LLEGARON LOS FEDERALES: THE FEDERAL GOVERNMENT'S PROSECUTION OF LOCAL CRIMINAL ACTIVITY IN PUERTO RICO

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ABSTRACT

In the midst of a debilitating humanitarian crisis in Puerto Rico and high-profile litigation concerning other U.S. territories, scholars, political leaders, and activists have elevated conversations of constitutionally-sanctioned inequality into the public spotlight. With respect to Puerto Rico, these conversations focus on its current economic morass and relation to the debate over decolonization. Absent from these important discussions is the role that federal criminal law plays in manifesting Congress' continued plenary power over U.S. territories. This Article breaks from that pattern and highlights an ignored part of federal criminal jurisprudence: the federal prosecution of local criminal activity in Puerto Rico.

This Article argues that federal prosecution of local criminal activity is an explicit manifestation of the federal government's continued colonial grasp over the Island. Moreover, it contends that scholars, advocates, and politicians should consider the significance of federal prosecutorial power as they approach decolonization options for the Island. The Article begins by setting the current stage of federal prosecutions on the Island, explaining how local and federal forces often work together in prosecuting federal crimes, and exhibiting how that collaboration has led to a federal system of mass incarceration over which Puerto Ricans have no direct control. The Article next details the jurisprudential evolution of applying federal criminal laws to the Island and highlights the way in which

* Visiting Assistant Professor, Cornell Law School. This Article is dedicated to the late Judge Juan R. Torruella—a legal luminary, unwavering advocate for the voiceless, inspiration to generations of lawyers, Orgullo Boricua, and who I had, for a time, the immense honor of calling my boss. I would like to thank Christina D. Ponsa-Kraus, Aziz Rana, Sheri Lynn Johnson, Adriel I. Cepeda Derieux, Shaun Ossei-Owusu, Pedro Malavet, Amarilis De Soto, Hiram Marcos Arnaud, Mayte Bayolo-Alonso, and Stephanie Guzmán for their invaluable comments and suggestions on earlier drafts of this Article. Many thanks also to the editors of the *Columbia Human Rights Law Review* for their work on this piece.

the creation of the Commonwealth of Puerto Rico in 1952 has allowed courts to simultaneously pay lip service to the ideals of liberty and equality on the mainland by invoking the popularly branded "compact theory," while sanctioning unequal treatment in Puerto Rico. Finally, the Article explores why conversations about decolonization should focus on the federal government's ability to prosecute local criminal activity.

TABLE OF CONTENTS

INTRODUCTION

The ability to create criminal laws not only helps define a polity's culture, but also delegates the authority to control life itself.[1] In the United States, the Federal Constitution, along with judicial interpretation concerning separation of powers, affords the federal government a rather limited role in defining and prosecuting activity as a federal criminal offense. Our federalist system instead provides the states with the greatest authority to prosecute criminal activity within their borders. As the Supreme Court has repeatedly emphasized, "[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity."[2] Yet, Puerto Ricans have not had the opportunity to fully wield that traditional state power.[3] Indeed, the federal government has meddled in

1. Incarceration is one of the most severe punishments imaginable. It exiles human beings from their communities and severs important social ties. *See* John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1040 (2009) ("People who have spent any time in prison are significantly more likely to experience chronic, stress-related health impairments, unemployment, and the breakdown of psychologically vital social ties."). Prolonged periods of incarceration cause and exacerbate mental health issues and significantly lower the life expectancy of human beings. Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ [https://perma.cc/5UQF-EL2H] ("Each year in prison takes 2 years off an individual's life expectancy."); Emily Widra, *New Data: People with Incarcerated Loved Ones Have Shorter Life Expectancies and Poorer Health*, PRISON POL'Y INITIATIVE (July 12, 2021), https://www.prisonpolicy.org/blog/2021/07/12/family-incarceration/ [https://perma.cc/5WAY-W7KE] ("[R]esearchers found that people who have an incarcerated or formerly incarcerated family member . . . have an estimated 2.6 years shorter life expectancy than those with no incarcerated family members."). In the United States, the death penalty remains the most severe punishment for an offense. *See* Gregg v. Georgia, 428 U.S. 153 (1976). Despite not having a voting representative in Congress, lacking the authority to vote for federal officers, and specifically prohibiting the penalty in their Constitution, inhabitants of Puerto Rico are subject to the federal death penalty. *See* United States v. Acosta-Martinez, 252 F.3d 13 (1st Cir. 2001); *accord* United States v. Pedró-Vidal, 991 F.3d 1, 6 (1st Cir. 2021).

2. Bond v. United States, 572 U.S. 844, 858 (2014). The federal government's prosecutorial power is typically limited by the offense's effect or interaction with interstate commerce. *See* United States v. Morrison, 529 U.S. 598, 608–09 (2000) (explaining that Congress' power to regulate activities pursuant to the Commerce Clause falls within three broad categories: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce"; and (3) "those activities that substantially affect interstate commerce"). The federal government also has the power to prosecute some crimes that do not affect interstate commerce, such as those which occur on federal land, in federal buildings, or ships flying the United States flag. *See, e.g.*, 18 U.S.C. § 7 (defining "special maritime and territorial jurisdiction of the United States").

3. United States v. Acosta-Martinez, 252 F.3d 13 (1st Cir. 2001); *accord* United States v. Pedró-Vidal, 991 F.3d 1, 6 (1st Cir. 2021).

local criminal affairs on the Island (without local input) for over a century, and to this day it enforces statutes aimed at local conduct in Puerto Rico ("the Island").

Consider, for example, a person in Puerto Rico who works for a local government entity that hires scores of subcontractors. One of the employees decides to take advantage of the subcontractors and demands money from them in exchange for timely payment of their wages. That would be extortion and the local nature of the offense would typically mean that local prosecutors would charge the extortion under local law. But in Puerto Rico, federal prosecutors have the ability to use their immense resources to prosecute those and many other types of cases as federal crimes thanks to jurisdictional provisions extending the reach of many federal criminal statutes to local activity taking place within any territory or possession of the United States.[4] These prosecutions have been orthodox throughout the twentieth and twenty-first centuries. Recently however, criminal defendants in Puerto Rico have challenged the federal government's continued prosecutorial power by invoking a narrative known as the "compact theory" which posits that when the United States granted Puerto Rico more power over its local governance in 1952, Puerto Rico ceased being a territory and became something more akin to a state of the Union.[5] Despite the weight of judicial precedent, defendants have argued that Puerto Rico is no longer a "territory or possession" under many criminal statutes in order to divest federal prosecutors of jurisdiction over their cases.[6] Some courts have taken the bait.[7] This Article argues that the federal government's ability to criminalize local activities on the Island is a manifestation of its continued colonial grasp, and that the compact theory (which, I argue, is meritless) serves as a vehicle of concealing colonialism within the federal judiciary and explains why the practical effects of federal prosecutions should play a central role in discussions about decolonization on the Island.

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4. This fact pattern is abstracted from United States v. López-Martínez. No. 15-739, 2020 WL 5629787, at *24–26 (D.P.R. Sept. 21, 2020); *see also* United States v. Liburd, 291 F. Supp. 2d 383, 385–86 (D.V.I. 2003) (finding that restraints on the Hobbs Act imposed on the States are not applicable in the U.S. Virgin Islands).

5. *See infra* notes 178–201.

6. *See, e.g.*, *López-Martínez*, 2020 WL 5629787, at *26 (arguing that Puerto Rico is not a "territory" within the meaning of the Hobbs Act); United States v. Maldonado-Burgos, 844 F.3d 339, 341 (1st Cir. 2016) ("[W]e are called upon to decide whether Puerto Rico is a 'Territory or Possession of the United States' under § 2421(a) [of the Mann Act]"); *cf.* United States v. Greaux-Gomez, 254 F. Supp. 3d. 329, 331 (D.P.R. 2017) (arguing that Puerto Rico is not a "commonwealth" under § 2423 of the Mann Act).

7. *See infra* notes 202–208.

To be sure, the federal government's ability to prosecute local activities on the Island would not have been as problematic seventy years ago. After acquiring the Island in 1898, the United States Federal Government created the applicable criminal laws in Puerto Rico,[8] drawing on the power expressly granted in the Treaty of Paris, which in turn recognized the federal government's plenary power over the territories pursuant to the Territorial Clause of the U.S. Constitution.[9] The Territorial Clause then allowed Congress to treat territories differently than the states, and rendered solely local activities on the Island a federal criminal offense. In the 1950s, Puerto Rico and the United States entered into what many view as an unprecedented agreement that gave Puerto Rico complete home-rule and created what we know today in English as the Commonwealth of Puerto Rico.[10] This event was seemingly the conclusion of a relatively long march towards self-determination and self-rule on the Island.[11]

That historical moment has since been interpreted in at least two major ways. The first, popularly branded the "compact theory," posits that from that agreement Puerto Rico emerged as a new entity, with the jurisdictional power and sovereignty akin to any state of the Union, and that it no longer assumes the role of an "unincorporated territory."[12] As a result,

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8. Eulalio A. Torres, *The Puerto Rico Penal Code of 1902–1975: A Case Study of American Legal Imperialism*, 45 REV. JUR. U. P.R. 1, 19–25 (1976).

9. David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U. P.R. 255, 257 (1952) [hereinafter Helfeld, *Congressional Intent*]; U.S. CONST. art. IV, § 3, cl. 2.

10. Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 REV. JUR. U. P.R. 945, 954 (2011).

11. Leading up to the creation of the Commonwealth, Congress had slowly relinquished some local governance to Puerto Ricans. For example, in 1917 Congress provided for the popular election of both houses of the legislature, and in 1947 Congress allowed for the popular election of the Governor—a position that had been appointed by the president of the United States up to that point. T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 18 (1994).

12. 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. 67, 78–79 (2018) [hereinafter Torruella, *Reply*]; Adam W. McCall, Note, *Why Congress Cannot Unilaterally Repeal Puerto Rico's Constitution*, 102 CORNELL L. REV. 1367, 1369–70 (2017) ("Congress chose to bind its own hands and provide Puerto Rico with quasi-sovereignty functionally equal to the sovereignty retained by states."); Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J. F. 101, 102–03 (2020) [hereinafter Ponsa-Kraus, *Political Wine*] (describing the limitations and potential consequences of Justice Sotomayor's concurrence regarding the compact theory); Casellas, *supra* note 10, at 954 ("Since 1953, it is well settled law in the First Circuit that, with the advent of Commonwealth status in 1952, Puerto Rico

Puerto Rico was no longer a mere territory of the United States subject to the plenary power of Congress vis-à-vis the Territorial Clause, but something else entirely, with a novel form of sovereignty. The second interpretation is less forgiving. Proponents of the second view posit that all the agreement did was provide Puerto Ricans greater authority to govern local affairs but that Puerto Rico remained, constitutionally, a territory.[13] For a long time the former interpretation prevailed in popular culture and has sometimes been reflected in statements from the federal executive and judicial branches, as well as intellectual circles.[14] That acceptance, however, as many scholars and jurists have established, is legally untenable when viewed in light of the weight of the legislative history[15] and is certainly not reflected in decisions by the Supreme Court of the United States.[16] Despite its legal barrenness, the use of the compact theory by federal courts has created a vehicle by which the federal government continues to tout ideals

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ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution.").

13. United States v. Cotto-Flores, 970 F.3d 17, 51–52 (1st Cir. 2020) (Torruella, J., concurring); *see also* United States v. Casey, No. 05-277, 2012 WL 12941134, at *2 (D.P.R. June 1, 2012) ("Congressional intent behind the approval of the Puerto Rico Constitution [pursuant to Law 600] was that the Constitution would operate to organize a local government and its adoption would in no way alter the applicability of United States Laws."); Jose A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 461–62 (1986) ("The place of Puerto Rico in the American constitutional system was not altered by 'commonwealth' status, although that pragmatic political formula clearly afforded the Puerto Ricans an opportunity to fashion for themselves the contours of their local government.").

14. *See* Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 40–41 (1st Cir. 1981) (describing statements by President Truman and statements before the United Nations by federal officers); Mora v. Torres, 113 F. Supp. 309, 313–14 (D.P.R. 1953) (discussing the new relationship between the federal government and Puerto Rico following the adoption of Public Law 600 and the Constitution of the Commonwealth of Puerto Rico); Casellas, *supra* note 10, at 954 ("Since 1953, it is well settled law in the First Circuit that, with the advent of Commonwealth status in 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution.").

15. Torruella, *Reply*, *supra* note 12, at 78–79 ("[I]n my opinion, the legislative history . . . makes clear that the intent behind the enactment of Public Law 600 was neither to change the unincorporated status of Puerto Rico, nor to establish a binding unalterable political relationship that could not be changed unilaterally by Congress.").

16. *See, e.g.*, Puerto Rico v. Sanchez Valle, 579 U.S. 59, 73–74 (2016) (holding that Puerto Rico and the United States were not separate sovereigns for purposes of the Double Jeopardy Clause because Puerto Rico's ultimate source of power to prosecute crimes stems from the United States Congress); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661 (2020) (holding that officers appointed to congressionally created fiscal oversight board pursuant to the Territorial Clause and who were vested with primarily local duties were not Officers of the United States subject to the Appointments Clause).

of liberty and sovereignty while strictly enforcing colonial legislation. Indeed, the compact theory, as this Article will show, is not only unsupported by the legislative record, but also clouds the reality that the federal government maintains the unfettered ability to meddle in what are otherwise local criminal activities on the Island.

Ever since the United States landed on the Island, it has never been seriously argued that Congress lacked the constitutional authority to regulate solely local activities in Puerto Rico. In fact, the First Circuit, which has jurisdiction over appeals from the United States District Court for the District of Puerto Rico, so confirmed in *Crespo v. United States*.[17] But the compact theory has recently made some high-profile appearances in significant decisions from the First Circuit and the Supreme Court. In 2016, the First Circuit decided *United States v. Maldonado-Burgos*,[18] a case that many—including some of the court's own members—viewed as a sudden departure from its own precedent.[19]

Maldonado-Burgos's holding—that the federal government could not prosecute local crimes under § 2421(a) of the Mann Act—was striking for several reasons. First, it overturned its own decision in *Crespo*, which had sanctioned the federal government's prosecution of § 2421(a) cases.[20] And, more importantly, the First Circuit panel in *Maldonado-Burgos* explicitly endorsed the compact theory as a significant narrative, and in doing so, applied a novel framework for determining whether a federal law is applicable to Puerto Rico. Oddly enough, the First Circuit again embraced the compact theory a few years later in *United States v. Cotto-Flores*,[21] but that time it confirmed that the federal government could in fact enforce a different section of the Mann Act that applied to solely local activities on the Island. The two decisions not only created tension within the circuit, but also cast a veil of confusion over the significance of the compact theory.

The federal government's continued authority to regulate local criminal activities is not necessarily an unwelcomed intrusion. On the Island, the federal government's increased involvement in prosecuting crimes has received a largely positive reception. Members of political and intellectual circles[22] as well as local law enforcement offices welcome and

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17. 151 F.2d 44, 45 (1st Cir. 1945).

18. 844 F.3d 339 (1st Cir. 2016).

19. See United States v. Cotto-Flores, 970 F.3d 17, 32 (1st Cir. 2020) (recognizing that the *Maldonado-Burgos* court found that *Crespo* no longer controlled).

20. *Crespo*, 151 F.2d at 45.

21. 970 F.3d at 28–31.

