is the federal government's domain, and it is its prerogative to intrude as much as they want.

Taken together, the federal government has meddled, to varying degrees, with the enforcement of criminal laws of different political entities. The MOU in Puerto Rico is another expression of the federal

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341. Id. at 673.

342. Ex parte Crow Dog, 109 U.S. 556, 572 (1883). Tribes can, arguably, also prosecute certain offenses covered by the Major Crimes Act, although they do so less frequently because of the significant expenses associated with trial. Addie C. Rolnick, Recentering Tribal Criminal Jurisdiction, 63 UCLA L. Rev. 1638, 1652 (2016) (discussing concurrent jurisdiction of offenses enumerated in the Major Crimes Act); Kevin K. Washburn, American Indians, Crime, and the Law, 104 Mich. L. Rev. 709, 768–69 (2006) [hereinafter Washburn, American Indians] ("While there may be no formal bar to access, the federal regime's removal of the trial from the community where the crime occurred to a distance city creates a routine, de facto denial of the public access to trials.").

343. David Patton, Tribal Law and Order Act of 2010: Breathing Life Into the Miner's Canary, 47 Gonz. L. Rev. 767, 778–79 (2012); Washburn, American Indians, supra note 342, at 732–33.

344. U.S. Gov't Accountability Off., GAO-11-167R, U.S. Department of Justice Declinations of Indian Country Criminal Matters 3 (2010).

345. Susan Filan, Epidemic Hiding in Plain Sight, Ariz. Att'y, July/Aug. 2021, at 44, 46.

government's broad prosecutorial power. But in Puerto Rico, the MOU functions covertly, furthering federal power on the Island.

C. *Another Way Forward*

To achieve substantive change in the territories, solutions in the criminal and civil realms must cope with the democratic deficit because that representational chasm is the lifeblood of the territorial condition. With an eye towards mitigating that deficit, two solutions—one of immediate practicality and another of constitutional dimension—would ameliorate the existing territorial arrangement.

First, it would behoove the PRDOJ and USAO to renegotiate the MOU. While this solution would not solve the underlying democratic issue, it is a harm reduction measure that could ameliorate one manifestation of the democratic deficit. A key concern with the current MOU is that it was negotiated in the shadow of executive power. The negotiations were in secret and the contents of the MOU remain unpublished. These processes shut out important power brokers in the federal and local criminal legal system, including the defense bar, nonprofit organizations, the formerly incarcerated, and the public. By bringing more parties to the negotiation table in a public setting, the MOU could better represent the objectives of not just a few prosecutors but of the community as a whole. Practically, a public renegotiation could result in fewer offenses in the MOU, different diversion programs, or even the wholesale repudiation of an MOU. Moreover, by holding these negotiations publicly, Puerto Rican voters could either reelect or vote out the local leaders that support these types of arrangements.

But a more significant action is necessary to target the undemocratic nature of the current arrangement. The fact that such a solution has not emerged is not for lack of trying. The usual reaction to any issue in the territories, especially with respect to Puerto Rico, is a search for a definitive end to the territorial condition through either statehood, a new type of free association, or independence. Puerto Rico's future status has been debated ad nauseum[346] and the protracted conversation contributes to the existent territorial limbo. Puerto Ricans have participated in a series of nonbinding plebiscites, the results which have been mixed or have had their legitimacy seriously questioned. Recently, a new bill has yet again

346. See, e.g., Arnaud, Llegaron los Federales, supra note 3, at 945–47 (describing two proposed bills that would address Puerto Rico's future status, as well as non-Congressional sources that could possibly address the issue); Gary Lawson & Robert D. Sloane, The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered, 50 B.C. L. Rev. 1, 44 (2009); Ponsa-Kraus, *Aurelius* Concurrence, supra note 3, at 102–03; Juan Cartagena, What Would Statehood Mean for Puerto Rico's Criminal Justice Reforms?, Common Dreams (July 28, 2023), https://www.commondreams.org/opinion/puerto-rico-criminal-justice-reforms [https://perma.cc/74HH-2ZZ4].

emerged in Congress asking for a binding plebiscite to determine Puerto Rico's status, and there seems to be no solution in sight.[347] With each passing election cycle, the promise of a decolonial option seems further away.

