# U.S. TERRITORIES AND THE CRIMINAL LAW CURRICULUM

Emmanuel Hiram Arnaud*

## *I. INTRODUCTION*

The five unincorporated territories of the United States live in the deep recesses of the American psyche.[1] Absent a cyber-attack,[2] natural disaster,[3] or economic meltdown,[4] the millions of Americans in the territories are typically overlooked, sentenced to live like "a disembodied shade, in an intermediate state of ambiguous existence."[5] Indeed, the existence of an unincorporated territory should be repugnant to our nation's founding narrative of freedom, self-determination, and sovereignty. Yet, the millions of Americans in the territories exist in a condition of political powerlessness—unable to vote for any meaningful federal representation,[6] nor for the President or Vice President,[7] and subject to constitutionally sanctioned discrimination.[8] It should

 Assistant Professor, Benjamin N. Cardozo School of Law. I would like to thank Sheri Johnson, Aziz Rana, and Stephanie Guzmán for their helpful comments on earlier versions of this Article. Thanks also to the editors of the *Stetson Law Review* for their excellent work.

1. *See Anti-colonialism*, ACLU, https://www.aclu.org/issues/racial-justice/anti-colonialism (last visited Jan. 18, 2025); United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) ("The United States includes five Territories: American Samoa, Guam, the Northern Mariana Islands, the U. S. Virgin Islands, and Puerto Rico.").

2. Hannah Ritchie, *Microsoft: Chinese Hackers Hit Key US Bases on Guam*, BBC (May 25, 2023), https://www.bbc.com/news/world-asia-65705198.

3. *Super Typhoon Yutu: One Year Later*, FEMA (Oct. 24, 2019), https://www.fema.gov/es/news-release/20200220/super-typhoon-yutu-one-year-later; *2 Years Later, U.S. Island Territories Still Hurting from Hurricanes Irma and Maria*, PBS NEWS (Dec. 26, 2019, 6:45 PM), https://www.pbs.org/newshour/show/2-years-later-u-s-island-territories-still-hurting-from-hurricanes-irma-and-maria.

4. Mary Williams Walsh, *Puerto Rico Declares a Form of Bankruptcy*, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/business/dealbook/puerto-rico-debt.html.

5. Downes v. Bidwell, 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting).

6. *Anti-colonialism*, *supra* note 1. Each territory sends a non-voting delegate to Congress. *Id.*

7. *Id.*

8. *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016); United States v. Vaello Madero, 142 S. Ct. 1539, 1543 (2022).

come as no surprise, then, that cases and policy debates concerning the U.S. territories are seldom found in law school casebooks.[9]

It should not be this way. In this Article, I make a case for why issues concerning the territories should be taught in law school courses and suggest a few ways in which federal criminal adjudication in the territories can and should be incorporated into the criminal law and procedure curriculum.[10] As I advance elsewhere,[11] criminal adjudication in the territories functions differently than in the mainland United States.[12] Using the framework of what I call the "territorial criminal legal system," I have begun mapping the contours of the unique prosecutorial ecosystem produced by the territorial condition.[13] Chief among the characteristics is the federal government's ability to treat the territories differently than the states.[14] This ability flows from the federal government's plenary—or complete and virtually unrestricted—power over the territories, which provides Congress with the ability to serve as both the federal and local territorial legislature when it so chooses.[15] Accordingly, Congress can choose to create federal district courts for the territories, allow federal prosecutors to prosecute local crime in the territories,[16] unilaterally apply criminal codes to a territory,[17] or create specialty courts to accommodate local conditions.[18] This ecosystem

9. Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the* Insular Cases *Should be Taught in Law School*, 21 J. GENDER RACE & JUST. 395, 413–16 (2018). *But see* FRANCISCO VALDES ET AL., CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY (2021) (offering a conceptual framework for understanding systemic justice and collectivized inequalities, including the colonial conquest of indigenous communities).

10. *See infra* pt. IV.B.

11. *See* Emmanuel Hiram Arnaud, *Colonizing by Contract*, 124 COLUM. L. REV. 2239 (2024).

12. *See infra* pt. IV.A.

13. *See infra* pts. III and IV.A.

14. Serrano, *supra* note 9, at 453.

15. *See generally id.* at 407–08 (explaining that because of Congress' plenary power, derived from the Territorial Clause, constitutional provisions seldom constrain congressional action in the territories).

16. United States v. Gillette, 738 F.3d 63, 72–76 (3d Cir. 2013); 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, 889–90 (2022).

17. *See* Dora Nevares Muñiz, *Evolution of Penal Codification in Puerto Rico: A Century of Chaos*, 51 REV. JUR. U. P.R. 87, 104–08 (1982).

18. *See, e.g.*, *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/5730365?objectPage=3 (last visited Jan. 18, 2025) [hereinafter NAT'L ARCHIVES CATALOG] (providing for the adoption of the judiciary and criminal laws in the newly created Northwest Territory); *see also* Serrano, *supra* note 9, at 428–30.

not only produces uncomfortable prosecutorial arrangements but also justifies its existence in the name of territorial rule.[19]

Below, I focus on how Puerto Rico and American Samoa are directly affected by their territorial relationship with the federal government[20] and how that relationship provides fertile ground for important discussions in criminal law and procedure courses that challenge fundamental norms of criminal justice such as democratic accountability, representational criminal justice, and the function of the jury.[21] As a preview, Puerto Rico and American Samoa stand on different ground with respect to criminal adjudication. They are both unincorporated territories of the United States, but only Puerto Rico has a federal district court;[22] American Samoa does not.[23] As a result, people accused of federal crimes in American Samoa must face their proceedings and trials elsewhere in the United States.[24] And even though Puerto Rico has a federal district court, most islanders cannot participate as jurors.[25] That is because the Jury Selection Service Act requires all federal jurors to have a certain level of English proficiency which about only ten percent of Puerto Ricans possess because the de facto language on the island is Spanish.[26] These two realities are a direct product of territorial governance.[27]

In the following pages, I encourage teachers of criminal law and procedure to use the territories as examples that challenge and complicate the traditional narrative of criminal law and procedure.[28] Incorporating the territories, however, goes well beyond adding a case or two. Indeed, it requires us to re-imagine or reconstruct essential narratives about our courses. In criminal law, this means challenging the criminal law as a democratic expression when, for example, the people of the territories have

19. Serrano, *supra* note 9, at 428–30.

20. *See infra* pt. III.