22. *See, e.g.*, Catherine E. Shoichet, *Puerto Rico: A Forgotten Front in America's Drug War?*, CNN (June 10, 2012), https://www.cnn.com/2012/06/09/justice/puerto-rico-drug-trafficking/index.html [https://perma.cc/QXW6-QDQX] ("[Puerto Rico's

implore the federal government to intervene in local activities, despite the colonial overtones or the apparent overstep of federal officers.[23] Given the federal government's vast resources, local law enforcement agencies[24] frequently collaborate with federal agencies in the investigation and prosecution of Puerto Ricans in federal court. That collaboration is often manifested in agreements between local and federal law enforcement agencies and prosecutor offices.[25] For example, the Puerto Rican

executive branch] ha[s] been asking the federal government to help us patrol . . . the Puerto Rican coasts [for drug trafficking], which we are unable to cover entirely by ourselves . . . in the same way they protect the borders with Mexico and Canada"); Caribbean Journal Staff, *Puerto Rico's Luis Fortuño Begins Security Talks with Federal Officials*, CARIBBEAN J. (July 11, 2012), https://www.caribjournal.com/2012/07/11/puerto-ricos-luis-fortuno-begins-security-talks-with-federal-officials/ [https://perma.cc/9YUC-ESCS] (describing the Puerto Rican Governor's call to the federal government to show the "same level of commitment" as Puerto Rican law enforcement in confronting drug trafficking-related crimes); Federico de Jesús & Laura Rodriguez, *An Urgent Rescue Plan for Puerto Rico*, CTR. FOR AM. PROGRESS (Apr. 28, 2021), https://www.americanprogress.org/article/urgent-rescue-plan-puerto-rico/ [https://perma.cc/6QF3-M5C7] (suggesting increased federal intervention in criminal prosecutions and law enforcement on the Island).

23. The federal government also supports further intervention in Puerto Rico's criminal affairs. In a 2011 report, for example, the Obama Administration recommended that "the various Federal agencies with security and law enforcement responsibilities convene a working group to begin a formal, interagency process of coordination and collaboration regarding Puerto Rico's security and safety." PRESIDENT'S TASK FORCE ON P.R.'S STATUS, REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 66 (Mar. 2011), https://obamawhitehouse.archives.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf [https://perma.cc/Z69H-PT5W].

24. One irony in the interagency task force is that while the Puerto Rico Police Department ("PRPD") welcomes and requests federal interference in local criminal activity, it is simultaneously regulated by the federal government for civil rights violations and unconstitutional police practices. *See generally* CIV. RTS. DIV., U.S. DEP'T OF JUST., 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/XJ7E-8HV4] (finding PRPD engages in a pattern of excessive force, unconstitutional searches and seizures, discriminatory police practices against people of color, and a failure to address domestic violence and sexual assault allegations). In 2013, the U.S. Department of Justice entered into a consent decree with the PRPD requiring sweeping reforms. Press Release, ACLU, Justice Department Settles with Puerto Rico Police Department on Brutality (July 17, 2013), https://www.aclu.org/press-releases/justice-department-settles-puerto-rico-police-departmentbrutality?redirect=human-rights/justice-department-settles-puerto-rico-police-department-brutality [https://perma.cc/QNE8-YCGL].

25. The general increased federalization of criminal activity is not entirely unique to Puerto Rico. Indeed, state governments often collaborate with federal agencies in the investigation and prosecutions of criminal activities. *See* Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757,

government participates in several task forces with federal agencies aimed at investigating and prosecuting crimes related to drug trafficking.[26] Similarly, in 2017, the Puerto Rican government signed a confidential memorandum of understanding ("MOU") with federal agencies which both continued and placed more drug trafficking cases, cases involving large quantities of drugs entering through airports, carjacking, and Hobbs Act crimes into the federal government's exclusive domain.[27] Notably, the MOU also expanded the collaboration between local and federal prosecutors on the Island. Local district attorney offices frequently loan out prosecutors through a process known colloquially on the Island as "destaque."[28]

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783 (1998) (discussing state governmental interests in the fragmentation of federal prosecutorial authority).

26. One of those task forces is the Caribbean Corridor Strike Force, which is "an initiative of the U.S. Attorney's Office created to disrupt and dismantle major drug trafficking organizations operating in the Caribbean" composed of "DEA, HSI, FBI, US Coast Guard, US Attorney Office for the District of Puerto Rico, and [Puerto Rico Police Department's] Joint Forces for Rapid Action." Press Release, U.S. Drug Enf't Admin., Caribbean Corridor Strike Force Dismantles Drug Trafficking Organization (Apr. 1, 2014), https://www.dea.gov/press-releases/2014/04/01/caribbean-corridor-strike-force-dismantles-drug-trafficking-organization [https://perma.cc/AQ45-UEPE]. Puerto Rico also participates in other interagency task forces such as the Puerto Rico-Virgin Islands High Intensity Drug Trafficking Areas Program. *See* Gretchen C.F. Shappert & Christopher F. Murray, *Violent Neighborhood Gangs: Two Districts, Two Strategies*, 68 DEP'T JUST. J. FED. L. & PRAC. 187, 191–92 (2020) (describing the collaborative effort of the program and the importance of its role in the Virgin Islands). Interagency collaboration in Puerto Rico is by no means a recent invention. For example, "since 1988, federal funds have supported the multijurisdictional activities of 'High Intensity Drug Trafficking Areas' (HIDTAs), which now encompass almost all of the United States, as well as Puerto Rico and the U.S. Virgin Islands." Sandra Guerra Thompson, *Did the War on Drugs Die with the Birth of the War on Terrorism?: A Closer Look at Civil Forfeiture and Racial Profiling After 9/11*, 14 FED. SENT'G. R. 147, 148 (2002).

27. 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-acuerdo-entre-gobierno-y-agencias-federales-para-combatir-el-crimen/ [https://perma.cc/F2CC-VM83]; *Puerto Rico y el Gobierno Federal Firman Acuerdo para Reforzar la Lucha Contra el Crimen*, MICROJURIS (Feb. 1, 2017), https://aldia.microjuris.com/2017/02/01/puerto-rico-y-el-gobierno-federal-firman-acuerdo-para-reforzar-la-lucha-contra-el-crimen/ [https://perma.cc/QD8Q-ZYWK]. The MOU reaffirmed the federal government's collaboration with Puerto Rican law enforcement agencies. Federal prosecutors have, for example, "agreed with [their] local counterpart that the federal-government will prosecute carjackings involving death, which has led to a large number of homicides being handled by that particular United States Attorney's Office" since at least 2001. U.S. DEP'T OF JUST., THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 4 (1988–2000) (Sept. 12, 2000), https://www.justice.gov/archives/dag/survey-federal-death-penalty-system [https://perma.cc/9XAH-BTAH].

28. "Destaque" can be translated to "assignment" or "tour of duty." *See* Lopez-Rosado v. Molina-Rodriguez, No. 11-2198 (JAG), 2012 WL 4681956, at *1 (D.P.R. Sept. 28, 2012).

Through that process, local prosecutors work as Special Assistant United States' Attorneys ("SAUSAs") and prosecute cases in federal court while local offices pay their salaries.[29] In the 2017 MOU, the Puerto Rican government agreed to provide up to ten local attorneys to work as SAUSAs for the U.S. Attorney's Office for the District of Puerto Rico—an office composed of about sixty prosecutors.[30]

The approval of the federal government's intrusion is not unanimous. Interagency collaboration certainly increases the local government's ability to investigate and prosecute crime and makes federal prosecutions more of a priority than local ones,[31] but in doing so the local government[32] all but officially acquiesces to federalization of local criminal activity.[33] Activists on the Island call out the federalization of local criminal

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29. The use of government attorneys as Special Assistant United States' Attorneys ("SAUSA") is not unique to Puerto Rico. In 1948, Congress vested the Attorney General with authority to designate an attorney as an Assistant United States Attorney ("AUSA") by statute. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 909 (codified at 28 U.S.C. § 543(a)); *see, e.g.*, United States v. Santiago-Colón, 917 F.3d 43, 60 (1st Cir. 2019) (explaining that trial counsel was a SAUSA from Puerto Rico's Department of Justice); United States v. Rivera-Solis, 129 F. Supp. 2d 108, 109 (D.P.R. 2000) ("These Special Assistant United States Attorneys are handling the cases and providing the necessary assistance to the United States Attorney's Office in Puerto Rico."). Many states participate in the type of cooperative models of federal prosecution that exists in Puerto Rico. Those inter-jurisdictional partnerships can produce a series of normative and constitutional concerns including conflicts of interest, successive prosecutions, and selective prosecutions. Even so, at least some courts have sanctioned the economic relationship that exists in Puerto Rico whereby the local agency pays the SAUSAs salary. *See* Victoria L. Killion, Note, *No Points for the Assist? A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMPLE L. REV. 789, 794–95, 806 (2009) (describing how the courts have viewed the relationship between SAUSAs and the jurisdictions in which they operate, including the implications of which jurisdiction pays an SAUSA's salary).

30. Valentín Ortiz, *supra* note 27.

31. *See* Press Release, Departamento de Justicia, Gobernador Rosselló Nevares Detalla Adelantos en la Lucha Contra el Crimen (Apr. 2, 2017), http://www.justicia.pr.gov/gobernador-rossello-nevares-detalla-adelantos-en-la-lucha-contra-el-crimen/ [https://perma.cc/B8F2-8ZK5].

32. Since SAUSAs have the same authority as federal prosecutors, they participate in all facets of federal prosecution. This necessarily includes the federal prosecution of local criminal activity under the Mann and Hobbs Acts.

33. The growing federalization of local criminal activity is a phenomenon that can be traced throughout the mainland United States in a similar manner. For example, the Supreme Court has sanctioned a broad interpretation of the Commerce Clause so that federal prosecutors can identify a jurisdictional hook needed to prosecute criminal activity that is predominantly intrastate in nature. *See* Taylor v. United States, 579 U.S. 301, 305 (2016) ("The language of the Hobbs Act is unmistakably broad. It reaches any obstruction, delay, or other effect on commerce, even if small, and the Act's definition of commerce encompasses all . . . commerce over which the United States has jurisdiction.")

activity as an overstep of federal authority. As some critics contend, it is one thing to use SAUSAs to help with the federal caseload, and another to increase federal prosecutions by using SAUSAs.[34]

It is not difficult to fathom the practical effect of the federal government's prosecution of solely local crimes, as well as their increased prosecutorial power, on the two systems of mass incarceration on the Island. Puerto Rico, which has about three million inhabitants, boasts a local prison population of around ten thousand people.[35] But that number does

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(internal quotation marks and citations omitted). Although the effects of a broadly construed Commerce Clause are felt on the Island, the case of Puerto Rico is substantively different than that mainland phenomenon. Indeed, several statutes specifically apply to intra-territory activity. *See infra* note 45 and accompanying text. Accordingly, there is no need for federal prosecutors to identify a federal "hook" that brings a case under federal jurisdiction. It is enough for the activity to have simply taken place within the territory. Additionally, there is a distinction based on democratic criminal justice and lack of political power. In this regard Puerto Rico is not only subjected to the general expansion of federal prosecutions and the specific intrusions on the Island, but Puerto Ricans also have no say in the creation of those laws nor in their enforcement. People in the mainland could ostensibly limit those types of prosecutions through legislation, setting prosecutorial priorities through the United States Attorneys that their representatives help name, and the process of nominating judges who will interpret the laws the representatives of the states created. Puerto Ricans are unable to take part in that political process.

34. The tension between those who support further federal intervention into local criminal activities and those who, on the other hand, would like to temper federal prosecutions raises practical concerns about what is characterized on the mainland as the simultaneous over-policing and under-policing of communities of color. *See* Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere"*, 94 CAL. L. REV. 617, 627–28 (2006) (outlining the dual nature of policing in Black communities, highlighting the "over-policing" of certain Black communities through the "Broken Windows movement" and the "under-policing" of other Black communities via law enforcement officers' failure to respond adequately to criminal activity); Deborah Tuerkheimer, *Underenforcement as Equal Protection*, 57 B.C. L. REV. 1287, 1314–15 (2016) (discussing settlement agreement between the United States Department of Justice and the Puerto Rico Police Department as it relates to over- and under-policing related to biases). Further federal intervention could ameliorate the perception of under-prosecuted crimes on the Island, especially sex crimes, but it can also be perceived as over-policing by a foreign power on the Island.

35. *Quick Facts: Puerto Rico*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/PR [https://perma.cc/YE2G-T8HT]; *World Prison Brief Data: Puerto Rico*, WORLD PRISON BRIEF, https://www.prisonstudies.org/country/puerto-rico-usa [https://perma.cc/MU2J-SEUK] (showing the prison population to be 8,884); *Puerto Rico*, PRISON INSIDER (2019), https://www.prison-insider.com/en/countryprofile/porto-rico-2019?s=vue-d-ensemble#vue-d-ensemble [https://perma.cc/7XRM-EMFG] (showing the prison population to be 10,475). Similar to the mainland United States, incarcerated people that identify as Black are overrepresented in Puerto Rican local prisons and jails. Marta I. Cruz-Janzen, *Out of the Closet: Racial Amnesia, Avoidance, and Denial—Racism Among Puerto Ricans*, 10 RACE, GENDER & CLASS 64, 77–78 (2003).

not show the full picture of crime on the Island because prisoners are transported to and from mainland prisons as part of cost-cutting initiatives[36] and many cases are prosecuted at the federal level. The prosecutorial diligence of the U.S. Attorney's Office is certainly felt on the Island. The lone federal jail in Puerto Rico, Metropolitan Detention Center Guaynabo ("MDC"), was designed to hold about 849 people, but in June of 2021, MDC boasted a population of over 1,200 people.[37] One report explained that "in order to accommodate so many prisoners the facility often places three inmates in cells designed for two, with one inmate sleeping on the floor near the toilet."[38] The number of sentences handed down by district judges closely tracks the federal prison population on the Island; in 2019 alone, the district court handed down sentences in 1,165 cases.[39]

Puerto Rico's elevated prison population mirrors the mainland United States in key ways. But what is unique to Puerto Rico is that although the local population can always attempt to make changes to the substantive criminal law and procedure through their elected officials, Puerto Ricans lack control over the federal system of mass incarceration on the Island because they cannot vote for any federal officers, with the exception of a non-voting delegate to Congress.[40] Second, the federal

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36. *See* Alice Speri, *Puerto Rico Wants to Cut the Cost of Incarcerating People by Shipping Them off the Island*, THE INTERCEPT (Mar. 23, 2018), https://theintercept.com/2018/03/23/puerto-rico-prisons-hurricane-maria/ [https://perma.cc/2NMN-WYUD] (discussing Puerto Rico's 2018 plan to transfer up to a third of all Puerto Rico's detainees after Hurricane Maria); Rob Urban et al., *This For-Profit Prison Moves Puerto Rican Inmates 1,800 Miles from Home*, BLOOMBERG (Oct. 30, 2018), https://www.bloombergquint.com/onweb/for-profit-prison-company-hopes-to-avoid-mistakes-of-2012-riot [https://perma.cc/4HN7-273D] (noting that prior to 2018, authorities attempted to transfer inmates from Puerto Rico to the mainland in 2012).

37. Nick Chrastil, *A Puerto Rican Federal Inmate's Horrifying Account of What the Prison Did After Maria*, THINK PROGRESS (Apr. 26, 2018), https://thinkprogress.org/puerto-rico-federal-detention-center-allegedly-abused-inmates-hurricane-maria-494c2a8306e8/ [https://perma.cc/JX32-7VHK]; MDC Guaynabo, FED. BUREAU OF PRISONS, https://www.bop.gov/locations/institutions/gua/ [https://perma.cc/8H2Y-7HL2] (showing the prison population to be 1,321).