The endurance of the territorial condition has not stopped Puerto Ricans from acting. Nonprofit organizations on the ground have taken matters into their own hands, attempting to marshal local resources to ameliorate a dearth in community-centric leadership.[348] Other organizations have tried harnessing the collective power of all the territories to confront the democratic deficit head-on through organizing and impact litigation.[349] These organizations, and others like them, have begun to work without the federal government's blessing precisely because the federal government constrains Puerto Rico's actions. In 2014, for example, the Puerto Rican legislature tried to pass a local bankruptcy statute to deal with its crippling debt; the Supreme Court swiftly struck down the measure.[350] Instead, as previously discussed, Congress established the Financial Oversight and Management Board, which controls the Island's budget and can veto local legislation.[351] In 2000, Puerto Rican legislators passed a new firearm statute with updated license requirements and stiffer penalties for firearm offenses. That statute has been called into question following the Supreme Court's decision in *NYRPA v. Bruen* but has so far survived challenges at the local level.[352] Further, several economic policies, such as the Jones Act, have effectively neutered the local economy for over a hundred years.[353]

Nevertheless, it is undeniable that some issues in Puerto Rico have a significant federal interest, especially in the criminal context. The Puerto

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347. Puerto Rico Status Act (2023) H.R. 2757, https://www.congress.gov/bill/118th-congress/house-bill/2757/text (on file with the *Columbia Law Review*).

348. See, e.g., FURIA Inc., ¿Quiénes Somos?, https://furiapr.org/quienes-somos [https://perma.cc/JX2F-VWLB] (last visited Aug. 13, 2024).

349. See, e.g., Who We Are, Right to Democracy: Confronting Colonialism, https://www.righttodemocracy.us/about (on file with the *Columbia Law Review*) (last visited Sept. 7, 2024).

350. See Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 117–18 (2016) (holding that Puerto Rico is a "State" for purposes of the Federal Bankruptcy Code's preemption provision).

351. See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661–62 (2020) (explaining that the president-appointed financial oversight board can prevent local laws from taking effect in Puerto Rico).

352. 142 S. Ct. 2111 (2022); see also Pueblo v. Rodriguez Lopez, 210 P.R. 752, 757 (2022).

353. Some scholars and commentators have called for extended waivers or the repeal of the Jones Act of 1920, which, by some estimates, costs the Island hundreds of million dollars a year. See Tom C.W. Lin, Americans, Almost and Forgotten, 107 Calif. L. Rev. 1249, 1292–94 (2019) (advocating an extended waiver of the Jones Act to mitigate the "significant economic strain" the Act places on the Territories); Marie Olga Luis Rivera, Hard to Sea: Puerto Rico's Future under the Jones Act, 17 Loy. Mar. L.J. 63, 127–28 (2018).

Rican Police Department, for example, has been under a federal monitorship for several years because of a culture of pervasive discrimination leading to constitutional violations.[354] Scholars and politicians attribute much of the violent crime on the Island to the drug trade that moves through Puerto Rico.[355] Because the international drug trade affects U.S. ports of entry, the federal government has a significant interest in investigating and prosecuting drug trafficking and other offenses that stem from the drug trade. Moreover, Congress can always authorize more prosecutorial intrusion through legislation. But, as explained above, funneling cases to the federal level to circumvent local rules and procedures undermines the legitimacy of those prosecutions. There is only a nominal criminal legal reform movement on the Island, leaving the political branches of the local and federal government to implement their policies with little resistance.

What, then, can be done at this moment when the status impasse meets problematic prosecutions? Because the federal government will always be involved in territorial governance, the second and most effective solution is to provide people living in Puerto Rico with full federal voting rights. This author has argued before that the nation should ratify a constitutional amendment providing the people of Puerto Rico and the other four unincorporated territories with full federal voting rights.[356] Each territory should be provided with two senators and representatives commensurate with their populations. A less drastic solution would be to provide full representation and voting rights through statute, although that type of legislation would be subject to constitutional challenge and possible revocation by a future Congress.[357] Notwithstanding the route,

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354. See C.R. Div., DOJ, Investigation of the Puerto Rico Police Department (Sept. 5, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf [https://perma.cc/JT6S-ALJ3] (explaining the federal investigation that led to the monitorship).