21. *See infra* pt. IV.B.

22. U.S. DIST. CT. FOR DIST. P.R., https://www.prd.uscourts.gov/ (last visited Jan. 23, 2025).

23. Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 325 (2008).

24. *Id.* at 326.

25. Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.–C.L. L. REV. 497, 498 (2011).

26. *Id.* at 498, 502.

27. *Id.* at 498.

28. *See infra* pts. II and IV.B.

never had a say in creating federal criminal statutes that apply to them. In criminal procedure, the territories require us to reflect on established parts of the class, such as the jury trial right, and rethink the meaning of community and how we conceive of inequality with respect to jury selection. This Symposium is about integrating the territories into the law school curriculum. When introducing territorial issues, we must think critically about how doing so complicates essential aspects of our established curriculum.

In Part II, I make the case for why issues concerning the territories should be taught in law schools. In Part III, I briefly describe the historical relationship between Puerto Rico, American Samoa, and the United States. In Part IV, I describe the parallel prosecutorial processes in the territories. I then explain how the current criminal adjudication arrangement in Puerto Rico and American Samoa challenges fundamental norms of our criminal legal system[29] and how these unique circumstances can be used in criminal law and procedure courses to not only create awareness of the U.S. territories but also to further interrogate our democratic project.[30]

## *II. HOW DID WE GET HERE?*

The fact that our jurisprudential narratives are bereft of discussions concerning the territories should be alarming. Although it may not seem like it today,[31] territorial acquisition and expansion were at the very heart of our nation's existence.[32] Indeed, the Europeans that came to North America did so with the common goal of staying.[33] That significant decision to stay not only lead to the displacement and dispossession of the indigenous populations whose lands the European colonizers forcefully acquired,[34] but it eventually produced colonies with allegiance to

29. *See infra* pt. IV.A.

30. *See infra* pt. IV.B.

31. *See* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 13 (2019).

32. *See id.* at 10.

33. Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 6–7 (2014) (explaining that settlers to North America came with the objective to occupy land, make it more profitable, displace the local population, and establish "a state over which they could exercise complete control"); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 11–12 (2010).

34. Saito, *supra* note 33, at 48–49.

the British Crown.[35] That initial thirst for land was never quenched. Even before the founding of the United States, the colonists fought a war over territorial expansion,[36] complained to the British Crown about its prohibition of westward expansion in the Declaration of Independence,[37] and created a federal territory before they ratified the Constitution.[38]

With that generational territorial desire in mind, the Founders provided a section in the Constitution devoted to territorial acquisition and governance, along with general guidance for admitting these future territories as states of the Union.[39] Once established, the republic continued its steady westward march, acquiring at least one territory every fifteen years.[40] The existence of these territories created unique constitutional issues,[41] prompting developments in our understanding of federal courts,[42] criminal procedure,[43] voting rights,[44] and citizenship.[45]

The territories also played a central role in the very reimagining of the United States as a democratic experiment and republican project.[46] For example, one thing not subject to much debate at the founding was the purpose of territorial acquisition, which was to create states of the Union.[47] Beginning with the Northwest Ordinance, Congress created a formula for territorial

35. *See Explore by Timeline: Colonial America and the Revolution (1565-1783)*, U.S. GEN. SERVS. ADMIN. (Sept. 20, 2024), https://www.gsa.gov/real-estate/historic-preservation/explore-historic-buildings/explore-by-timeline/colonial-america-revolution-15651783.

36. DANIEL M. FRIEDENBERG, LIFE, LIBERTY, AND THE PURSUIT OF LAND: THE PLUNDER OF EARLY AMERICA 95–96 (1992).

37. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) ("[King George III of Great Britain] has endeavoured to prevent the population of these States . . . [by] obstructing the Laws for Naturalization of Foreigners[,] refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.").

38. *See* NAT'L ARCHIVES CATALOG, *supra* note 18.

39. U.S. CONST. art. IV, § 3, cl. 2.

40. Sam Erman, *"The Constitutional Lion in the Path": The Reconstruction Constitution as a Restraint on Empire*, 91 S. CAL. L. REV. 1197, 1208–09 (2018).

41. *See id.*

42. *See* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828).

43. *See* Grafton v. United States, 206 U.S. 333 (1907); Puerto Rico v. Sanchez Valle, 579 U.S. 59 (2016).

44. *See* Igartua de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000).

45. *See* Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021).

46. *See* Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 776, 782 (2022).

47. *Id.* at 799–800.

acquisition that would remain in place for about a hundred years.[48] The formula was quite straightforward. The federal government would first acquire a territory through conquest, purchase, or treaty,[49] and then create the rules for its local internal governance through federal statutes called "organic acts."[50] These organic acts would then have certain markers, like population growth, that would trigger greater local autonomy in the territories,[51] eventually leading to the territory's admission as a state of the Union.[52]

But then came 1898. In April 1898, the United States engaged Spain in what would be known as the Spanish-American War.[53] At the end of the war, the United States could count the Philippines, Guam, and Puerto Rico as spoils of war after a decades-long hiatus from the practice of territorial acquisition.[54] The acquisition of these new territories—distant in geography and culture, racially dissimilar, and bereft of American influence—prompted a heated debate concerning the propriety and meaning of their acquisition and incorporation into the United States polity.[55] This was no private discussion. What to do with these new territories was a focal point of the presidential election of 1900,[56] in which President McKinley and his Manifest Destiny standard-bearer running mate, Theodore Roosevelt, "thoroughly trounced [their opposition] in what many considered to be a national plebiscite approving the annexations of these lands."[57]

The election was seen as a directive to keep the new territories.[58] But a question of constitutional dimension soon emerged: could the federal government govern these new distant territories differently than all prior territories? The Supreme Court confronted this and related questions in a series of turn-of-

48. *Id.*

49. JOHN W. HOWARD ET AL., LEGAL ANALYSIS: PUBLIC LANDS 47 (2015), https://www.justice.gov/usao-or/file/851711/dl.

50. Emmanuel Hiram Arnaud, *Dual Sovereignty in the U.S. Territories*, 91 FORDHAM L. REV. 1645, 1657 (2023).

51. *Id.* at 1659.