38. Chrastil, *supra* note 33.

39. U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2019 DISTRICT OF PUERTO RICO 1, 3 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2019/pr19.pdf [https://perma.cc/729K-CRTB].

40. While it is true that federal prosecutors on the mainland are, like in Puerto Rico, appointed, the prosecutors on the mainland are still subject to the political constraints of popular elections. Prosecutorial priorities and the U.S. attorney for every district are, in large part, affected by the political party in the White House and the federal representatives from that state. People living in Puerto Rico are politically

prosecutor's unique authority on the Island adds yet another wrinkle to the conversation around decolonization. The federal government actively works with local prosecutors to subject Islanders to a set of federal criminal laws which, by virtue of lacking any voting representation in Congress and the ability to vote for the president or vice president of the United States, they never had a say in creating.[41] Even more, federal prosecutors continually defend their ability to legally discriminate against Puerto Ricans in both the civil and criminal realms before our nation's highest courts.[42] What we are left with, then, is a system in which Puerto Ricans are criminally charged by prosecutors they did not select, under federal laws enacted by politicians they did not elect, and adjudicated in federal courts by judges who were selected by a president they did not elect and confirmed by a Senate which does not represent them.

This Article argues that the federal government's continued influence over the criminalization of local activities on the Island is a manifestation of the United States' colonial grasp, and that the compact theory serves as a vehicle for concealing imperialism within the federal judiciary. American imperialism and the art of judicial concealment exist in two interrelated discourses, both of which have profound effects on private and public transcripts of domination. The first is the manner in which the federal government, to this day, devotes significant resources and

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powerless in this regard. In Puerto Rico, local prosecutors are also not elected. 3 L.P.R.A. § 291(d) (noting that the district attorney is appointed by the governor of Puerto Rico). As a result, there is a strong argument that Puerto Ricans do not have the power to "vote them out." Yet, Puerto Ricans do have the ability to effect change in the areas of criminal procedure and substantive criminal law by voting for local government officials—a power which they do not have within the federal system. Moreover, Puerto Ricans also have the ability to influence appointments and prosecutorial priorities through their local political process.

41. In key ways, Puerto Rico's lack of political power, and the federal government's expansive prosecutorial power over the U.S. territories, mirrors the relationship between the District of Columbia and the federal government. For example, D.C. residents are also unable to elect a voting representative in Congress. Congress' legislative reach also extends to the local activities within D.C.'s border, regardless of their effect on interstate commerce. 18 U.S.C. § 1951(b)(3) (defining "commerce" under the Hobbs Act as "commerce within the District of Columbia, or any Territory or Possession of the United States"); *see also* U.S. CONST. art. I, § 8, cl. 17 (providing Congress power to legislate over D.C.). Notably, however, D.C. residents may cast votes for the president and vice president. U.S. CONST. amend. XXIII, § 1.

42. *See, e.g.*, United States v. Maldonado-Burgos, 844 F.3d 339, 344–46 (1st Cir. 2016) (arguing that Congress intended to regulate intra-territory activity under § 2421(a) of the Mann Act, although it cannot do the same within the states of the Union); United States v. Vaello-Madero, 956 F.3d 12, 18–19 (1st Cir. 2020) (arguing that the exclusion of Puerto Rico residents from receiving Social Security Income benefits does not violate the Equal Protection Clause of the Fifth Amendment).

maintains the power to regulate intra-state activity on the Island through federal criminal statutes—a power that is absent over states of the union.[43] The second discourse is the compact theory. This view of the creation of the Commonwealth has influenced both public and juridical understandings of the constitutional relationship between the United States and Puerto Rico and, as we will see, simply masks the federal government's power over the Island.

Existing scholarship has seldom focused on how the inequalities experienced in the territories are reflected in the criminal arena. Scholarship pertaining to federal criminal law, for example, has largely focused on its function in the mainland[44] and scholarship on constitutional law as it relates to Puerto Rico, is primarily historical[45] or geared towards a resolution of the Island's constitutional status.[46] As a consequence, there is an important and insufficiently explored area of the federal government's control of the territories' internal affairs that materially impacts people in Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands. Not enough attention has been given to the continued federal power over local criminal affairs even though Congress' authority has broader implications for the federal and local governments' regulation of crime as well as conversations pertaining to decolonialization. This Article seeks to begin to fill that void.

Part I of this Article highlights important historical markers in the development of the Commonwealth of Puerto Rico and discusses the

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43. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states"); United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power . . . .").

44. Some scholars have explored the function of federal criminal law on the Island. For example, important work has been done on the consequences of using the English language in federal courts in Puerto Rico. *See generally* 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 (2011).

45. *See, e.g.*, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 3 (Burke Marshall & Christina D. Ponsa-Kraus eds. 2001) ("Our introduction roughly mirrors the structure of the book, tracing a trajectory from the historical context . . . to more specific questions of constitutional jurisprudence . . . ."); SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE (2019) [hereinafter ERMAN, ALMOST CITIZENS] (describing the history of how the United States refused to grant Puerto Ricans full citizenship).

46. *See, e.g.*, Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 230–31 (2018) ("Puerto Rico's debt crisis and its treatment at the Supreme Court add new urgency to resolving its relationship to the United States.").

relevant jurisprudential developments that have come to define Congress' power to legislate with respect to the Island. Part II explains how the analytical framework that permits the continued prosecution of local criminal activities on the Island developed and how the compact theory plays a role in legislative interpretation. Part II also discusses how federal prosecutions recently led to a flurry of challenges that have, to a limited extent, questioned the federal government's police power on the Island. Part III urges scholars, advocates, and political actors to incorporate the practical realities of the federal government's continued power over local criminal activities as an essential element of the conversations about decolonialization on the Island.

I. ¿A Dónde Has Llegado, Puerto Rico?[47]

Puerto Rico has a constitutionally and socially complicated relationship with the United States. On its face, the Island functions much like any state of the Union. It has its own bicameral legislature,[48] a popularly elected governor,[49] and some, albeit non-voting, congressional representation.[50] Throughout the Island, you will find the same federal buildings and offices as in the contiguous United States, ranging from the United States District Court for the District of Puerto Rico,[51] to offices for the United States Attorney and the Department of Veterans Affairs.[52]

47. In English: What have you come to, Puerto Rico? The Island has been in a state of, at times violent, change since Spaniards first arrived in 1493. Those trials and tribulations have been well documented, especially in José Trías Monge's seminal text, JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997). *See also* Juan R. Torruella, *¿Hacia Dónde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1508–12 (1998) (describing the pointed political developments in Puerto Rico following the acquisition by the United States).

48. Puerto Rico's Legislative Assembly is divided into two chambers: the House of Representatives and the Senate. P.R. CONST. art. III § 1.

49. P.R. CONST. art. IV § 1.

50. *What Is the Resident Commissioner?*, U.S. CONGRESSWOMEN JENNIFER GONZALEZ-COLON, https://gonzalez-colon.house.gov/about/what-resident-commissioner [https://perma.cc/PZR3-D9YN] (describing the role of the Resident Commissioner, Puerto Rico's elected non-voting representative before Congress).

51. *Court Locations*, U.S. DIST. CT. DIST. P.R., https://www.prd.uscourts.gov/court-locations [https://perma.cc/DJ72-4X4L].

52. *United States Attorney's Office District of Puerto Rico*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-pr/about-district-puerto-rico [https://perma.cc/AN76-CPU4]; *San Juan Regional Office*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/sanjuan/ [https://perma.cc/WAB6-KVAG].

Moreover, for over one hundred years Puerto Ricans have been extended United States citizenship.[53]

But unlike territorial expansion in many parts of the contiguous United States, these similarities did not come about through the pattern of expansion that developed in the eighteenth and nineteenth centuries, by which North American settlers confronted and eradicated local inhabitants, often with the assistance of federal and local governments.[54] Instead, Puerto Rico's resemblance to the mainland was the result of pointed sociopolitical and cultural tensions, which saw the physical expansion of the United States collide with a distinct and deeply embedded Puerto Rican culture.[55] That

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53. Pub. L. 64–368, 39 Stat. 951 (1917). Although citizens of the United States, Puerto Ricans residing on the Island are for all intents and purposes second-class citizens. While living on the Island, Puerto Ricans are ineligible for a variety of federal benefits and modes of assistance. Further, they cannot vote for the president of the United States, the vice president, or any member of Congress. Moreover, the argument remains that Puerto Ricans are citizens by statute alone, and Congress may revoke that citizenship at any point. *See, e.g.*, Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) (holding that the Fourteenth Amendment's guarantee of citizenship does not apply to unincorporated U.S. territories), *cert. denied*, 136 S. Ct. 2461 (2016); Fitisemanu v. United States, 1 F.4th 862, 865 (10th Cir. 2021) (same); Hiram Marcos Arnaud, Note, *Are the Courts Dividing Puerto Ricans: How the Lack of Voting Rights and Judicial Interpretation of the Constitution Distorts Puerto Rican Identity and Creates Two Classes of Puerto Rican American Citizens*, 22 CORNELL J.L. & PUB. POL'Y 701, 710–12 (2013) (describing the meaning of citizenship and federal voting rights of Puerto Rican on the Island and on the mainland).

54. *See* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLE'S HISTORY OF THE UNITED STATES 97–102 (2014) (describing the manner in which territorial militias and federal troops assisted in territorial expansion). The pattern of colonialization that took place in the contiguous United States—also known as settler colonialism—was unique because unlike the Founding Fathers' "brethren who colonized much of Africa and Asia, they did not come to extract profit from the land, labor and natural resources of their colonies and then return home. Instead, like those who established settler states in Australia, New Zealand, and Canada, they came to stay." Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 6 (2014). The implications of that last phrase—to stay—as Professor Saito explains, had the most significant repercussions on the Native peoples already in North America. The practical consequences of that truth "meant disappearing the peoples indigenous to that land," making the land profitable, which required the importation of labor—voluntary and involuntary—and establishing structures for controlling that labor," and that they "did not come to join someone else's society; they came to establish a state over which they could exercise complete control." *Id.* at 7.

55. Before North Americans arrived in Puerto Rico, the Island had endured four hundred years of Spanish colonialism. During that time, the Island had created its own identity with a unique culture and language and had begun to form part of the Latin American community. *See* Carmelo Delgado Cintrón, *Derecho y Colonialismo: La Trayectoria Histórica del Derecho Puertorriqueño*, 49 REV. JUR. U. P.R. 133, 133 (1980).

collision resulted in drastic changes to the Island's political and juridical structure.

A. From Spain to the United States

Prior to the United States landing on its beaches, the inhabitants of Puerto Rico endured over 400 years of Spanish rule.[56] Initially, what had been a vibrant civilization of peaceful Taino natives when the Spaniards arrived on the Island was rather quickly reduced to near extinction as a result of disease, enslavement, and genocide.[57] What followed was the migration of Spaniards, along with the forced migration of enslaved Africans to the Island.[58] During their reign, the Spanish Crown ruled the Island's economy through policies of "strict Spanish mercantilism,"[59] while it extended applicable laws and constitutional limitations from abroad with little to no input from Puerto Ricans.[60] All the while, Puerto Rico was governed as a "Spanish Military Plaza" roughly from the early 1500s until 1897, where military governors appointed by the crown represented the highest executive authority on the Island.[61]

Over time, the Island's inhabitants developed a new culture that was tied to, but also distinct from, Spain. That culture—expressed in

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56. Marie Olga Luis Rivera, Note, *Hard to Sea: Puerto Rico's Future Under the Jones Act*, 17 LOY. MAR. L.J. 63, 73 (2014).

57. *See* Piri Thomas & Suzie Dod, *Puerto Rico—500 Years of Oppression*, 19 SOC. JUST. 73, 73 (1992) ("The Tainos were a peaceful people . . . . Generosity and kindness were dominant social values and their culture was geared towards sustainable interaction with their natural surroundings.").

58. TRÍAS MONGE, *supra* note 49, at 5; Adalberto López, *The Evolution of a Colony: Puerto Rico in the 16th, 17th and 18th Centuries, in* THE PUERTO RICANS: THEIR HISTORY, CULTURE, AND SOCIETY 25, 26 (Adalberto López ed., 1980) ("[S]ince there were too few Spaniards available and willing to supply the necessary labor in the sugar farms and cattle ranches, Spanish landowners on the island turned to the importation of black slaves to meet their labor needs.").

59. Robert A. Martinez, *The Emergence of Imperialist Capitalism and Puerto Rican Emigration, 1879–1901*, 3 J. AM. ETHNIC HIST. 54, 55 (1984).

60. During the period of Spanish rule, the crown applied three main legal codes to the Island, all rooted in the Civil Law tradition: *El Derecho Indiano*, *el Derecho Ultramarino*, and finally the Spanish Constitution of 1876, with exceptions. Dora Nevares Muñiz, *Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico*, 12 ELEC. J. COMPAR. L. 1, 2 (2008). At the time of the North Americans' arrival, the substantive criminal law and procedure came from the Spanish Code of Criminal Procedure of 1872 and the Penal Code of 1870. Dora Nevares Muñiz, *Evolution of Penal Codification in Puerto Rico: A Century of Chaos*, 51 REV. JUR. U. P.R. 87, 87 (1982) [hereinafter Muñiz, *Evolution of Penal Codification in Puerto Rico*].

61. Muñiz, *Evolution of Penal Codification in Puerto Rico*, *supra* note 56, at 88.

accents, local dialects, and new customs[62]—was also being expressed in what some commentators have called *el derecho puertorriqueño*—the Puerto Rican law or bar.[63] The Island's bar was comprised of sophisticated native and foreign-born practitioners and academics, and the practice of law was intimately tied to its Spanish civil law roots. As Professor Carmelo Delgado Cintrón of the University of Puerto Rico explains, "[b]y the end of the 19th century, Puerto Rico had an advanced and technical body of law, that when compared to other modern judicial institutions was equal to any other European or American country of the time."[64]

On the eve of the Spanish-American War, Puerto Rico's legal relationship with Spain underwent one final and significant change. In 1897, Spain ratified the Carta Autonómica, turning Puerto Rico into an autonomous province, which produced a new constitutional relationship with Spain by expanding home-rule and affording representation in Spain's government.[65] Puerto Rico adopted a partially popularly elected bicameral parliament and an executive branch headed by a prime minister with subservient cabinet members.[66] The Spain-appointed military governor, or Governor General, remained on the Island as the representative of the crown.[67] In February 1898, the structure of the new Puerto Rican government came into force with an all-Puerto Rican cabinet under the prime minister and looming parliamentary elections. The elected members of parliament were sworn in on July 17, 1898.[68]

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62. The "Spanish language is the most obvious embodiment of unity and cultural strength" on the Island. Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 11 GA. J. INT'L & COMP. L. 211, 216 (1981). The "characterization of Puerto Rican cultural identity consciously relates to Spanish and European values." *Id.*

63. Cintrón, *supra* note 57, at 137.

64. *Id.* (translation provided).

65. Torruella, *Reply*, *supra* note 12, at 71; Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 18–20 (2000) [hereinafter Malavet, *Puerto Rico*] (describing the changing relationship between Spain and Puerto Rico in the 1800s). Spain did not grant Puerto Rico its new status out of charity or sheer benevolence. Spain's concession emerged from a confluence of events including the beginning of Cuba's war for independence, the growing Autonomist movement in Puerto Rico, and the United States' eagerness to annex Spain's Caribbean possessions. Cintrón, *supra* note 57, at 137–38; Leibowitz, *supra* note 58 at 215–16.