355. See Juan Nadal Ferrería, The Colossal Coast of Subsidizing Failure: How the Drug War Impacts Puerto Rico's Budget, 81 Rev. Jur. U.P.R. 1139, 1144–45 (2012) ("Most of the crimes committed in Puerto Rico are a direct consequence of the Drug War. It is commonly believed that the drug-related crime rate is between 65–75% of total crimes.").

356. See Arnaud, A More Perfect Union, supra note 8, at 103, 107–09. Others have also argued for a constitutional amendment providing full federal voting rights. See Sigrid Vendrell-Polanco, Puerto Rican Presidential Voting Rights: Why Precedent Should Be Overturned, and Other Options for Suffrage, 89 Brook. L. Rev. 563, 566 (2024); Neil Weare, Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia, 46 Stetson L. Rev. 259, 265 (2017).

357. For more on the mechanics and challenges of future legislation, see Luis Fuentes-Rohwer, Bringing Democracy to Puerto Rico: A Rejoinder, 11 Harv. Latino L. Rev. 157, 162 (2008) ("[I]f one accepts the view that Congress could and should grant citizens of Puerto Rico representation in the House by mere legislation, one must be reconciled to the fact that Congress could always take this representation away."); César A. López Morales, A Political Solution to Puerto Rico's Disenfranchisement: Reconsidering Congress's Role in Bringing Equality to America's Long-Forgotten Citizens, 32 B.U. Int'l L.J. 185, 218–22 (2014).

Puerto Ricans and residents of the other unincorporated territories should be afforded full representation and federal voting rights.

This proposal is both normatively and practically beneficial. This solution ameliorates many of the fundamental issues with the current balance of power between the federal government and the Island. It would provide Puerto Ricans with a voice in amending and creating new federal statues and rules of criminal procedure and evidence. Further, it would begin to alleviate the lack of representational criminal justice at the federal level. In essence, the representational chasm created by the territorial condition would begin to narrow. Practically, it would give Puerto Ricans an actual voice in Congress, permitting representatives to use their political capital to amend harmful federal rules, like the English proficiency requirement for jury service in federal court. Indeed, Puerto Rico is not the only place in the nation where English proficiency bars a segment of the population from serving on federal juries.[358] Representatives from Puerto Rico could band together with those from states like Texas, New Mexico, and Arizona, to eradicate the English proficiency requirement, and instead provide translation services for potential jurors, as is done in some state courts. Further, Puerto Rico's representatives could use their voting power to push for amendments to the Supplemental Security income program and other government programming that offer fewer funds to the territories than the states.

The Island, and the other territories, need an alternative to their never-ending odyssey through the territorial desert. For Puerto Rico, waiting for the status question to be resolved without an earnest attempt at ameliorating systems of inequality would simply perpetuate the current reality. Extending full representation and voting rights to the territories is a substantial step towards remedying those inequalities.

CONCLUSION

The federal government wields complete power in the U.S. territories and that power is evident in the field of criminal adjudication. The effects of that power were recently on display when the U.S. Attorney's Office for the District of Puerto Rico negotiated a memorandum of understanding in which the Puerto Rican Department of Justice gave the USAO primary jurisdiction over prevalent violent crimes on the Island. The result was an increase in the federal criminal docket, the increased prosecution and sentencing of Puerto Rican defendants under laws that do not represent the populace, a conscious disregard for the expressions of Puerto Ricans through local criminal law and procedure, and the optical displacement

358. Jasmine Gonzales Rose, Language Disenfranchisement in Juries: A Call for Constitutional Remediation, 65 Hastings L J. 811, 815 (2014) ("In 2009, eighty-seven percent of the [Limited English Proficiency] population was comprised of people of color. As applied to the current population, that is 25.67 million people of color. Furthermore, approximately forty-four percent of Latinos and forty percent of Asians are LEP.").

of local prosecutors from their essential functions. The MOU did come with certain benefits, however, chief among them being the facilitation of criminal convictions in federal courts and a formal agreement that helped parties navigate issues of double jeopardy. Nevertheless, the arrangement had the equally powerful function of bolstering federal presence in the territorial criminal legal system and furthering the U.S. neocolonial project.