52. *Id.*

53. Erman, *supra* note 40, at 1217.

54. *Id.* at 1200, 1208–09.

55. *Id.* at 1209–10.

56. Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, U. PA. J. INT'L L. 283, 299 (2007).

57. *Id.*

58. *See id*.

the-century decisions known as the *Insular Cases*.[59] In these cases, the Supreme Court explained that, despite the Reconstruction Constitution's constraints,[60] some constitutional provisions are not always applicable to some territories.[61] Relying on indisputable racial animus, the Court explained that:

> 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; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.[62]

According to the Court, the racial and cultural differences between territories and the mainland could prevent the applicability of certain constitutional provisions.[63]

But the Court would go further. Fueled by xenophobia, the Supreme Court would establish in the *Insular Cases* what we know today as the doctrine of territorial incorporation.[64] According to

---

59. Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 798–800, 799 n.7 (2010). Although the *Insular Cases* did not quite present the issue so clearly, the Court used a series of cases dealing with tariffs, imports, and questions of criminal procedure to draw out a new theory of territorial incorporation. *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1, 200 (1901) (holding that Puerto Rico, after being acquired by the United States from Spain, was no longer considered a "foreign country" for purposes of U.S. tariff law); Downes v. Bidwell, 182 U.S. 244, 250–51 (1901) (finding that the Foraker Act, which charged duties on imported goods from Puerto Rico into the United States, did not violate the Uniformity Clause); Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922) (holding that the Sixth Amendment jury trial right does not apply to the unincorporated territory of Puerto Rico).

60. Erman, *supra* note 40, at 1198 ("[T]he constitutional transformations wrought by the Civil War and Thirteenth, Fourteenth, and Fifteenth Amendments . . . produced the constitutional regime that I term the Reconstruction Constitution, which dramatically moved the racially heterogeneous United States towards rights, membership, and equality.").

61. *See id.* at 1221.

62. *Downes*, 182 U.S. at 287.

63. *Id.*

64. Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows to Be True*: *Why Stare Decisis Is Not an Obstacle to Overruling the* Insular Cases, 53 COLUM. HUM. RTS. L. REV. 721, 764 (2022). This doctrine was first advanced by Abbott Lawrence Lowell in a law review article. Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155, 176 (1899). Justice White relied heavily on Lowell's

this doctrine, there were two types of territories: incorporated and unincorporated territories. And not all constitutional provisions are applicable to the unincorporated territories.[65] Further, in a reversal of over one hundred years of practice and precedent, not all territories were destined to become states.[66] Instead, only incorporated territories were state bound; meanwhile, unincorporated territories were not.[67] What made a territory unincorporated? The Court would look to congressional action and the treaties of acquisition for that answer, emphasizing how the treaties of acquisition defined the rights given to the inhabitants of the new territories.[68] Coincidentally, using this approach, all the territories acquired after the Spanish-American War were unincorporated.[69] In the *Insular Cases*, the Supreme Court completely reimagined the role of the United States as an imperial power and found a constitutional justification for it.[70] The Court created a new regime of territorial governance where not only are some constitutional provisions inoperable in certain territories, but the federal government can also hold those unincorporated territories in their subservient positions indefinitely.[71]

By creating a new relationship between territories and the federal government, the Supreme Court further undermined the United States' claim to an anti-imperialist constitution.[72] The *Insular Cases* expanded the constitutional acquisitive power to include the holding of colonial possessions in perpetuity[73]—an

ideas in his concurring opinion in *Downes*, see 182 U.S. at 287–344 (White, J., concurring), and that view would be adopted by a unanimous court in *Balzac*, see 258 U.S. at 305, 314. Torruella, *supra* note 56, at 308.

65. Erman, *supra* note 40, at 1221.

66. Arnaud, *supra* note 50, at 1659.

67. *See* Lopez-Morales, *supra* note 46, at 781 (quoting Boumediene v. Bush, 553 U.S. 723, 757 (2008)).

68. Torruella, *supra* note 56, at 308.

69. Arnaud, *supra* note 50, at 1656. Notably, the United States acquired Hawaii just before the end of the Spanish-American War, on July 7, 1898. Hawaii v. Mankichi, 190 U.S. 197, 209 (1903). The Supreme Court explained that Hawaii was an unincorporated territory until 1900, when Congress extended citizenship to its inhabitants. *Id.* at 211. Similarly, the Court explained that Alaska, which the United States purchased from Russia in 1867, was incorporated principally because the treaty of acquisition extended citizenship. Rassmussen v. United States, 197 U.S. 516, 522 (1905). The extension of citizenship, however, would prove insufficient to incorporate Puerto Rico. *See Balzac*, 258 U.S. at 309.

70. Erman, *supra* note 40, at 1221–22.

71. Arnaud, *supra* note 50, at 1656.

72. *See id.* at 1659.

73. Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting) ("The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,—the people inhabiting them to enjoy only such

action that seemingly contradicts the accepted American liberatory creed.[74] We have all heard the story and, if you grew up in the United States, you learned about it in school: the thirteen colonies rebelled against the British Crown precisely because the colonists felt like second-class citizens and had fallen victims to the Crown's imperial boot.[75] The United States acquired territories over time, but any differential treatment was temporary because they would eventually become states.[76] That the United States currently holds lands in territorial purgatory is simply the product of a unique historical moment and not representative of the country as a whole.[77] And this is precisely why the *Insular Cases* and issues of territorial governance must be incorporated into the law school curriculum—because these cases and their progeny contest and problematize fundamental tenets and understanding of the constitutional canon.[78]

It is interesting, then, that territorial issues are so far from the spotlight.[79] But that seems to be changing in academic and political circles with an increased number of scholars and

---

rights as Congress chooses to accord to them,—is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution."); *see also* Christina Duffy Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797 (2005) (explaining that the *Insular Cases* did not create a "Constitution-free-zone" but instead created a new type of domestic territory that could be governed and later relinquished).

74. Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 278 (2015).