66. Cintrón, *supra* note 57, at 138; Malavet, *Puerto Rico*, *supra* note 67, at 19.

67. Cintrón, *supra* note 57, at 138. The Governor General had the power to veto legislation and suppress civil rights during emergencies. Leibowitz, *supra* note 64, at 215–16.

68. Cintrón, *supra* note 57, at 138.

All of that changed when the United States landed on the beaches of Guánica, Puerto Rico on July 25, 1898.[69] The United States Army's invasion of the Island was swift and encountered little resistance.[70] In a matter of weeks the Island fell to the hands of the North American invaders.[71] Some of the U.S. troops were met with applause and delight,[72] and American generals reciprocated their welcome by expounding promises of North American freedoms. General Nelson Miles, commander of the United States forces in Puerto Rico, infamously issued one of the first proclamations on behalf of the invaders, expressing that the United States brought the "blessings of liberty" to the Island and that the North Americans had 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 government."[73]

Despite spirited resistance on other fronts, Spain agreed to end hostilities in Puerto Rico on August 12, 1898, and ceded the Island to the United States.[74] On December 10, 1898, Spain and the United States entered

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69. Malavet, *Puerto Rico*, *supra* note 67, at 21. Although the history of the conflict has been recounted many times, it bears noting that the United States had long desired Spain's Caribbean territories to further expand the ever-growing American Empire. *See* FELIPE FERNÁNDEZ-ARMESTO, OUR AMERICA: A HISPANIC HISTORY OF THE UNITED STATES 238–41 (2014). Then-Assistant Secretary of the Navy Theodore Roosevelt wrote Senator Henry Cabot Lodge asking him to "not make peace until we get Porto Rico [sic]." Lodge famously responded: "Porto Rico [sic] is not forgotten and we mean to have it." BRAD K. BERNER, THE SPANISH-AMERICAN WAR: A DOCUMENTARY HISTORY WITH COMMENTARIES 191 (Brad K. Berner ed., 2014). The expansion into the Caribbean and Pacific was intimately tied to both economic pursuits and areas of military strategic value. One U.S. investor stated in relation to Cuba: "We mean business . . . and not a thing in Cuba should be allowed to get away from the Americans." *See* FERNÁNDEZ-ARMESTO, *supra* note 66, at 240.

70. JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 20–22 (1985) [hereinafter TORRUELLA, THE SUPREME COURT AND PUERTO RICO].

71. *Id.*

72. For example, when North American troops entered the city of Ponce on July 29, 1898, they were met by a cheering crowd and the municipal band playing the American national anthem. North American troops encountered a similar welcome in other towns. *Id.* at 22.

73. TRÍAS MONGE, *supra* note 49, at 30. Although General Miles was initially supportive of North American expansion—having fought Indigenous peoples on the mainland—and intervention in the Caribbean and Pacific, General Miles would eventually come to see North American expansion as a violation of the principles of the Founding Fathers and would become a staunch anti-imperialist. *See* Torres, *supra* note 8, at 77–78 (describing how Miles became aware of "the true imperialist nature of the American Intervention" and after lodging complaints, was forced into retirement).

74. TORRUELLA, THE SUPREME COURT AND PUERTO RICO, *supra* note 72, at 22–23. The last of the Spanish troops left the Island on October 1, 1898, almost 405 years to the day of the Spanish's first arrival on the Island. *Id.* at 23. Despite the view that the Spanish-

into the Treaty of Paris, formally bringing an end to the war.[75] Among other things,[76] Spain ceded Guam and Puerto Rico to the United States as well as the Philippines, for an added price.[77] In so doing, the United States acquired non-contiguous territories with primarily non-white inhabitants,[78] and established itself as the preeminent hegemonic force in the Western Hemisphere.[79]

The Treaty of Paris laid the groundwork for the radical transformation of Puerto Rico's internal governmental and juridical structures. Under the Treaty, the U.S. Congress had the power and ability to determine the sociopolitical qualities of the newly acquired territories as they related to the U.S. Constitution. Article IX of the treaty stated that the "civil rights and political status of the native inhabitants of the territories herby ceded to the United States shall be determined by the Congress."[80] As a consequence, the treaty explicitly vested Congress with complete authority to create the new legal instruments through which the people remaining[81] in Puerto Rico would be governed,[82] as well as the ability to

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American war ended quickly because of Spain's cowardice and incompetence, the Spanish army engaged in "impressive resistance on land." The outdated Spanish fleet was decimated by the much more technologically advanced United States Navy, but the Spanish resistance on land proved "remarkably effective until the government in Madrid, realizing its futility, called it off. In the land campaigns, a combination of Spanish tenacity and yellow fever worsted the invaders, although to no avail in the long term." FERNÁNDEZ-ARMESTO, *supra* note 71, at 239–40.

75. 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, 209–10 (2010).

76. Principally, the treaty secured the main objective of the war by providing for Spain's relinquishment of sovereignty over Cuba and establishing the United States as Cuba's occupying power. TORRUELLA, THE SUPREME COURT AND PUERTO RICO, *supra* note 72, at 23; ANDERS STEPHANSON, MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT 76–77 (1995).

77. Treaty of Paris of 1898, Arts. I, II, & III, 30 Stat. 1754 (1899). Up to this point, the United States had been "deeply invested in a notion of itself as opposed to imperialism, to the extent that even the Spanish-American War was justified as an anti-(Spanish) imperialist gesture." LAURA BRIGGS, REPRODUCING EMPIRE 33 (2002). The war's conclusion, and the concessions demanded and achieved by the United States, clearly told another story.

78. Leibowitz, *supra* note 64, at 219–20.

79. *See* FERNÁNDEZ-ARMESTO, *supra* note 71, at 241 ("[The end of the Spanish-American war] seemed to set the seal on the triumph of Anglo-America and demonstrate its superiority over Hispanic America.").

80. Treaty of Paris of 1898, Art. IX, para. 2.

81. The Treaty of Paris also gave the choice to *Peninsulares*—a person born on the Iberian Peninsula but living in Puerto Rico—of keeping or relinquishing their Spanish citizenship. Those who had been born in Puerto Rico did not have a choice, and instead

define the political status of Puerto Ricans within the U.S. citizenry.[83] That authority gave Congress a choice: treat Puerto Ricans as full political citizens[84] of the United States, or instead deny Puerto Ricans the rights,

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automatically lost their claim to Spanish citizenship. Malavet, *Puerto Rico*, *supra* note 67, at 43 n.184.

82. Throughout the history of North American westward expansion, Congress passed statutes, known as Organic Acts, which established the governmental structure of those lands. The same was done for Puerto Rico when on April 12, 1900, Congress passed the Foraker Act, creating the territory's internal governance structure. Gonzalez v. Williams, 192 U.S. 1, 9–11 (1904).

83. The meaning of Puerto Rican and United States citizenry was one that continued to confound courts, scholars, and people around the world. On the heels of Puerto Rico's annexation, an ardent debate ensued as to the practical consequences of acquiring non-contiguous territories where the native population was not white. The conversation was colored by racist and prejudiced viewpoints. For example, Representative Atterson Rucker "expressed concern regarding an association with Puerto Rico because the people were the result of 'an unreadable genealogical tree' and because '[t]he production of children, especially of the dark color, is largely on the increase.'" Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 24, 29 (1998) (citing the views of Representative James Slayden on Puerto Rico: "We are of different races . . . We are mainly Anglo-Saxon, while they are a composite structure, with liberal contributions to their blood from Europe, Asia, and Africa. They are largely mongrels now . . . ."). All three branches of government fiercely debated the issue but avoided taking a strong stance on the citizenship question. For example, in 1904 the Supreme Court of the United States found that Puerto Ricans traveling into the mainland United States were not considered noncitizens or "aliens" under the federal immigration law. Gonzalez v. Williams, 192 U.S. 1, 13, 16 (1904). Although called by plaintiff's counsel and amicus to comment on the citizenship question, the Supreme Court opted for the more narrow and pointed question in the case, stating: "We are not required to discuss . . . the contention of Gonzales' counsel that the cession of Porto Rico [sic] accomplished the naturalization of its people; or that of [amici] that a citizen of Porto Rico [sic], under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891." *Id.* at 12.

84. By the end of the 19th century, the meaning of citizenship as it related to rights, privileges, and immunities was continuing the transformation that began following the United States Civil War. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 6–7 (2019). Following the United States Civil War, the Reconstruction Amendments would redefine the meaning of citizenship by "incorporating equal rights regardless of race." *Id.* Yet, when the United States continued non-contiguous territorial expansion, the question of what rights would apply to those new territories took another turn. This time, proponents of annexation placed the meaning of territorial acquisition and citizenship in a frame of "empire-friendly ambiguity" which would allow the federal government to continue touting what Sam Erman has termed the "Reconstruction Constitution" while simultaneously leaving the inhabitants of those territories in political limbo. ERMAN, ALMOST CITIZENS, *supra* note 47, at 12–13.

privileges, and immunities afforded by the Federal Constitution, which the Treaty did not expressly require.[85]

Following the ratification of the Treaty, Puerto Rico underwent several significant changes affecting its internal governance, applicable laws, and constitutional relationship with its new sovereign. Immediately following the Treaty, the federal government implemented a temporary military government on the Island.[86] Chief among its objectives was enabling Puerto Rico's transition from a Spanish colony to a North American one. To that end, military leaders issued what would be hundreds of military orders, establishing new house rules.[87] General Order Number 1 provided a road map for the fate of the then-existing legal codes on the Island. The Order stated in pertinent part:

> The provincial and municipal laws, in so far as they affect the settlement of private rights of persons and property and provide for the punishment of crime, will be enforced unless they are incompatible with the changed conditions of Puerto Rico, in which event they may be suspended by the department commander. They will be administered substantially as they were before the cession to the United States.[88]

That Order signaled some modicum of respect for the customs, traditions, and laws that developed in Spain and Puerto Rico over the preceding 400 years; but any purported respect was superficial at best. Indeed, "little by little, the legal system was carved away. There always seemed to be some basis of 'incompatibility' on which to hang a new decree."[89]

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85. Malavet, *Puerto Rico*, *supra* note 67, at 80. Notably, the federal government had in the past afforded the privileges and immunities of the Federal Constitution to newly acquired territories, as it did in the Treaty of Guadalupe-Hidalgo following the Mexican-American War. *Id.* at 80–81.

86. At first, authority was exercised on behalf of the United States by the field commander pursuant to a General Order, but by August 14, 1898, the military exercised its authority as a belligerent nation in hostile control. Congress would eventually establish a civilian government by 1900. TORRUELLA, THE SUPREME COURT AND PUERTO RICO, *supra* note 72, at 24.

87. Rodriguez Ramos, *Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico*, 23 TULANE L. REV. 345, 363–64 (1948). Officers or soldiers of the United States Army, however, were not subject to Puerto Rican criminal courts, and instead General Order Number 1 vested jurisdiction within the court martial or military commissions. Navares Muñiz, *Evolution of Penal Codification in Puerto Rico*, *supra* note 62, at 102.

88. Torres, *supra* note 8, at 3–4.

89. *Id.* at 4. Although I am mainly referring to the abrogation of the Puerto Rican penal code, it bears noting that the United States would completely replace three, and

To be sure, the North Americans did not try to hide their belief in the inferiority of the various systems established in the new possessions.[90] And that view was evident in the actions of federal agents. For example, the military government began eroding the accepted criminal procedure on the Island by, among other things, introducing concepts of criminal procedure foreign to the established civil law traditions at the time, including the writ of habeas corpus.[91] The military government also made changes to the substantive criminal law, adding prohibitions on lotteries and raffles, pugilistic encounters between men, cockfighting, and dueling to the penal code.[92] Moreover, the military government made changes to the sanctions available under the penal code, adopting the purportedly reformative rationale for punishment, and providing hard labor as a discretionary punishment to induce reform.[93] Notably for the cultural aspect of Puerto

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substantively change two, of the five basic codes of the Puerto Rican civil law system. *Id.* at 2.

90. All throughout this time, the majority view concerning the newly acquired territories and its inhabitants was one mired in racism, bigotry, and xenophobia. As summarized by one North American general, in his view the Cubans were "no more capable of government than the savages of Africa" and "the relationship of the white men to the tropical people must be one of dominance." FERNÁNDEZ-ARMESTO, *supra* note 71, at 240; *see also* LORRIN THOMAS, PUERTO RICAN CITIZEN: HISTORY AND POLITICAL IDENTITY IN TWENTIETH-CENTURY NEW YORK CITY 5–6 (2010) (explaining that following the Treaty of Paris "most jurists and lawmakers saw no need to hide their racist judgment about Puerto Ricans behind coded language of foreignness" referring to Puerto Ricans as "mongrel[s]" and "an alien and inferior race."). This same position would be expressed by the United States Supreme Court on various occasions. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 287 (1901) ("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."); Balzac v. Porto Rico, 258 U.S. 298, 347–48 (1922) ("The jury system needs citizens trained to the exercise of the responsibilities of jurors . . . . The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.").

91. Torres, *supra* note 8, at 4. The military government was under no orders to make these changes. Indeed "the military government introduced all these changes into Puerto Rican life without any instructions from Washington." HENRY WELLS, THE MODERNIZATION OF PUERTO RICO: A POLITICAL STUDY OF CHANGING VALUES AND INSTITUTIONS 75–76 (1969). Furthermore, the military government tried civilians in military courts despite Supreme Court precedent suggesting that it was unconstitutional to do so. Torres, *supra* note 6, at 4 n.11 (citing *Ex Parte Milligan*, 18 U.S. 281 (1866)).

92. Muñiz, *Evolution of Penal Codification*, *supra* note 62, at 104. The prohibition on cockfighting announced by the military government has been a source of tension between Puerto Ricans and the federal government since the 1900s and continues spurring litigation to this day. *See* Hernandez-Gotay v. United States, 985 F.3d 71, 75 (1st Cir. 2021) (denying a challenge to the federal statute banning cockfighting in Puerto Rico).

93. Muñiz, *Evolution of Penal Codification*, *supra* note 62, at 104.

Rican jurisprudence, the military government issued an order requiring that Puerto Ricans study law only in the United States, as opposed to the common practice of studying in Spain.[94] Many attorneys and government officials were shocked by the lack of respect the military government showed for a centuries-old regime that tied the social fabric of the Puerto Rican people.[95] With time, federal actors would institute more significant changes to the applicable legal codes.[96]

As federal actors tinkered with local laws, Congress began the process of creating the Island's new governmental structure by passing the Foraker Act of 1900.[97] Under the Act, the local government consisted of a presidentially appointed Governor, an eleven-person executive council, with the majority being statesiders,[98] thirty-five elected Puerto Ricans in the House of Delegates, and an elected Resident Commissioner who represented Puerto Rico in the House of Representatives but did not have a vote.[99] The institution of a civil government on the Island facilitated the process of Americanization, which proceeded with unabated ferocity.[100]

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94. Headquarters, U.S. Dep't of P.R., Gen. Order No. 134 (Aug. 31, 1899); Torres, *supra* note 8, at 4 n.13 (citing a general order from the military government); Cintrón, *supra* note 57, at 153 (outlining that legal studies performed in Spain will not be accepted).

95. Professor Eulalio A. Torres recounts one instance where Puerto Rican members of the cabinet resigned over a decision to eliminate a government program, noting that they refused "to continue giving their cooperation to the absorbent policy being developed around them, and which Puerto Ricans perceive with sorrow and anguish." Torres, *supra* note 8, at 5.