75. *American Revolution Facts*, AM. BATTLEFIELD TR. (Nov. 14, 2024), https://www.battlefields.org/learn/articles/american-revolution-faqs.

76. Lopez-Morales, *supra* note 46, at 772. The Supreme Court has interpreted the Territory Clause, U.S. CONST. art. IV, § 3, cl. 2., as giving the federal government plenary power over the territories. Burnett, *supra* note 73, at 813. This, in a nutshell, means that Congress can not only treat the territories differently than states, but it can also "exercise[] the combined powers of the general . . . [and] state government[s]" when legislating on their behalf. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828).

77. *See* Burnett, *supra* note 73, at 799–801 (explaining that the United States' practice of annexing territory without any view towards statehood was without precedent and a product of the unique time period of the turn of the century).

78. *See* Aziz Rana, *How We Study the Constitution: Rethinking the* Insular Cases *and Modern American Empire*, 130 YALE L.J.F. 312, 316 (2020); *see also* Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 53 (2023).

79. There are compelling arguments supporting the view that the lack of attention on the territories is by design. *See* IMMERWAHR, *supra* note 31, at 15 (explaining that the issue is not due to "a lack of knowledge" but is caused by sidelining territorial materials); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Constitution of Difference*, 137 HARV. L. REV. F. 133, 134–35 (2024) (providing various explanations for why America's colonial history is not commonly included within the study of American constitutionalism).

commentators joining the conversation.[80] Despite this increased attention, those discussions are mainly approached through the civil lens.[81] Accordingly, issues of criminal law and procedure in the territories are often twice-ignored: in the territorial governance discussion and by mainstream discussions about criminal law, procedure, and the Constitution.[82] The territories, however, provide a unique perspective to our understanding of criminal law and procedure in the United States.

I am, by no means, the first person to critique the lack of the *Insular Cases* or cases about territorial governance in the law school curriculum, nor am I the first to teach about it in my courses.[83] Scholars like Christina Ponsa Kraus, Aziz Rana, Sam Erman, Susan K. Serrano, Luis Fuentes-Rohwer, Guy-Uriel Charles, and Sanford Levinson, among others, have long advocated for the inclusion of the *Insular Cases* in the law school curriculum, particularly the constitutional law canon.[84] They have also taught about territorial governance and the *Insular Cases* in their first-year and upper-level courses. I join their efforts and specifically call on teachers of criminal law and procedure to complicate their own narratives of the criminal legal system by looking at our nation's territories.

---

80. *See* Charles & Fuentes-Rohwer, *supra* note 79, at 134–35 (providing an extensive list of constitutional scholars regarding America's colonial history in relation to constitutionalism). *See generally* Lía Fiol-Matta, *Introduction to the "Future of the* Insular Cases*" Special Issue*, 53 COLUM. HUM. RTS. L. REV. 711 (2022) (summarizing recent scholarship concerning the *Insular Cases* and territorial governance); Rachel Valentina Sommers, *Introduction to the Special Issue on the Law of the Territories*, 131 YALE L.J. i (2022) (same).

81. *See, e.g.*, Rana, *supra* note 78 (primarily discussing the non-criminal, constitutional implications of settler-imperial dynamics); Blackhawk, *supra* note 78, at 53–55 (same).

82. There have been some recent notable articles concerning criminal adjudication in the territories. *See, e.g.*, Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 665, 698 (2013); Molly R. Case, *Status-Differentiated Access to Federal Habeas Relief for U.S. Citizens and Noncitizen Nationals Detained in American Samoa*, 66 ARIZ. L. REV. 233, 237 (2024).

83. I introduce issues of territorial governance in my first-year criminal law course, an upper-level survey course called Race and the Law, and an upper-level seminar on the U.S. territories.

84. Serrano, *supra* note 9, at 399; Colleen Walsh, *Reexamining the* Insular Cases*. Again.*, HARV. L. BULL. (May 3, 2024), https://hls.harvard.edu/today/reexamining-the-insular-cases-again/; *see* Rana, *supra* note 78, at 333; Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 243 (2000); *Race and the 1L Curriculum: Constitutional Law*, DUKE UNIV. SCH. L. (Feb. 23, 2021), https://law.duke.edu/video/race-and-1l-curriculum-constitutional-law.

## *III. TERRITORIAL GOVERNANCE*

The federal government is an experienced territorial administrator.[85] It got its start when the newly formed Congress passed the Northwest Ordinance in 1787,[86] which established the internal governance of the Northwest Territory following the American Revolution.[87] Since then, the federal government has managed territories ranging from those that became states to uninhabited areas like Jarvis Island or the Guano Islands.[88] Key to their administration was the passage of organic acts—legislation that established the internal governance of a territory, including the structure of the territorial government.[89] The territories acquired after the Spanish-American War were typically organized in a similar way,[90] but missing from their organic acts or treaties of acquisition was an implicit or explicit pathway to statehood.[91] Because of the resulting territorial purgatory, the five unincorporated territories have developed differently than states, producing divergent relationships with the federal government.[92]

85. *See* IMMERWAHR, *supra* note 31, at 10.

86. *See* Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1632–34 (2019).

87. *See* NAT'L ARCHIVES CATALOG, *supra* note 18.

88. Connor Brighton, *The Territories of the United States*, WORLDATLAS (May 31, 2024), https://www.worldatlas.com/geography/the-territories-of-the-united-states.html. Apart from the Northwest Ordinance, the Territories Clause of the U.S. Constitution provides for the general procedure for admittance of a new state. U.S. CONST. art. IV, § 3, cl. 2. As one scholar suggests, "the fact that Article IV addressed both federal territory and new states in a single integrated section both reflected and reinforced a general expectation that territories would indeed mature into new states that in due course would be admitted on equal terms." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 274 (2005).

89. Michael Milov-Cordoba, *Territorial Courts, Constitutions, and Organic Acts, Explained*, STATE CT. REP. (Jan. 6, 2025), https://statecourtreport.org/our-work/analysis-opinion/territorial-courts-constitutions-and-organic-acts-explained.