96. The penal code felt the full brunt of the American plenary power, particularly from its military and executive branch. While the military government attempted to Americanize the Puerto Rican legal system through piecemeal orders, the executive branch of the United States government established several commissions and task forces primarily composed of mainlanders dedicated to studying and "harmonizing" the legal codes of the Island with the common law traditions of the mainland. As Professors Nevares Muñiz, Torres, and Cintrón recount, these reports and commissions would lead to the eventual abrogation of the Puerto Rican penal code, which would be replaced by a penal code copied almost verbatim from the Penal Code of California of 1873 over the objections of Puerto Ricans. Muñiz, *Evolution of Penal Codification*, *supra* note 62, at 104–07; Muñiz, *Recodification of Criminal Law in a Mixed Jurisdiction*, *supra* note 62, at 5 (describing how the California Penal Code was adopted as the Puerto Rico Penal Code); Torres, *supra* note 8, at 15–20 (describing the history of various commissions and changes to the civil code that gave rise to the new Penal Code of 1902).

97. Foraker Act of 1900, Pub. L. No. 56-191, 31 Stat. 77 (1900).

98. Torres, *supra* note 8, at 10, 23. This structure ensured that, despite some local representation, statesiders always had the final say in important matters.

99. José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 434–35 (1978).

100. *See* Pedro Cabán, *Subjects and Immigrants During the Progressive Era*, 23 DISCOURSES 24, 25 (2001) ("In . . . Puerto Rico Americanization included implanting a new

Although partially comprised of Puerto Ricans, the executive council and governor had de facto control over all legislation on the Island, which facilitated the enactment of significant structural reforms.[101] For example, with respect to criminal procedure, the civil government passed a law establishing jury trials and providing that both English and Spanish would be used in courts on the Island.[102]

While Congress developed the governing structure of the Island, the rest of the federal government began applying federal laws to Puerto Rico. To be sure, the application of federal law to a newly acquired territory was completely orthodox. The Territorial Clause authorized Congress to apply federal statutes to the territories, bestowing Congress with the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,"[103] and the Supremacy Clause assured that federal statutes would always apply in case of conflict with local ordinances. What was unique to the early twentieth century was that the Supreme Court of the United States began carving out special doctrines just for the newly acquired territories, which allowed federal legislation to discriminate against acquired territories in perpetuity.[104] Prior to the 1898 acquisitions, the accepted understanding among the courts and government officials was that all territories were

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system of governance and law and an educational campaign to win acceptance of the legitimacy of the new sovereign power.")

101. Torres, *supra* note 8, at 10.

102. Muñiz, *Recodification of Criminal Law in a Mixed Jurisdiction*, *supra* note 62, at 5. To this day all proceedings in federal courts are conducted only in English, leaving large segments of the Puerto Rican population without the ability to participate in federal civil and criminal matters, including jury service. *See* Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors*, *supra* note 44, at 498 ("Because less than a quarter of the population of Puerto Rico speaks English, and even fewer speak English at an advanced level that would allow them to serve on a jury, an estimated 90% of Puerto Rico's citizenry is denied the privilege and responsibility of serving on federal juries.").

103. U.S. CONST. art. IV, § 3, cl. 2. As then-Judge Breyer explained, following its acquisition, Puerto Rico became a territory of the United States "subject to the command of Congress." Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 39 (1st Cir. 1981).

104. The federal government's attitude towards the newly acquired territories spurred another chapter in executive "inventive statesmanship" by which the executive, and by extension the legislative and judiciary branches, used intellectual and legal gymnastics to legally justify their foreign policy. *See* Joseph Blocher & Mitu Gulati, *supra* note 48, at 259 (describing the federal government's use of inventive approaches to territorial governance); R.B.S., *Inventive Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA. L. REV. 1041, 1050–54 (1974) (describing the development of novel political and judicial interpretations of the Territorial Clause as a response to the acquisition of Guam, Philippines, Cuba, and Puerto Rico).

destined for statehood and should not remain in some sort of legal purgatory ad infinitum.[105] That general understanding, however, changed[106] dramatically at the turn of the twentieth century with the now infamous *Insular Cases*.[107]

Considerable ink has been spilled explaining these cases, and their continued longevity has been, at times, put into question.[108] But a few more words are appropriate here. The *Insular Cases* stand for the proposition that at the moment of acquisition, Puerto Rico—like the other territories acquired after the Spanish-American War—was an unincorporated territory, meaning that the U.S. government could exercise its plenary power over the territory pursuant to the Territorial Clause, as had always been the case,[109] but now it explicitly could do so in perpetuity and without

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105. The Supreme Court explained this understanding of the federal government's acquisition of territories in *Dred Scott v. Sandford*:

> [A territory] is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States . . . .

60 U.S. 393, 447 (1856); *see also* Robert F. Berkhofer Jr., *The Northwest Ordinance and the Principle of Territorial Evolution*, *in* THE AMERICAN TERRITORIAL SYSTEM 45, 45–46 (John Porter Bloom ed., 1973) ("[A]ny status less than eventual statehood . . . [is] a betrayal of the very principle upon which Americans had fought the revolution.").

106. *See* Emmanuel Hiram Arnaud, *A License to Kill: State Sponsored Death in the Oldest Colony in the World*, 86 REV. JUR. U. P.R. 291, 299–301 (2017) (describing American expansion at the turn of the twentieth century and the importance of the *Insular Cases*).

107. The *Insular Cases* are generally understood to be those decisions that dealt with the relationship between insular territories and the United States beginning in 1901 up until 1922. *See* John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. 401, 428 (2018).

108. Reid v. Covert, 354 U.S. 1, 14 (1957). In a case involving the applicability of the jury trial right to United States military tribunals abroad, the Supreme Court expressed its views on the *Insular Cases*, noting that:

> [I]t is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

Id.

109. Christina D. Ponsa-Kraus, *The Constitution and Deconstitution of the United States*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 181, 191 (Sanford Levinson & Bartholomew Sparrow eds., 2005).

granting Puerto Ricans the extension of all federal constitutional rights.[110] In other words, some constitutional provisions did not apply in unincorporated territories that do apply in incorporated ones. Further, the *Insular Cases* explicitly rebutted the assumption that all territories were destined for statehood.[111] Although the earliest decisions were comprised of several concurring opinions with no clear majority, the Supreme Court formally adopted the incorporation doctrine in *Balzac v. Porto Rico*,[112] explaining that even though Congress extended Puerto Ricans U.S. citizenship, it did not extend the full protections of the Federal Constitution to the Island.[113] The importance of the incorporation doctrine for purposes of federal legislation rests in Congress' power not only to legislate over Puerto Rico and the other territories with broad strokes, but also its ability to treat those territories differently in perpetuity without offending the Federal Constitution.[114]

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110. *See* Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976); Torres v. Puerto Rico, 442 U.S. 465, 468–69 (1979) (describing some constitutional rights that were not granted to Puerto Ricans living on the Island); Maysonet-Robles v. Cabrero, 323 F.3d 43, 53 (1st Cir. 2003) ("Puerto Rico is an unincorporated territory of the United States"); United States v. Rivera Torres, 826 F.2d 151, 154 (1st Cir. 1987) ("We begin with the proposition that Congress can, pursuant to the plenary powers conferred by the Territorial Clause, legislate as to Puerto Rico in a manner different from the rest of the United States.").

111. It bears noting that there are at least two different views of the consequences of the *Insular Cases*. The "standard account" is that the doctrine of territorial incorporation meant that the Constitution did not apply in its entirety in the unincorporated territories and instead that only the fundamental rights applied there. Furthermore, those unincorporated territories did not have a promise of statehood, but incorporated ones did. *See, e.g.*, Fitisemanu v. United States, 1 F.4th 862, 869–71 (10th Cir.), *en banc denied*, 20 F.4th 1325 (10th Cir. 2021). A second view posits that this standard account is "fundamentally wrong" and that the *Insular Cases* did not create a "constitution-free-zone" but instead created a new domestic territory that could be governed and later be relinquished. Christina Duffy Burnett [Ponsa-Kraus], *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 798–800 (2005).

112. 258 U.S. 298, 312–13 (1922); *Examining Bd.*, 426 U.S. at 599 n.30 (describing the *Insular Cases*).

113. *See* Balzac v. Porto Rico, 258 U.S. 298, 309 (1922) ("The citizen of the United States living in Porto Rico [sic] cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican [sic].").

114. Harris v. Rosario, 446 U.S. 651, 651–52 (1980) ("[Congress] may treat Puerto Rico differently from States so long as there is a rational basis for its actions."). The *Insular Cases*, it bears reminding, were invariably racist. Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147, 168 (2006) ("[T]he Insular Cases are plagued by racist discourse used by the Justices to justify the denial of rights to inhabitants of unincorporated territories. Worse yet, the Justices tried to cloak some of this racist language in the guise of pushing 'self-determination' for these areas."); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. POL'Y REV. 57, 68 (2013) ("[A] definite tinge of racial bias is discernible

One of the ways in which Congress' ability to discriminate between states and territories manifests is in the applicability of federal criminal statutes. With the ability to treat the territories differently, Congress extended some criminal statutes beyond their typical scope and has specifically regulated the local affairs of Puerto Rico and other territories. The proposition that Congress had the ability to regulate local activity was not controversial. Indeed, almost fifty years after acquiring the Island, the First Circuit held that federal prosecutors could enforce federal criminal statutes that in their application regulated local crimes in Puerto Rico—thereby regulating conduct that Congress could not otherwise reach in the states.[115] In *Crespo v. United States*, the First Circuit sanctioned Congress' ability to regulate local crime within Puerto Rico.[116] There, defendant Crespo was convicted of five counts of transporting women for the purpose of prostitution within Puerto Rico under the Mann Act.[117] On appeal, Crespo argued that the Mann Act could not be read to regulate the transportation of someone solely within Puerto Rico (Crespo had been convicted of transporting women between the Puerto Rican cities of Caguas and Aguadilla) and instead could only apply to transportation in and out of the Island.[118] He explained that "to intervene in matters of interest only to the people of Puerto Rico, that is to say, regulating immorality in general [] is within the proper and exclusive domain of the legislature of Puerto Rico"

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in several of the plurality opinions. This is not a surprising circumstance considering that the Justices that decided the Insular Cases were, almost to a man, the same that decided the infamous 'separate but equal' case of Plessy v. Ferguson in 1896.").

115. Crespo v. United States, 151 F.2d 44, 45 (1st Cir. 1945), *abrogated by* United States v. Maldonado-Burgos, 844 F.3d 339, 340 (1st Cir. 2016); *see also* Rivera v. United States, 151 F.2d 47, 48 (1st Cir. 1945) (sanctioning prosecution for transportation of a firearm and ammunition for firearms within Puerto Rico by a person previously convicted of a crime under the Federal Firearms Act).

116. *Crespo*, 151 F.2d at 45.

117. *Id.* at 44; *cf.* United States v. Beach, 324 U.S. 193, 195 (1945) (per curiam) (finding that § 2423(a) of the Mann Act was applicable to transportation of a woman for the purpose of prostitution solely within the District of Columbia). The legislative history of the Mann Act bears noting. Scholarship has long determined that its legislative history exposed that the legislators had no real commitment to protecting women of color, and instead "[t]he focus of the congressional floor debates on Mann's bill was the mythical white farm girl who came to the city looking for adventure and found herself trapped in a life of sexual slavery." Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1493–94 (2015) (quoting Barbara Holden-Smith, *Lynching, Federalism & the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 67 (1996)) (internal quotation marks omitted). Indeed, from its inception, the Mann Act "was actually used to further police the sexuality of white women by prosecuting black men for engaging in consensual interracial relations." *Id.*

118. *Crespo*, 151 F.2d at 45.

and not Congress.[119] The First Circuit disagreed, explaining that the Mann Act expressly applied to transportation within any territory and that there was "no ambiguity to clear up by resorting to evidence of the intention of Congress."[120] In any event, it found that the weight of the legislative history and Congress' plenary power to legislate within Puerto Rico did not support Crespo.[121] The Mann Act's Committee Report expressly stated that transportation under the Act included transportation not only in interstate or foreign commerce, but also within the territories "without regard to the crossing of district, territorial or state lines."[122] Furthermore, the court, relying on the *Insular Cases* and their progeny,[123] explained that there was "no question" as to Congress' plenary power to legislate with respect to Puerto Rico, a territory.[124]

With *Crespo*, the First Circuit confirmed what could have been readily inferred from the Territorial Clause alone: that the federal government could regulate even the Island's local criminal affairs. *Crespo*, however, was also significant for other reasons as well because it clarified the analytical framework that courts should apply when deciding whether a statute applied to Puerto Rico, and even more specifically, whether a statute applied to solely intra-Island activities. First, if the statute expressly applied to intra-territory activity, it was unnecessary to inquire whether Congress intended to meddle in a territory's local affairs because, by the express terms of the statute, there was "no ambiguity to clear up."[125] Second, Puerto Rico was plainly a territory, and the Supreme Court had already confirmed Congress' plenary power to legislate for the territories.[126] But a few years after *Crespo*, the development of a new governmental structure for the Island would complicate the manner in which courts viewed the application of federal law to Puerto Rico.

B. What's in a Name? The Commonwealth Emerges

In the 1950s Puerto Rico entered a peculiar stage in its history. The first half of the twentieth century saw the surge of panoply of clashing political forces—both local and international—which in the aggregate demanded greater local autonomy for insular possessions and, at times,

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119. *Id.*
120. *Id.*
121. *Id.* at 46.
122. *Id.* (quoting H. Rep. No. 62–47 (1992)).
123. The court first cited to *Downes v. Bidwell*, 182 U.S. 244 (1901).
124. *Crespo*, 151 F.2d at 45.
125. *Id.*
126. *Id*.

even independence from the United States.[127] Those sociopolitical forces prompted the United States to progressively grant Puerto Ricans more authority over local affairs throughout the twentieth century.[128] In 1947, for example, Congress granted Islanders the ability to popularly elect their own Governor, who had been up to that point appointed by the president of the United States.[129] The most significant change, however, occurred with the passage of Public Law 600 in 1950.

"[F]ully recognizing the principle of government by consent," the federal government believed that it was prudent to adopt a law "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."[130] For the first time since Spanish colonization, Puerto Ricans had the opportunity to create a constitution of their own making, so long as it called for a republican form of government and was approved by Congress.[131] Islanders quickly mobilized, convened a constitutional convention, and drafted a

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127. Two major movements intersected leading up to the Commonwealth. The first was the restlessness many Puerto Ricans felt as a result of being second class citizens which spurred various decolonization movements, including a renewed independence struggle. The second was the international movement towards self-determination for colonies throughout the world, which then intersected with the United States' Cold War narrative of freedom and liberty for democratic nations. *See* Joel Colón-Ríos & Martín Hevia, *The Legal Status of Puerto Rico and the Institutional Requirements of Republicanism*, 17 TEX. HISP. J. L. & POL'Y 1, 9–10 (2011) (describing the political climate in Puerto Rico preceding the creation of the Commonwealth); Nelson Torres-Ríos, *Limitations of the Jones Act: Racialized Citizenship and Territorial Status*, 19 RUTGERS RACE & L. REV. 1, 4 (2018) (discussing the international pressures during the Cold War incentivizing the United States to shield its colonial relationship with Puerto Rico).

128. In 1917, for example, Congress passed the Second Organic Act, known as the Jones Act, which granted Puerto Rican U.S. citizenship and the ability to popularly elect both houses of the Island's legislature, among other things. Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 6 (1953). The President of the United States continued appointing the Puerto Rican Governor with consent of the Senate, and all laws passed by the Puerto Rican legislature had to be reported to Congress, which reserved the power to veto them. *Id.*; *see* Jones Act, Pub. L. 64-368, 39 Stat. 951 (1917).

129. The first popularly elected governor of Puerto Rico was Luis Muñoz Marín. Marín who, like his father, was a strong advocate for the independence movement on the Island. Muñoz Marín would eventually turn away from that position and instead become one of the faces of the Commonwealth movement. *See* Eamon J.P. Riley et al., *"Yo Soy Boricua": Tapping into the Strength of the Puerto Rican Community to Reclaim Control over Its Political, Social, and Economic Future*, 87 REV. JUR. U. P.R. 972, 978 (2018).

130. 48 U.S.C. § 731(b).

131. Mitu Gulati & Robert K. Rasmussen, *Puerto Rico and the Netherworld of Sovereign Debt Restructuring*, 91 S. CAL. L. REV. 133, 150 (2017).

constitution which was approved through an Island-wide referendum.[132] Within two years, Congress approved Puerto Rico's new Constitution—after making several revisions[133]—thereby creating *el Estado Libre Asociado*—or the Commonwealth of Puerto Rico, as referred to in the United States.[134] Notably, Congress also repealed provisions of the Foraker Act, believing they were inconsistent with the new constitutional structure and reorganized the remaining provisions under a new statute known as the Puerto Rican Federal Relations Act ("PRFRA").[135]

Congressional approval of Puerto Rico's Constitution certainly spurred a significant shift in the Island's internal governance. But in the aftermath of the Constitution's adoption, a consensus about the implications of the Commonwealth in a constitutional sense had not yet formed in some circles. Several stakeholders in both the federal government and the Island's political and academic circles suggested that the Puerto Rican Constitution went beyond merely creating a new structure of governance, but rather altered the constitutional relationship between Puerto Rico and the mainland.[136] This position, which has been popularly branded as the "compact theory," was espoused by prominent political leaders, judges, and intellectuals.

One such representation happened on the international stage before the United Nations. In 1947, any U.N. member who administered

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132. Torruella, *Reply*, *supra* note 12, at 80–81.

133. Congress provided three amendments: first, that "students in private schools were exempt from the compulsory public education requirement of Article II" of the Constitution; second, that "Article II, section 20, of the proposed Puerto Rico Constitution—a declaration of Human Rights—should be eliminated"; and third "that Article VII, section 3, should have added to it language that essentially would require Congressional approval of amendments to the Puerto Rico Constitution." Malavet, *Puerto Rico*, *supra* note 67, at 34–35. For an in-depth discussion about the reasons behind the proposed amendments, as reflected in the legislative record, see Helfeld, *Congressional Intent*, *supra* note 9, at 284–88.

134. The term "commonwealth" does not exist in Public Law 600 nor in the Puerto Rican constitution. It is merely an attempt to translate the term "estado libre asociado" which translates literally to "free associated state." The constitutional or legal significance of the "Commonwealth" name is truly immaterial. As Judge Torruella explained, "Massachusetts, Pennsylvania, and Virginia are all entitled 'commonwealths,' yet Puerto Rico is certainly not equivalent to them as a political entity." Igartua De La Rosa v. United States, 229 F.3d 80, 87 n.16 (1st Cir. 2000) (Torruella, J., concurring).

135. United States v. Cotto-Flores, 970 F.3d 17, 29 (1st Cir. 2020).

136. Acceptance of this narrative on the Island has largely been divided on political lines. Those who support the statehood party (Partido Nuevo Progresista) or who are generally against the Commonwealth status (such as independence supporters) largely oppose this view. Supporters of the Partido Popular Democratico and of the status quo, on the other hand, largely support this view. *See* Ponsa-Kraus, *Political Wine*, *supra* note 12, at 102.

territories that had not attained a full measure of self-government had to submit a report to the United Nations concerning those territories.[137] In conformity with that responsibility, the United States began submitting reports in 1947.[138] Shortly after the adoption of the Puerto Rican Constitution, the federal government submitted a memorandum to explain the constitutional significance of the new changes and therefore exclude the United States from the reporting requirement.[139] The memorandum stated that:

> Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision.[140]

The federal government went even further a few months later when U.S. delegate to the United Nations, Mason Sears, informed the United Nations that:

> A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and Puerto Rican people. A compact, as you know, is far stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.[141]

Some top Puerto Rican officials agreed with that assessment. Resident Commissioner Antonio Fernós-Isern similarly explained that the jurisdiction of the federal government to legislate in Puerto Rico "is [now] based on a bilateral compact to which it is a party and into which the people of Puerto Rico have entered of their own volition."[142] Similarly, the Governor of Puerto Rico believed that the United States relinquished its ability to legislate with respect to Puerto Rico "without the consent of its

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137. U.N. Charter art. 73(e); *see* G.A. Res. 66 (II) (Dec. 14, 1946).

138. TORRUELLA, THE SUPREME COURT AND PUERTO RICO, *supra* note 72, at 160.

139. Proponents of the compact theory on the Island had seized on the reporting requirement as a manner through which they could convince the executive branch to publicly support the compact theory. *Id.* at 160–66.

140. Magruder, *supra* note 130, at 15; Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 41 n.28 (1st Cir. 1981) (citing Magruder, *supra* note 130, at 15).

141. TORRUELLA, THE SUPREME COURT AND PUERTO RICO, *supra* note 72, at 162–63.

142. *Id.* at 163.

people, to override its laws, to change its form of government, and to alter its relations to the United States."[143] Representative Frances P. Bolton (R-OH), U.S. delegate to the United Nations, in her attempt to clarify some "misconceptions" about the meaning of Puerto Rico's commonwealth status explained that as a result of the new agreement the "authority of the Commonwealth of Puerto Rico is not more limited than that of any state of the Union; in fact in certain aspects is much wider."[144] Major political circles on the Island also embraced that understanding of Law 600 and the Commonwealth. For example, by 1952 the 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 and the party of Governor Luis Muñoz Marín—the first popularly elected governor of Puerto Rico.[145]

President Truman, following the adoption of the Puerto Rican Constitution, offered more fuel to the compact theory fire. He explained that as a result of Puerto Rico's new Constitution, "full authority and responsibility for local self-government will be vested in the people of Puerto Rico" and that its Constitution represented the "culmination of a consistent policy of the United States to confer an ever-increasing measure of local self-government upon the people of Puerto Rico."[146] Echoing and expanding on that narrative, representatives at the Constitutional Convention of Puerto Rico adopted resolutions explaining that Puerto Rico was now "a state which is free of superior authority in the management of its own local affairs" and "that by the approval of a constitution we attain the goal of complete self-government."[147]

These types of public statements prompted all levels of the federal judiciary to comment on, and at some points adopt, the compact theory, or at least its central narrative. The Supreme Court of the United States

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143. Press Release, Mission at the United Nations, Statement by the Honorable Frances P. Bolton, United States Representative, in Committee Four on Puerto Rico, U.N. Press Release SC/1802 (Nov. 3, 1953), https://history.state.gov/historicaldocuments/frus1952-54v03/d916 [https://perma.cc/PGH9-25U7]

144. *Id.* Bolton also made the incredible assertion that "[i]t should be remembered that the functions of the Federal Government in Puerto Rico are carried out under the same laws and within the same constitutional limitations under which they are carried on behalf of the states." *Id.* Bolton also explained to the United Nations that "[t]he previous status of Puerto Rico was that of a territory subject to the full authority of the Congress of the United States in all governmental matters" making the inference that the federal government relinquished its "full authority" to legislate over the Island. *Id.*; *see* Casellas, *supra* note 10, at 948.

145. *See* Ponsa-Kraus, *Political Wine*, *supra* note 12, at 102.

146. Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 40 (1st Cir. 1981).

147. *Id.*

explained that the "constitutional developments were of great significance" and that "Congress in 1952 'relinquished its control over [the Commonwealth's] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the states.'"[148] The First Circuit, in an opinion by then-Judge Breyer, noted that:

> Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the Territorial Clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.[149]

The "[PR]FRA and the Puerto Rico Constitution," then-Judge Breyer explained, "were intended to work a significant change in the relation between Puerto Rico and the rest of the United States."[150] Justice Breyer would bring this same position with him to the Supreme Court, with its most recent manifestation in his dissent in *Puerto Rico v. Sanchez Valle*.[151]

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148. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 74 (2016) (quoting Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976)); *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, 671 (1974))).

149. *Cordova*, 649 F.2d at 40.

150. *Id.* at 39. Justice Breyer continues holding this view, evident by his recently joining Justice Sotomayor's concurrence in *Aurelius* and his dissenting opinion in *Sanchez Valle*. The perceived shift in Puerto Rico's status was also adopted in several district court opinions following the creation of the Commonwealth. *See, e.g.*, Mora v. Torres, 113 F. Supp 309, 314–15 (D.P.R. 1953) ("[A] compact has been established between the people of Puerto Rico and the government of the United States . . . ."); Mora v. Mejias, 115 F. Supp. 610, 612 (D.P.R. 1953) ("Puerto Rico is now 'a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact . . . .'" (quoting Mora v. Mejias, 206 F.2d 377, 387 (1st Cir. 1953))).

151. 579 U.S. 59, 84–85 (2016) (Breyer, J., dissenting) ("Congress intended [Public Law 600] to work a significant change in the nature of Puerto Rico's political status."). Coincidentally, the Court's decision in *Sanchez Valle* overruled the First Circuit's decision in *United States v. Lopez Andino*, which had used the compact theory narrative to find that Puerto Rico and the federal government were indeed separate sovereigns for purposes of the Double Jeopardy Clause. 831 F.2d 1164, 1168 (1st Cir. 1987). As Judge Torruella noted in his concurrence in *Lopez Andino*, the majority's reasoning was "incorrect because Puerto Rico is *constitutionally* a territory, thus lacking that separate sovereignty." *Id.* at 1172 (Torruella, J., concurring). At the heart of the majority's misapprehension was that "the legislative history of [Public Law 600] leaves no doubt that even though its passage signaled the grant of internal self-government to Puerto

Justice Sotomayor endorsed Justice Breyer's position in a high-profile concurrence in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*.[152] Further yet, Justice Sotomayor repeatedly endorsed the position that Public Law 600 amounted to a "compact with the Federal Government," invoking the compact theory's main tenet that the law created a mutually binding agreement between Puerto Rico and the United States as the central narrative in her concurrence.[153]

On their face, the provisions that Congress repackaged as the PRFRA also lent some support to the conclusion that Puerto Rico now assumed a different constitutional posture, especially with respect to its internal affairs. As previously noted, the PRFRA consists, in part, of several holdovers from the previous Organic Acts which included broad delineations of the Puerto Rican-United States relationship.[154] Most importantly, the PRFRA both permits and limits the applicability of certain federal laws on the Island. Section 9 states that the "statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States . . ."[155] Although the prohibitory language in Section 9 appeared in the organic acts applicable to other territories,[156] it took on new meaning after the enactment of Puerto Rico's Constitution, inviting challenges to the applicability of various federal laws to the Island, even when the statute previously applied to Puerto Rico.[157] A reasonable interpretation of the plain language of the statute "reflects at least some intent that not only developing social and economic conditions but also

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Rico, no change was intended by Congress or Puerto Rico authorities in the territory's constitutional status or in Congress' continuing plenary power over Puerto Rico." *Id.* at 1173. The Supreme Court would ultimately vindicate Judge Torruella's position in *Sanchez Valle*.

152. 140 S. Ct. 1649, 1671–82 (2020) (Sotomayor, J., concurring).

153. *See, e.g.*, *Aurelius*, 140 S. Ct. at 1671, 1676, 1678 (Sotomayor, J., concurring). For a complete analysis of Justice Sotomayor's concurrence and the political repercussions of her endorsement of the compact theory, see Ponsa-Kraus, *Political Wine*, *supra* note 12.

154. United States v. Cotto-Flores, 970 F.3d 17, 29 (1st Cir. 2020); Elizabeth Vicens, Note, *Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350, 362 (2005).

155. 48 U.S.C. § 734.

156. Vicens, *supra* note 156, at 362.

157. Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 37 REV. JUR. U. P.R. 615, 636 (1968) ("[Section 9 of the PRFRA] gained increased importance since it quickly was seized upon to question the applicability of federal law in a variety of situations, even where Puerto Rico was specifically mentioned in the statute or where the statute had previously applied to Puerto Rico.").

emerging territorial self-government could render general federal law inapplicable."[158]

Despite the broad proclamations of federal and other political actors, that understanding of the effect of Public Law 600 does not withstand scrutiny. Indeed, the contemporaneous legislative history of Public Law 600 and the hearings on the approval of Puerto Rico's Constitution in Congress tell a radically different story. Even before Public Law 600 saw a vote in Congress, Resident Commissioner Fernós-Isern had explained to both a House and Senate subcommittee discussing Public Law 600's precursor that the law "would not change the status of the island of Puerto Rico relative to the United States . . . . It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris."[159] His testimony was not alone, as both the Secretary of the Interior and an Associate Justice of the Supreme Court of Puerto Rico also explained that the law would not change Puerto Rico's political relationship with the United States.[160] Even Governor Muñoz Marín explained before a House Committee that Public Law 600 would give Puerto Ricans authority under a constitution of their own creation to govern themselves in areas of local concern, but would not change the political and economic relationship with the United States.[161] Before the House, the Secretary of the Interior explained that Public Law 600 would not change "Puerto Rico's political, social and economic relationship to the United States" and the Resident Commissioner added that it "would not alter the power of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris."[162] Moreover, Chief Justice Cecil Snyder of the Supreme Court of Puerto Rico cogently stated: "Under it there is no

158. Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 44 n.38 (1st Cir. 1981).

159. *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the H. Comm. on Pub. Lands*, 81st Cong. 63 (1950) [hereinafter *Puerto Rico Constitution H. Comm. on Pub. Lands*] (statement of Fernós-Isern, Resident Commissioner of Puerto Rico); *see also Puerto Rico Constitution: Hearing on S. 3336 Before a Subcomm. Of the S. Comm. on Interior & Insular Affs.*, 81st Cong. 11–12 (1950) (explaining that the passage of this law would only grant Puerto Rico a "dignified station within the Union" which conforms to the then-present circumstances of the island).

160. *Puerto Rico Constitution H. Comm. on Pub. Lands*, *supra* note 153, at 54. This position was also endorsed in the Senate Report on S. 3336. S. REP. NO. 81-1779, at 3 (1950) ("The measure would not change Puerto Rico's fundamental political, social, and economic relationship to the United States.").