90. *See id.* Congress passed an organic act (or, in the case of the Northern Mariana Islands, entered into a covenant) for every post-1898 territory except for American Samoa. Ruth Chan, *Records of the Government of American Samoa (Record Group 284)*, HIST. HUB (June 1, 2022), https://historyhub.history.gov/b/researchers-help-blog/posts/records-of-the-government-of-american-samoa-record-group-284; *see What are US Territories?*, ASIA MATTERS FOR AM., https://asiamattersforamerica.org/the-pacific/what-are-us-territories (last visited Jan. 23, 2025).

91. Derieux, *supra* note 59, at 806–07.

92. *See* Case, *supra* note 82, at 235.

### A. Puerto Rico

The United States acquired the Caribbean archipelago of Puerto Rico at the end of the Spanish-American War in 1898.[93] Soon thereafter, Congress passed its first organic act, the Foraker Act, establishing the territory's internal governance structure.[94] The Act provided for a "local government consist[ing] of a presidentially-appointed Governor, an eleven-person executive council," a popularly elected House of Delegates, and an elected but nonvoting representative to the U.S. House of Representatives known as the Resident Commissioner.[95] Congress also officially established a federal district court for Puerto Rico, which a military governor initially established by military order in 1899.[96] In 1917, Congress passed a second organic act, the Jones-Shafroth Act,[97] which provided for the popular election of both houses of the legislature and extended United States citizenship to people born in Puerto Rico.[98] And most recently, in 1950, Congress gave the people of Puerto Rico the ability to draft their own constitution.[99] This Act, which looks and quacks like an organic act,[100] gave Puerto Ricans the ability to create a governing document which expressed their cultural preferences, ideological stances, and

93. *See* Treaty of Peace (Treaty of Paris) art. II, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

94. *See* Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900) (codified as amended throughout 48 U.S.C. §§ 731–916).

95. Arnaud, *supra* note 16, at 906; *see also* José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 434 (1978).

96. NAT'L ARCHIVES & RECS. ADMIN., GUIDE TO PUERTO RICAN RECORDS IN THE NATIONAL ARCHIVES NEW YORK CITY 4 (2013), https://www.archives.gov/files/nyc/finding-aids/puerto-rican-records-guide.pdf; *see also* Arnaud, *supra* note 11, at 2256.

97. Jones–Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified as amended throughout 48 U.S.C. §§ 731–916).

98. Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 6 (1953). Although not through an organic act, Congress would eventually provide for the popular election of the Governor in 1947. Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 77 (2018).

99. Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950) (codified as amended throughout 48 U.S.C. §§ 731–916). Congress directed the people of Puerto Rico to create a republican form of government. *See id.* After the local constitutional convention concluded, Congress reviewed and amended the Puerto Rican Constitution before it went into effect. Torruella, *supra* note 98, at 81–84.

100. *See* Emmanuel Hiram Arnaud, *A License to Kill: State Sponsored Death in the Oldest Colony in the World*, 86 REVISTA JURÍDICA U. P.R. 291, 312–14, 320 (2017) (referring to the creation of the Commonwealth of Puerto Rico through Public Law 600 as "the third iteration of the *Organic Act*"); Torruella, *supra* note 98, at 77 (referring to the Commonwealth as the "third experiment" in territorial governance).

community values, with certain federally imposed parameters.[101] The result was a three-branch government that mirrors the federal government.[102] This includes a bicameral legislature, a unified judicial system, and a popularly elected governor who sits at the head of the executive branch.[103] Puerto Ricans also continue to elect the Resident Commissioner to Congress.[104]

Importantly, these three branches exercise local autonomy akin to a state of the Union.[105] For example, since 1950, Puerto Rico's legislature has rehauled its local criminal code to reflect the desires of the community.[106] The federal government, however, retains its power to alter the local government or intervene in local affairs in ways it could never with a state,[107] like in 2016 when Congress established a fiscal control board within Puerto Rico's government.[108] Constitutionally sanctioned federal intervention is, ultimately, a defining feature of the territorial condition.[109]

### B. American Samoa

American Samoa's relationship with the United States took a different path. In the latter part of the nineteenth century, federal actors became interested in having a presence in the Pacific and set their eyes on the use of the deep-water bay at Pago Pago as a potential naval coaling station.[110] The United States would, after a series of conflicts and escalations, enter into an agreement with Germany and England that split the Samoan archipelago into a

101. *See* Puerto Rican Federal Relations Act §§ 2–3.

102. *See* P.R. CONST. art. I, § 2, cl. 1.

103. *Id.* arts. III–V.

104. Arnaud, *supra* note 16, at 906.

105. *See* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 670 (1974))).

106. *See* Julian Bava, *Prosecuting Extraterritorial Atrocity Crimes Under State Law: An Analysis of the Puerto Rico Model*, 44 VT. L. REV. 327, 352 (2019).

107. *See* Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 101, 130 Stat. 549 (2016) (codified as amended throughout 48 U.S.C. §§ 2102–2241).

108. § 2121.

109. *See* R. SAM GARRETT, CONG. RSCH. SERV., IF11792, STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND (2024).

110. Stanley K. Laughlin, Jr., *The Application of the Constitution in the United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337, 361 (1980); LINE-NOUE MEMEA KRUSE, THE PACIFIC INSULAR CASE OF AMERICAN SĀMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES 26–29 (2018) (ebook).

western part for Germany and an eastern part for the United States.[111] In 1900, and again in 1904, the most senior chiefs, or *matai*, of the eastern islands ceded eastern Samoa to the United States, creating the territory of American Samoa.[112] American Samoa remained under naval control until 1951, when the naval station closed and the President of the United States transferred administration of American Samoa to the Department of the Interior.[113]

Unlike the other territories, Congress never passed an organic act for American Samoa.[114] In its absence, the people of American Samoa consulted with the Department of Interior and, in 1960, adopted a constitution, later revised and approved in 1967.[115] The local government consists of a bicameral legislature called the *Fono*, an elected governor, and a local court system.[116] The High Court of American Samoa is the highest court in the territory and consists of a trial division, land and title division, and an appellate division.[117] Importantly, their constitution seeks to preserve local customs and advances that aim in several ways.

The *fa'a Samoa*—the Samoan way—plays a critical role in the sociopolitical order of American Samoa.[118] It represents "the 'essence of being Samoan,' and includes a 'unique attitude toward fellow human beings, unique perceptions of right and wrong, the

111. Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 75–76 (2013); Convention for the Adjustment of Jurisdiction in Samoa art. II, Dec. 2, 1899, 31 Stat. 1878. Germany ceded its rights in the Solomon Islands and Tonga, among other territories, in return for Great Britain's renunciation of all rights and interests in Samoa. *See* Convention for the Adjustment of Jurisdiction in Samoa, *supra*. The western Islands would eventually gain independence and are known as the Independent State of Samoa. *History and the Islands of Samoa,* NAT'L PARK SERV. (Sept. 28, 2024), https://home.nps.gov/npsa/learn/historyculture/history-and-the-islands-of-samoa.htm.

112. Laughlin, *supra* note 110, at 361; Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015). Although still steeped in the imperial expansion of the United States, the acquisition of American Samoa was, at least on its face, different than other post-1898 acquisitions. Indeed, "[u]nlike the territories acquired by sudden conquest during the Spanish-American War, the establishment of U.S. sovereignty in America Samoa was a negotiated and incremental process pondered for decades[.]" Jason Buhi, *Citizenship, Assimilation, and the* Insular Cases*: Reversing the Tide of Cultural Protectionism at American Samoa*, 53 SETON HALL L. REV. 779, 807 (2023).

113. Laughlin, *supra* note 110, at 361–62.

114. Chan, *supra* note 90.

115. Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L.J. 220, 254–55 (1980); AM. SAM. CONST. pmbl., art. V, § 11.

116. Leibowitz, *supra* note 115, at 233; AM. SAM. CONST. arts. 2–4.

117. AM. SAM. CODE ANN. § 3.0208 (2021).

118. Uilisone Falemanu Tua, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246, 267 (2009).

Samoan heritage'" and represents "the aggregation of everything that the Samoans have learned."[119] One way in which the constitution preserves the *fa'a Samoa* is by requiring any senator be *matai* and "elected in accordance with Samoan custom."[120] The *fa'a Samoa* is also represented through local laws, like the American Samoa penal code;[121] however, federal power over the territory ultimately persists.[122] Indeed, Congress used its constitutional power in 1980 when it adopted a statute requiring Congress to approve any amendments to the American Samoan Constitution before they go into effect.[123]

Like the other four unincorporated territories, American Samoa has sent a non-voting representative—the Samoan delegate at large—to Congress since 1970.[124] This representative, like their colleagues from the other territories, still cannot vote on any federal legislation.[125]

## *IV. PROSECUTING FEDERAL CRIME*

The territories are a part of the federal criminal legal system. There are ninety-three U.S. Attorneys who are responsible for enforcing federal law within the ninety-four federal districts that cover just about all states, territory, federal enclaves, and

119. *Id.* (quoting Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. 35, 37 (1999–2000)).

120. AM SAMOA CONST. art. II, § 4; *see also id.* art. II, § 3 ("A Senator shall . . . be the registered matai of a Samoan family who fulfills his obligations as required by Samoan custom in the county from which he is elected."); *see* James Daugherty, *A Legal Framework for Traditional Rights and Conservation: Yap as a Case Study*, 21 ASIAN-PAC. L. & POL'Y J. 1, 23–24 (2019) ("[Samoan] senators receive a mandate to protect Samoan ancestry and way of life through enacting legislation to 'protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry . . . .'" (quoting AM. SAM. CONST. art. I, § 3)).

121. *See, e.g.*, AM. SAM. CODE ANN. § 46.1910(b) (2021). For example, the local custom of the *ifoga*—where the family of a person who commits a criminal offense makes a formal public apology to the family of the victim—is codified under local law. *Id.*; *see also* La'auli A. Filoiali'i & Lyle Knowles, *The Ifoga: The Samoan Practice of Seeking Forgiveness for Criminal Behaviour*, 53 OCEANIA 384, 384 (1983). If the *ifoga* is performed and the apology accepted, local courts may use that as a factor in reducing a sentence. § 46.1910(b). I continue exploring the tension between local customs and federal criminal adjudication in American Samoa in forthcoming work.

122. *See, e.g.*, 48 U.S.C. § 1662a (allowing amendments to the American Samoan Constitution only through an act of Congress).

123. *Id.*

124. *Id.* § 1731.

125. *Id.* § 1711.

Indigenous land throughout the country.[126] These attorneys are also responsible for managing their own offices, which vary in composition by district, and setting prosecutorial priorities and guidelines under the direction of the U.S. Attorney General.[127] Wherever there is a federal district court, there is a U.S. Attorney's Office to enforce federal law, and this is generally true for the territories as much as it is for the states.

### A. Puerto Rico and American Samoa

Two territories are illustrative of how territorial governance complicates this narrative. In Puerto Rico, for example, a U.S. Attorney post was created through the same military decree that established the provisional district court for the Island in 1899.[128] This process is almost a necessity because it clearly establishes who will enforce federal law in a given judicial district. As a result, in Puerto Rico, the U.S. Attorney has represented federal interests essentially since the territory's annexation. This means that federal prosecutions in Puerto Rico are procedurally similar to those in any other federal district. Federal investigators work closely with local authorities on investigations, and those investigations are then presented to Assistant U.S. Attorneys who seek indictments. Those cases proceed before a federal district judge in the federal district of Puerto Rico. A person accused of a crime who cannot meet bail is held in the lone federal jail on the Island until their proceedings conclude.[129] If they are convicted, the person serves their sentence in a federal prison in the mainland United States.

Federal prosecutions in Puerto Rico, however, suffer from various deficiencies that are directly related to their colonial

126. *See* Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675, 676, 680 (2005). The Northern Mariana Islands and Guam share one U.S. Attorney's office although they have two separate federal district courts. *About the U.S. Attorneys' Office*, OFFS. U.S. ATT'YS, https://www.justice.gov/usao (last visited Jan. 9, 2025).

127. *The Role of the United States Attorney*, U.S. ATT'Y'S OFF. W. DIST. TEX. (Dec. 12, 2022), https://www.justice.gov/usao-wdtx/role-united-states-attorney. For a comprehensive history of the Department of Justice, see generally Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2014).