161. Helfeld, *Congressional Intent*, *supra* note 9, at 264.

162. *Id.* at 267.

change of sovereignty. The economic and legal relationship between Puerto Rico and the United States remains intact."[163]

During the debates about the Puerto Rican Constitution, the consensus in Congress followed the same narrative. The Chairman of the Senate Committee on Interior and Insular Affairs, Senator Joseph C. O'Mahoney (D-WY), explained that the U.S. Constitution "gives the Congress complete control and nothing in the Puerto Rican constitution could affect or amend or alter that right. That constitution is before us, and I find nothing in it which goes beyond the scope of local self-government which we by law expressly authorized."[164] Seeking more clarity, Chief Counsel to the Office of Territories Irwin Silverman described that the new relationship between Puerto Rico and the United States was of a contractual nature: "It is our hope and it is the hope of Government, I think, not to interfere with that relationship *but nevertheless the basic power inherent in the Congress of the United States, which no one can take away, is in the Congress as provided for in [the Territorial Clause]*."[165] Further, Silverman explained that following the creation of the Constitution, Congress retained the power to "annul acts of the Puerto Rican legislature" and that there is "[n]othing that we can do [that] can take that power away."[166]

The rest of the legislative record reflects Congress' understanding that they were not, in fact, relinquishing control over Puerto Rico, which still very much remained a territory.[167] 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.[168] Although the Senate and House debates on Public Law 600 and the approval of the Puerto Rican Constitution were peppered with different views, the bulk of the legislative history was clear. Indeed, Professor David Helfeld, the future Dean of the University of Puerto Rico Law School, wrote a pair of powerful and closely contemporaneous accounts[169] of Public Law 600 and the Puerto Rican Constitution. Reviewing the extensive legislative history, he concluded that

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163. *Id.*

164. *Id.* at 281.

165. *Id.* at 282 (emphasis added).

166. *Id.* at 283.

167. *Id.* at 270–72, 280–84, 293, 313–15.

168. Significantly, both Muñoz Marín and Fernós-Isern testified that if Puerto Ricans were to amend their constitution at a later point in a manner not approved by Congress, Congress could "always get around and legislate again." *Id.* at 265 ("[T]he authority of the Government of the United States, of the Congress, to legislate in case of need would always be there.").

169. *Id.* at 255; David Helfeld, *Historical Prelude to the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U. P.R. 135, 135 (1952) [hereinafter Helfeld, *Historical Prelude*].

it was "barren of any evidence, beyond a few statements uttered by representatives of minority Congressional opinion, that Congress intended to cede its Constitutional power over Puerto Rico in perpetuity."[170] The legislative history makes clear that "in constitutional theory Puerto Rico remains a territory," meaning that "Congress continues to possess plenary but unexercised authority over Puerto Rico."[171] Taken together, what is left are contemporaneous records strongly suggesting that Law 600 was never meant to change the relationship with the United States,[172] and on the other hand, post-hoc assertions that the Commonwealth status did just that. Accordingly, Public Law 600 is better understood as just another experiment in internal territorial governance.[173] With that history in mind, Part II turns to how things played out in the judiciary.

II. Federal Criminal Statutes in the Supposed Commonwealth World

According to the compact theory, the federal government's relationship with Puerto Rico underwent a significant change that granted greater autonomy to Puerto Ricans.[174] One of the crowning achievements of

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170. Helfeld, *Congressional Intent*, *supra* note 9, at 307; *see also* Helfeld, *Historical Prelude*, *supra* note 170, at 150 (explaining that the "compact" was a "solemn pledge of Congressional non-interference" into the Puerto Rican local government and not an abdication of its plenary Constitutional power over the territories).

171. Helfeld, *Congressional Intent*, *supra* note 9, at 307.

172. The practical effects of Public Law 600 prompted Representative Vito Marcantonio (Labor-NY) to attack the bill as a "fraud." He explained that the bill was no more than an amendment of the previous organic act, the Jones Act, and that Puerto Rico was not gaining any sense of sovereignty since their constitution was simply an act of Congress. *Id.* at 268–69. Marcantonio's pointed and incisive defense of Puerto Ricans was not at all surprising. Marcantonio was an Italian-American politician and community leader who represented East Harlem in the United States House of Representatives throughout the 1930s and 1940s. Throughout his tenure in the House, he was known to be a staunch advocate on behalf of his Puerto Rican constituents in Harlem and those on the Island as well. *See, e.g.*, THOMAS, *supra* note 92, at 86, 123, 140 (highlighting Marcantonio's fierce advocacy for Puerto Ricans).

173. *See, e.g.*, E.H. Arnaud, *supra* note 108, at 311 (referring to the Creation of the Commonwealth through Public Law 600 as the "the third organic act"); Torruella, *Reply*, *supra* note 12, at 84 ("[T]he legal and constitutional reality is that there was neither a 'creation' of an actual new entity, nor the establishment of one with new empowerment except on purely local matters––and even that was subject to congressional oversight and power.").

174. Casellas, *supra* note 10, at 948. Casellas and many other compact theory adherents typically justify their stance by, in part, recounting statements by a representative of the United States to the United Nations in which they stated that:

> It would be wrong, however, to hold that . . . the creation of the Commonwealth of Puerto Rico does not signify a fundamental change in the status of Puerto Rico . . . . The relationships

Public Law 600—per the compact theory—was not only that in many respects the Island's autonomy now mirrored that of a state of the Union, but also, the Island's sovereignty was now unique: that of a Commonwealth, or more accurately as it appears in Spanish, a free associated state.[175] As a result, shortly after the newly minted Constitution went into effect, criminal defendants on the Island tested whether the relationship had in fact changed. Prior to the 1950s, the First Circuit had already established in *Crespo* that federal criminal statutes applied to Puerto Rico and that, further, Congress could pass federal criminal statutes that regulated local activity.[176] If the Island's relationship with the mainland had truly changed, according to the compact theory, Congress had relinquished the power to regulate local criminal activities. That turned out not to be exactly right.

A. Towards an Analytical Framework

One of the first instances in which a Puerto Rican resident-defendant challenged the continued applicability of a federal criminal statute to Puerto Rico occurred in *Moreno Rios v. United States*.[177] Defendant Moreno Rios pleaded guilty to charges under the Narcotic Drugs Import and Export Act.[178] Following his guilty plea, he filed a motion[179] to set aside his conviction, arguing that the federal Narcotic Drugs Import and Export Act was inapplicable to Puerto Rico in the aftermath of Public Law 600.[180] The

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> previously established also by a law of the Congress, which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.

Id.

175. *See* Ponsa-Kraus, *Political Wine*, *supra* note 12, at 106 (describing the position of "commonwealthers" in debates regarding Puerto Rico's relationship with the United States).

176. Crespo v. United States, 151 F.2d 44, 45 (1st Cir. 1945).

177. 256 F.2d 68, 69 (1st Cir. 1958).

178. *Id.*

179. Moreno Rios sought relief under 28 U.S.C. § 2255, the vehicle through which incarcerated people may seek habeas review for their federal conviction. *Id.*

180. Rios pleaded guilty before Chief Justice Cecil Snyder of the Supreme Court of Puerto Rico who was serving as an "acting judge" in the district court of Puerto Rico. In his motion to set aside the conviction, Rios also argued that Chief Justice Snyder was unlawfully designated to serve as acting judge in the federal district court because after the passage of Public Law 600, justices of the Puerto Rican Supreme Court were appointed by the governor instead of the president of the United States as had previously been the case. *Id.* at 70. The First Circuit rejected this argument. *Cf.* Aponte v. United States, 325 F.2d 714, 715 (5th Cir. 1963) (holding that a sentence imposed by an associate justice of the Puerto Rico Supreme Court sitting as a U.S. district judge under presidential order was valid).

First Circuit rejected the argument. At the outset, the court explained that the passage of Law 600 did not affect Congress' ability to extend general federal criminal statutes to the Island.[181] Indeed, when Puerto Rico entered into the supposed "compact" with the United States, the people of Puerto Rico agreed to the Puerto Rican Federal Relations Act, which specifically provides that the "statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States."[182] The court reasoned that since the Narcotic Drugs Import and Export Act would apply to Puerto Rico just as it would to any other state, and because "the problem dealt with is a general one, certainly not 'locally inapplicable' to Puerto Rico," Congress clearly had the power to apply the Act to the Island.[183]

The court then directed its attention to the alternate, although not necessary, question of whether Congress actually intended for the Act to apply to Puerto Rico. The court first expressed that the Act had clearly applied to Puerto Rico prior to when the Commonwealth "came into being."[184] The Act, which was passed in 1909, was amended in 1922 to define the term "United States" to include "the several States and Territories, and the District of Columbia."[185] That amendment also imposed a penalty upon a person who fraudulently or knowingly brought a narcotic drug into the United States or any territory under its control or jurisdiction, among other acts.[186] The court reasoned that since Congress originally intended to apply the Act to Puerto Rico, it "would seem clear . . . that it was not necessary for the Congress to alter specifically all outstanding statutes thereto previously applicable in order to continue their effectiveness in Puerto Rico after it became a commonwealth in 1952."[187]

On the same day, the First Circuit also decided *Dario Sanchez v. United States*.[188] There, defendant Dario Sanchez appealed several convictions under the Narcotic Drugs Import and Export Act as well as under the Marihuana Tax Act, arguing that following the creation of the

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181. *Moreno Rios*, 256 F.2d at 71.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 72.
188. Dario Sanchez v. United States, 256 F.2d 73, 73 (1st Cir. 1958); *accord* Valpais v. United States, 289 F.2d 607, 609 (1st Cir. 1961) (relying on *Dario Sanchez* in denying challenge to the applicability of the Marihuana Tax Act to Puerto Rico); *see also* Rodriguez Salgado v. United States, 277 F.2d 653, 655–56 (1st Cir. 1960) (denying a similar challenge to the to the applicability of § 2593(a) of the Internal Revenue Code).

Commonwealth, neither of the statutes applied to Puerto Rico.[189] Relying on *Moreno Rios*, the court summarily disposed of Dario Sanchez's argument regarding the Import and Export Act. The applicability of the Marihuana Tax Act, however, required further inspection.[190]

The Marihuana Tax Act, which Congress passed under its taxing power, criminalized certain marijuana-related transactions taking place solely within Puerto Rico without reference to whether the marijuana was imported.[191] The question was whether the statute was still applicable given its local applicability following the passage of Public Law 600. In answering in the affirmative, the court relied on the reasoning from *Moreno Rios*. Focusing on Congress' intent both before and following the passage of Law 600, the Court explained that when Congress passed the Act in 1937, it originally intended to apply it to Puerto Rico, and the same was true two years later, when Congress incorporated the Act into the Internal Revenue Code, and again when Congress revised the Revenue Code in 1954.[192] Further, Congress' post-Commonwealth intent, and Puerto Rico's assent to the Marihuana Tax Act, was made clear through § 2603 of the Revenue Code, which placed the administration of the Act in Puerto Rico in the hands of the internal revenue officer of the Island.[193] In other words, the Puerto Rican government had administered and continues to administer the Marihuana Tax Act on the Island with no conflict or protest, therefore assenting to the application of the federal statute following the "compact."[194] In taking that route, the First Circuit specifically noted that the continued applicability of federal penalties to other intra-Island conduct was a question that would one day need to be answered, but was not at issue in *Dario Sanchez*.[195]

Indeed, a case challenging the continued validity of a federal criminal statute's application to intra-Island activity had come, but it stayed at the district court level. In *United States v. Figueroa Rios*, the defendant

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189. *Dario Sanchez*, 256 F.2d at 74.

190. *Id.* at 75. Interestingly, the court cited at length to an unpublished District of Puerto Rico opinion which considered the applicability of the Act to the Commonwealth and found that the Islanders consented to its application by consenting in the Public Law 600 referendum to the "'compact' offered to them by Public Law 600." *Id.* at 74. The court explained that the district court's reasoning was not entirely convincing because the PRFRA exempted the "internal revenue laws" and it could be argued that Puerto Ricans, by ratifying the compact, did not consent to the local application of the Marihuana Tax Act. *Id.* at 74–75.

191. *Id.* at 74.

192. *Id.* at 75.

193. *Id.*

194. *Id.* at 74.

195. *Id.*

challenged his indictment under Section 901(2) of the Federal Firearms Act ("FFA"), arguing that the statute was inapplicable to a prosecution concerning transportation of firearms in interstate commerce for acts solely within the Island.[196] The FFA prohibited a person who was "under indictment or who has been convicted of a crime of violence or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."[197] Under the FFA, transportation within a U.S. territory fell within the statute's definition of interstate or foreign commerce.[198] The federal government immediately showed its hand and argued that even after the creation of the Commonwealth, Puerto Rico remained a territory of the United States, and that Congress at no point revoked its power to regulate territories under the Territorial Clause.[199] Therefore, Puerto Rico still fell within the scope of Section 901(2) of the FFA. The defendant countered by invoking the compact theory and argued that following the creation of the Commonwealth, Puerto Rico was no longer a territory of the United States and that as a result, transportation of a firearm solely within Puerto Rico was not covered by the statute.[200]

Puerto Rico District Court Judge Ruiz-Nazario sided with the defendant, but explicitly declined to pronounce that Puerto Rico ceased being a territory of the United States.[201] Instead, the District Court followed the Supreme Court's lead in the pre-Commonwealth decision of *Puerto Rico v. Shell Co*.[202] and tried to discern, as a matter of legislative interpretation, whether Puerto Rico was a territory within the context of the FFA.[203] Answering in the negative, the district court emphasized that Puerto Rico no longer functioned as a typical U.S. territory because it now had a "government [] created by the People of Puerto Rico at a constitutional convention," none of its local officers were appointed by federal government actors, the local legislature now "reign[s] supreme over all matters of local concern" and it ceased relying on the president or Congress

196. 140 F. Supp. 376, 377 (D.P.R. 1956). *Figueroa Rios* was recently recognized as overruled. *See* United States v. Santiago, No. 10-333 (GAG), 2014 WL 12673699, at *3 (D.P.R. Mar. 11, 2014).

197. *Figueroa Rios*, 140 F. Supp. at 377.

198. *Id.*

199. *Id.* at 377–78.

200. *Id.* at 377.

201. *Id.* at 382.

202. 302 U.S. 253 (1937). In *Shell Co.*, the Supreme Court addressed the question of whether Puerto Rico should be treated as a "state" or "territory" within the meaning of the Sherman Antitrust Act. In *Shell Co.*, the Supreme Court held that Puerto Rico was a territory within the meaning of § 3 of the Sherman Antitrust Act. *Id.* at 259.

203. *Figueroa Rios*, 140 F. Supp. at 378–79.

for supervision.[204] Judge Ruiz-Nazario went further, stating that "[w]e are fully justified, in view of the changed situation, in going further and saying that if Congress had foreseen the Commonwealth of Puerto Rico, it would have so varied the language [of the FFA] as to exclude it from the intra-territorial operation of the Firearms Act."[205] Accordingly, the District Court found Section 901(2) of the FFA locally inapplicable to Puerto Rico.[206] The compact theory, to a great extent, prevailed.[207]

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204. *Id.* at 380–81. The fundamental assumption here—that as a result of the supposed compact Puerto Rico was now free and clear of federal intrusion in local affairs—has been directly refuted by the Supreme Court. In *Aurelius*, the Supreme Court sanctioned the appointment of territorial officers by the federal government who have since 2016 supervised Puerto Rico's fiscal affairs. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661 (2020). Similarly, in *Sanchez Valle*, the Supreme Court held that Puerto Rico's power to prosecute local crime came from the federal government, as opposed to their own power as a "Commonwealth." Puerto Rico v. Sanchez Valle, 579 U.S. 59, 73 (2016). In *Franklin Trust*, the Supreme Court found that, in contrast to the states of the Union, under Chapter 9 of the federal bankruptcy code Puerto Rico was preempted from creating its own municipal debt restructuring legislation. Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 117–18 (2016).

205. *Figueroa Rios*, 140 F. Supp. at 381.