128. Dora Nevares-Muñiz, *Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico*, 12 ELEC. J. COMP. L. 1, 4 (2008); *Judges' Info*, U.S. DIST. CT. FOR DIST. P.R., https://www.prd.uscourts.gov/judges-info (last visited Jan. 23, 2025).

129. *See Our Locations*, BUREAU PRISONS, https://www.bop.gov/locations/list.jsp (last visited Jan. 23, 2025).

history with the United States. One of these deficiencies is manifested in federal jury selection.[130] The Jury Selection and Service Act requires a prospective juror to speak, read, and write English at a certain level of proficiency.[131] Because the de facto language on the island is Spanish, few Puerto Ricans meet this requirement.[132] By some estimates, this requirement bars eighty-five to ninety percent of the local population from federal jury service, leaving a jury pool that typically consists of a narrow socioeconomic class of wealthy and educated Puerto Ricans.[133] This practice has been subject to litigation, specifically arguments that the remaining jury pool does not represent a fair cross section of the community, in violation of the Sixth Amendment's jury trial right.[134] But the First Circuit has been patently clear that, even accepting that large portions of the population are systematically excluded from the jury pool, the interest in having all federal proceedings in English supersedes its effect.[135]

Another territory where the territorial condition affects juries is American Samoa. Unlike the other territories, Congress never established a federal district court in American Samoa, and, as a result, the territory not only lacks a U.S. Attorney but also a forum to prosecute federal offenses.[136] As I explore in forthcoming work, federal agencies are still involved in investigations of federal crimes, albeit to a lesser degree, but the procedural posture of a federal criminal prosecution is radically different in the states than in the territories.[137] Federal defendants do not have their day in court in American Samoa; instead, they are taken from the

130. I highlight other issues related to federal prosecutions in the District of Puerto Rico that stem from the territorial condition in other scholarship. *See generally* Arnaud, *supra* note 11; Arnaud, *supra* note 16.

131. 28 U.S.C. § 1865(b)(2)–(3).

132. Rose, *supra* note 25, at 498. The dominance of Spanish on the island is due in large part to a rich history of resistance to Americanization efforts. *Id.*

133. *Id.* at 508–09.

134. *See* United States v. Benmuhar, 658 F.2d 14, 18–19 (1st Cir. 1981).

135. *Id.* at 20 ("We consequently decide that the national language interest is significant. Appellant therefore was not denied a representative jury in violation of the Sixth Amendment."); 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"); *accord* United States v. Candelario-Santana, 356 F. Supp. 3d 204, 207–08 (D.P.R. 2019).

136. Weaver, *supra* note 23, at 325–26.

137. *Id.* at 330–31.

territory and are prosecuted elsewhere in the country.[138] That's right. A person accused of a federal crime in American Samoa is transported thousands of miles away to face proceedings in a distant land before a distant jury pool.[139] The juries in those cases are chosen from the district in which the court sits. Therefore, a defendant will never have a federal criminal proceeding where a Samoan judge presides and a Samoan jury sits.

At least two federal courts of appeals have sanctioned the practice of transporting a federal defendant from American Samoa to another part of the country for trial.[140] This practice is primarily justified by a strict reading of the federal Constitution and enabling federal statutes. The federal Constitution provides that "when [a crime is] not committed within any State, the Trial shall *be at such Place or Places as the Congress may by Law have directed*."[141] And, in the U.S. Code, Congress directed that the "trial of all offenses begun or committed . . . elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought[.]"[142] Two courts have explained that defendants are "first brought" to a judicial district, as understood under federal law, when they are transported to or are arraigned in a federal judicial district.[143] American Samoa is not a federal district because Congress never created a district court for the territory.[144] Accordingly, these two courts found that the District of Hawaii and the District of Columbia were the districts to where the defendants were "first brought."[145]

These practices are just two of several troubling prosecutorial postures that are produced by the territorial criminal legal system. But they are also important because they problematize one of the

138. *See* United States v. Lee, 472 F.3d 638, 645 (9th Cir. 2006) (affirming the conviction of a defendant who was tried in the District of Hawaii for a crime committed in American Samoa).

139. Weaver, *supra* note 23, at 326.

140. *Lee*, 472 F.3d at 645; United States v. Gurr, 471 F.3d 144, 155 (D.C. Cir. 2006).

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

142. 18 U.S.C. § 3238.

143. *See Lee*, 472 F.3d at 644; *Gurr*, 471 F.3d at 155.

144. *Lee*, 472 F.3d at 644.

145. *Id.*; *Gurr*, 471 F.3d at 155. In *Lee*, the defendant also argued that the district court of Hawaii lacked jurisdiction over the matter because Congress had delegated jurisdiction over federal crimes to the High Court of American Samoa. 472 F.3d at 644. The Ninth Circuit disagreed. The court explained that while Congress gave the High Court exclusive jurisdiction over all American Samoan criminal offenses, it never gave the High Court jurisdiction over federal criminal offenses. *Id.* at 642–44.

most central parts of our criminal legal system—the jury. These two practices are ideal candidates for use in a criminal law or procedure course.

### B. Incorporating the Territories into the Criminal Curriculum

Juries are foundational to our criminal legal system.[146] Their importance is clearly manifested in the Declaration of Independence, and by their place in the U.S. Constitution.[147] Although criminal trials occur less often than in the past—with over ninety-five percent of state and federal cases ending as the result of plea bargains[148]—the jury still plays a vital function in criminal adjudication. The jury trial right is a critical line of defense in "prevent[ing] oppression by the Government" because "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[149] The jury trial right provides "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[150] The jury, then, acts as both a check against an overzealous government, and as a representative of the community in the imposition of criminal sanctions.

This foundational institution plays an important role in the criminal law and procedure curriculum as well. In criminal law, for example, most casebooks devote considerable space to the role of the jury. Instructors use the jury in criminal law courses to discuss the role of the community in law making. We teach about their critical role as the finders of fact, and how a jury's decision is significantly protected from appeal and collateral attack in order to preserve the democratic deliberative process. And some instructors use jury nullification to highlight the power that juries

146. Ramos v. Louisiana, 590 U.S. 83, 93 (2020) ("This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice . . . .'" (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968))).

147. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); U.S. CONST. art. III, § 2, cl. 3.

148. *The Truth About Trials*, MARSHALL PROJECT (Nov. 4, 2020), https://www.themarshallproject.org/2020/11/04/the-truth-about-trials.

149. Williams v. Florida, 399 U.S. 78, 100 (1970).

150. *Duncan*, 391 U.S. at 156; *see also* Jenny E. Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829–32 (2015).

have to act as a bulwark against an overzealous government and unjust practices.[151]

The lack of a representative jury for federal prosecutions in American Samoa flips these fundamental notions on their head. By using this example, educators can not only introduce students to the U.S. territories and their differential treatment, but also explore why we are willing to negate these fundamental protections to people within our country. How is a jury in, say, Washington D.C., a fair representation of the community in American Samoa? If they are not a fair representation, then can we reasonably argue that such a jury fulfills its function as a defense against an overzealous government? Can we reasonably argue that such a jury expresses the desire of the community in which the harm was done? And, ultimately, why does it all matter? These are important questions that lead to illuminating discussions in and outside of the classroom.

The English proficiency issue in Puerto Rico further complicates that narrative. Is the community sufficiently represented in Puerto Rico's case? What problems do we encounter with these types of juries? And when comparing Puerto Rico to American Samoa, which arrangement is justifiable, if at all? These types of questions prompt more nuanced discussions about the traditional role of the jury, and the role our students hope the jury should play in our criminal legal system.

Further, the territorial condition, broadly, provides a space for class discussion related to the creation of criminal law. Who is represented in the creation of criminal statutes? Can we properly say that the entirety of the United States is represented in the creation of federal criminal law when the territories are politically powerless?[152] The answer to this question is very likely no, but the fact that the application of federal criminal statutes to the territories is central to federal sovereign interests makes for an interesting conversation about the source of criminal law and the fundamental fairness of its application to the territories.

---

151. *See, e.g.*, CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 48–65 (4th ed. 2019); JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 19–29 (9th ed. 2022).

152. Some instructors start the semester off with the classic H.M. Hart article, *The Aims of the Criminal Law*, which stresses that the moral condemnation of the community that accompanies criminal conduct is a defining feature of criminal law. *See* Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958). This Article, too, provides a space to ask similar questions about representational criminal justice.

When it comes to criminal procedure, the jury occupies a more prominent role in the curriculum.[153] The jury is central to questions of fundamental fairness and community participation through issues of jury selection like peremptory strikes,[154] the fair cross-section requirement,[155] and challenges for cause,[156] among many others. Transposing these rights to the territories provides fertile ground for dynamic conversations about essential parts of the curriculum. One of those issues is the fair cross-section requirement. By using leading cases on the issue as it relates to Puerto Rico, like *United States v. Benmuhar*,[157] instructors can complicate their unit on the fair cross-section requirement. *Benmuhar* stands for the proposition that although the English proficiency requirement in federal courts systematically excludes the vast majority of Puerto Ricans from federal jury service, the interest in keeping a uniform language in federal courts is significant enough to outweigh its effect.[158] This fact pattern certainly calls into question the fairness of jury selection and highlights another blind spot of the fair cross-section requirement.

Some professors have already begun incorporating the unique ecosystem that the territorial condition produces in their criminal law related courses. For example, in his seminar on sentencing, Columbia Law School Professor Daniel Richman uses sentencing practices from the District of Puerto Rico to get students to think about the justifications offered for district-specific variances. As exemplified by a recent *en banc* decision in *United States v. Flores-Gonzalez*,[159] some federal Puerto Rican judges have chosen to base upward variances on local conditions. Professor Richman uses this example, alongside others, to prompt a discussion on the propriety of using community factors, as opposed to case-specific factors, when departing upwards under the federal sentencing guidelines.

---

153. Here, I am specifically referring to Criminal Procedure: Adjudication. Although, to those who teach Criminal Procedure: Investigation, I should point out that some cases from the U.S. Virgin Islands provide an excellent discussion regarding the border search exception. *See, e.g.*, United States v. Baxter, 951 F.3d 128 (3d Cir. 2020) (finding that a warrantless search of a package mailed to the Virgin Islands from South Carolina was reasonable under the border search exception).

154. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

155. *See* Taylor v. Louisiana, 419 U.S. 522 (1975).

156. *See* United States v. Salamone, 800 F.2d 1216 (3d Cir. 1986).

157. 658 F.2d 14 (1st Cir. 1981).

158. *Id.* at 19–20.

159. 86 F.4th 399 (1st Cir. 2023) (en banc) (approving the district court's consideration of Puerto Rico's gun violence in imposing an upwardly variant sentence).

And as a final call, aspects of the territorial criminal legal system can also be incorporated into courses that are not solely devoted to criminal law or procedure. For example, in my Race and the Law course, I teach about the fascinating jurisdictional issues arising out of prosecutions in Puerto Rico and the U.S. Virgin Islands. As I have explored elsewhere, federal prosecutors have jurisdiction over certain cases by virtue of the alleged actions having occurred within a territory.[160] And in the U.S. Virgin Islands, federal prosecutors have the ability to file charges arising under the local penal code in federal court[161]—a practice akin to having an Assistant U.S. Attorney for the Southern District of Florida file a case under a Florida statute in federal court. I then juxtapose these procedural postures to the complex procedural landscape of offenses that occur in Indian country, prompting rich discussions concerning issues of sovereignty, representational criminal justice, and colonialism within our nation's borders.

## *V. CONCLUSION*

Territorial expansion and governance are essential components of our nation's past and present, offering not only a more nuanced understanding of our legal institutions but also the interpretation of our Constitution. Territorial governance highlights the existence of a dark underbelly of the United States, and that reality is clearly manifested in the realm of criminal law and procedure. These topics should be included throughout the law school curriculum, and there are innumerable ways in which instructors can bring territorial issues into their criminal law and procedure courses. Ultimately, including the territories in our courses also means challenging fundamental aspects and narratives of our curriculum. When it comes to criminal law and procedure, the territories invite us to rethink concepts like community expressions, inequality, and democratic criminal justice. I invite you to let the territories challenge fundamental aspects of your courses, as well.

160. *See* Arnaud, *supra* note 16, at 886.
161. *See* United States v. Gillette, 738 F.3d 63, 72–76 (3d Cir. 2013).