206. *Id.* Judge Ruiz-Nazario also used his compact theory interpretation to find Section 5 of the Federal Alcohol Administration Act locally inapplicable to Puerto Rico, insofar as Section 70 of the Wine regulations prohibited the selling of certain wine solely within the Island. Trigo Bros. Packaging Corp. v. Davis, 159 F. Supp. 841 (D.P.R. 1958), *vacated sub nom*. Davis v. Trigo Bros. Packing Corp., 266 F.2d 174 (1st Cir. 1959). The Federal Alcohol Administration Act specifically defined the word "State" to include Territories, and then defined the term "Territory" to include Puerto Rico. *Id.* at 177 n. 5. The Act then prohibited the sale of certain wines in interstate or foreign commerce, which the Act defined as including within territories. *Id.* Despite the statute's explicit language, Judge Ruiz-Nazario, relying on his own *Figueroa Rios* decision, explained that in light of the creation of the Commonwealth "such local transactions or conduct are to be dealt with by the Commonwealth under its own Constitution and internal laws, and it would be frustrative of the very purpose and intention of Congress in establishing new status to now hold that said statute may accomplish by indirection the very thing that Congress expressly wanted to leave in the hands of the Commonwealth's government." *Id.* at 842 (quoting *Figueroa Rios*, 140 F. Supp. at 381). In light of the local nature of regulating wine purchases solely on the Island, the court found that the text of the PRFRA commands that those regulations be created locally, and not by the federal government. Accordingly, Judge Ruiz-Nazario found those sections of the Federal Alcohol Administration Act locally inapplicable to the Island. *Id.* at 842–43.

207. This reading of the effect of the Commonwealth was in line with some of the most prolific legal minds of the time. For example, José Trías Monge, one of the architects of the Commonwealth, had long advocated for the adoption of the compact theory. José Trías Monge, *El Estado Libre Asociado Ante los Tribunales, 1952-1994*, 64 REV. JUR. U.P.R. 1, 13, 37–38 (1995) (discussing *Moreno Ríos* and *Dario Sanchez* and applauding the First Circuit's interpretation of the constitutional meaning of the Commonwealth). Trías Monge also argued that "[t]hose who favor independence or statehood sustain that the constitutional development from 1950–52 did not alter the status of the Island as a

Yet the compact theory's prevalence in popular culture, intellectual circles, and the District Court was a mere drop in the ocean of judicial decisions—especially those from the U.S. Supreme Court—rejecting it. In the years following *Moreno Rios*, both the First Circuit and Supreme Court of the United States would affirm that Puerto Rico was indeed still a territory, subject to the plenary power of Congress, and that its Commonwealth status did not significantly change its constitutional relationship with the United States. For example, in *United States v. Villarin Gerena*, the First Circuit stood by its holding in *Moreno Rios*.[208] In that case, a member of the Puerto Rico Police Force appealed his conviction for a violation of 18 U.S.C. § 242—42 U.S.C. § 1983's criminal analogue which criminalizes the deprivation of rights under color of law—for striking someone various times and arresting him without probable cause.[209] Villarin Gerena appealed his conviction and sentence by arguing, in part, that Section 242 was not applicable to Puerto Rico following the creation of the Commonwealth.[210] The First Circuit was unconvinced. Relying on *Shell Co.* and *Moreno Rios*, the court explained that pre-Commonwealth statutes were presumptively applicable to Puerto Rico and that there was no reason to

non-incorporated territory, a position not supported by the most informed decisions of the courts." *Id.* (translation provided). He would, however, eventually criticize the practical consequences of Public Law 600 and the shortcomings of the alleged "compact." *See* Christina D. Ponsa-Kraus, *Recent Publications: Puerto Rico*, 23 YALE J. INT'L L. 561, 562 (1998) ("Trías Monge's use of the term 'colony' has caused an uproar in Puerto Rico. This is not because nobody there believes the term applies to the island . . . but rather, because Trías Monge was among the architects of the Commonwealth status his book maligns."); Torruella, *¿Hacia Dónde Vas Puerto Rico?*, *supra* note 49, at 1507 ("[T]he unequivocal posture that Trías Monge expresses toward the Commonwealth's colonial status in [his book] is nothing short of startling. Trías Monge, after all, was one of the principal architects of the Commonwealth as well as an active participant in its endeavors during much of the political entity's golden years.").

208. United States v. Villarin Gerena, 553 F.2d 723, 726 (1st Cir. 1977) ("Moreno Rios is settled law and sensible doctrine.").

209. *Id.*

210. *Id.* at 724. Interestingly, and in a seeming tip of the hat to the *Insular Cases*, the First Circuit also addressed the "threshold question" of whether the victim had been deprived of the exercise of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." *Id.* at 724. In answering in the affirmative, the court explained that "[f]reedom from arrest without probable cause and from police violence are fundamental constitutional rights. They apply in Puerto Rico as forcefully as elsewhere." *Id.* This inquiry directly invoked the "fundamental rights" theory from *Downes v. Bidwell* and confirmed in *Balzac*, which stood for the proposition that only the fundamental rights emanating from the Federal Constitution applied to Puerto Rico and other unincorporated territories. Downes v. Bidwell, 182 U.S. 244, 290–91 (1901); 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, 396, 409–10, 449 (discussing *Balzac v. Porto Rico* and the impact of the *Insular Cases*).

believe that the "elevation of Puerto Rico to Commonwealth status [] render[ed] § 242 inapplicable."[211] Further, the court also responded to another relevant "intriguing but unpersuasive" argument.[212] Appellant argued that Section 242 had been amended after 1952, but that Congress did not amend the statute to explicitly apply to Puerto Rico as it had done in other statutes.[213] This argument, however, was explicitly rejected in *Moreno Rios*, when the First Circuit explained that the term "territory" in a statute may not necessarily refer to a specific legal classification, but rather a physical place, and if Congress had intended to apply a statute to Puerto Rico before 1952, it was not necessary for Congress to amend all statutes for them to continue their effectiveness in the Island.[214]

A few years later, in *Harris v. Rosario*, the Supreme Court reiterated that Congress could treat Puerto Rico differently than the states.[215] There, the Supreme Court considered whether Congress could allocate less federal financial assistance to Puerto Rico, under the Aid to Families with Dependent Children program, than the states of the Union. The Supreme Court emphatically sanctioned the unequal treatment, stating plainly that "Congress, which is empowered under the Territory Clause of the Constitution . . . to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[216] In the wake of Public Law 600, both Supreme Court and First Circuit decisions settled the general concept from *Harris*: that Congress could continue treating Puerto Rico differently pursuant to the Territorial Clause.[217]

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211. *Villarin Gerena*, 553 F.2d at 725.
212. *Id.*
213. *Id.* at 725–26.
214. Moreno Rios v. United States, 256 F.2d 68, 72 (1st Cir. 1958).
215. 446 U.S. 651 (1980) (per curiam).
216. *Id.* at 651–52.
217. Despite initially taking a different approach, the District Court of Puerto Rico likewise has since come to that conclusion. *See, e.g.*, United States v. Lebrón-Cáceres, 15-279 (PAD), 2016 WL 204447, at *14 (D.P.R. Jan. 15, 2016) (quoting Detres v. Lions Bldg. Corp., 234 F.2d 596, 600 (7th Cir. 1956)) (tracking the legislative history of Public Law 600 and concluding that Puerto Rico was a U.S. territory both before and after the Puerto Rican constitution was approved). The First Circuit has echoed the Supreme Court by noting that "Puerto Rico is an unincorporated territory of the United States." Maysonet-Robles v. Cabrero, 323 F.3d 43, 53 (1st Cir. 2003); Franklin Cal. Tax-Free Tr. v. Puerto Rico, 805 F.3d 322, 344 (1st Cir. 2015) (noting that Puerto Rico is "constitutionally a territory" (quoting United States v. Lopez Andino, 831 F.2d 1164, 1172 (1st Cir. 1987))), *aff'd* 136 S. Ct. 1938 (2016); Dávila-Pérez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000) ("[Puerto Rico] is still subject to the plenary powers of Congress under the territorial clause."). Two recent examples of the Supreme

Indeed, since 1952, a variety of federal criminal statutes that regulate intra-Island activities have remained applicable to Puerto Rico. For example, Section 2422(a) of the Mann Act criminalizes a person who "knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any [criminal] sexual activity."[218] Section 2423(a) of the Mann Act also criminalizes transporting a minor "in any commonwealth, territory or possession of the United States" with the intent to engage in criminal sexual activity.[219] Similarly, the Hobbs Act also regulates local Puerto Rican activity. Section 1951(3) defines "commerce" under the Act as "commerce within the District of Columbia, or any Territory or Possession of the United States."[220] Further, federal prosecutors apply other statutes related to sex trafficking codified under Title 18 to Puerto Rico. For example, 18 U.S.C. § 1591(a) criminalizes sex trafficking of children "in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States."[221] And 18 U.S.C. § 2251(a) punishes sexual exploitation of children "in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States."[222]

Taken together, at the turn of the twentieth century, various federal criminal statutes applied to local activity in Puerto Rico and both the Supreme Court and First Circuit had established a clear framework for analyzing whether a federal criminal statute applied to the Island. From these decisions we can glean that so long as Congress intended—expressly

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Court sanctioning the unequal treatment of Puerto Ricans can be seen in the Court's approval of PROMESA, which to this day subjects Puerto Rico's government to a fiscal board that reviews and approves its budget, and its decision finding that Puerto Rico is not a separate sovereign for double jeopardy purposes. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) ("[T]he Constitution's Appointments Clause applies to the appointment of officers of the United States with powers and duties in and in relation to Puerto Rico, but that the congressionally mandated process for selecting members of the Financial Oversight and Management Board for Puerto Rico does not violate that Clause."); Puerto Rico v. Sanchez Valle, 579 U.S. 59, 75 (2016) ("Puerto Rico cannot benefit from our dual-sovereignty doctrine."). The authority to treat Puerto Rico differently is also manifested in the supremacy of federal statutes over the Puerto Rican Constitution even with respect to local matters. *See, e.g.*, United States v. Quinones, 758 F.2d 40, 41 (holding that the Omnibus Crime Control and Safe Streets Act controlled over Puerto Rican constitutional provision prohibiting participation in wiretapping).

218. 18 U.S.C. § 2422(a).
219. 18 U.S.C. § 2423(a).
220. 18 U.S.C. § 1951(b)(3).
221. 18 U.S.C. § 1591(a).
222. 18 U.S.C. § 2251(a).

or impliedly—the application of a federal criminal statute to Puerto Rico (regardless of its local applicability to Puerto Rico), courts will faithfully abide by that intention. We can also appreciate that courts will likely ensure that federal statutes passed before the establishment of the Commonwealth have continued vitality on the Island.[223] The compact theory had, at least at the highest levels of the federal judiciary, receded into a political talking point.

B. The Return of the Compact Theory

Recently, a series of cases in the First Circuit have once again challenged the extent to which the United States can police local criminal activity on the Island. Those cases—all of which challenged the applicability of various provisions of the Mann Act to local activity on the Island—coincided with, and are at times in tension with, recent Supreme Court decisions regarding Puerto Rico's constitutional relationship with the United States.[224] As previously described, in 1945 the First Circuit explicitly held in *Crespo* that Congress could regulate criminal activity that occurs solely within Puerto Rico. That case, decided prior to the creation of the Commonwealth, found that the plain language of the statute and Congress' plenary power to legislate over the territories sanctioned Congress' intent to police local activities. Despite the long-established doctrines of incorporation and the enduring plenary power of Congress even following the establishment of the Commonwealth,[225] a new set of defendants sought to press the First Circuit to decide the open question that was left in *Dario Sanchez*. This time around, the compact theory was at the heart of the narrative of those decisions.

In 2014, the federal government filed a two-count indictment against Edwin Maldonado-Burgos, alleging that he transported two women within Puerto Rico with the intent to engage in criminal sexual activity.[226] This was not an unusual charge, and as far as the Assistant United States Attorneys ("AUSAs") were concerned, it was also perfectly in line with the First Circuit's decision in *Crespo*. Yet, before the District Court, Maldonado-Burgos argued that transportation occurring solely within Puerto Rico was

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223. *See* United States v. Moreno Rios, 256 F.2d 68, 73 (1st Cir. 1958); Dario Sanchez v. United States, 256 F.2d 73, 75 (1st Cir. 1958).

224. *See, e.g.*, Puerto Rico v. Sanchez Valle, 579 U.S. 59, 75 (2016) (concluding that the dual-sovereignty doctrine applies differently to Puerto Rico); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661 (2020) (concluding that the Appointments Clause applies differently to U.S. Territories under Article IV, § 3 of the Constitution).

225. *Supra* notes 18–21, 31–34.

226. Indictment, United States v. Maldonado-Burgos, 3:14-CR-00336, ECF. No. 11.

not covered under Section 2421(a) of the Mann Act.[227] This should not have been a difficult decision since *Crespo* had answered this exact question many years before, but the District Court agreed with Maldonado-Burgos[228] and dismissed the indictment, prompting the federal government to appeal.

On appeal, Maldonado-Burgos defended the district court's decision by challenging the continued validity of *Crespo* in light of the creation of the Commonwealth (advancing the compact theory), while the government explained that the historical significance of the Commonwealth engendered limited legal significance. *Crespo* should have probably ended the argument, and the First Circuit acknowledged as much, noting that in "a typical case, this [precedent] would end our inquiry."[229] But this was not a typical case in the panel's eyes because the creation of the Commonwealth casted doubt on the reasoning used in *Crespo* as to whether Puerto Rico was still a "territory" under that section of the Mann Act. In a rather striking turn of events, the First Circuit panel adopted the narrative of the compact theory pressed by Maldonado-Burgos and found that *Crespo* was no longer viable because Puerto Rico's constitutional relationship with the United States had significantly shifted in 1952. The court first recounted the history between Puerto Rico and the United States and concluded that the creation of the Commonwealth bestowed "a distinctive, indeed exceptional,

227. Section 2421(a) criminalizes "knowingly transport[ing] any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." 18 U.S.C. § 2421(a). The current iteration of the Mann Act does not define the words "Territory" or "Possession." United States v. Maldonado-Burgos, 844 F.3d 339, 341 n.3 (1st Cir. 2016).

228. United States v. Maldonado-Burgos, 130 F. Supp. 3d 498, 509–12 (D.P.R. 2015). Another judge of the District of Puerto Rico had also held that § 2421(a) did not apply to activities taking place solely within Puerto Rico. United States v. Mercado-Flores, 109 F. Supp. 3d 467, 468 (D.P.R. 2015), *rev'd on other grounds*, 872 F.3d 25, 28 (1st Cir. 2017).

229. United States v. Maldonado-Burgos, 844 F.3d at 340 (1st Cir. 2016). A few months prior to the *Maldonado-Burgos* decision, another First Circuit panel—composed of Chief Judge Jeffrey Howard, Judge Juan R. Torruella, and Judge Sandra Lynch—was presented with a similar question under a different section of the Mann Act in United States v. Carrasquillo-Peñaloza, 826 F.3d 590 (1st Cir. 2016). Acknowledging that the defendant in that case "faced an uphill battle in light of precedent" the court ultimately affirmed the defendant's conviction because she had entered into an unconditional guilty plea and the plea agreement included a valid waiver of appeal clause. *Id.* at 592. Indeed, the District Court had already rejected defendant's challenge arguing that § 2423(a) Mann Act did not apply to the transportation of people solely within Puerto Rico. United States v. Carrasquillo-Peñaloza, No. 12-728 (PG), 2013 WL 1490085 (D.P.R. April 10, 2013).

status" to Puerto Rico.[230] The court next explained that the "role that this history should play in" its analysis would determine how to approach the ultimate question in the case.[231] As a result, instead of adhering to the usual tools of statutory interpretation and relying on the plain language of an otherwise unambiguous statute as it had typically done,[232] the First Circuit declared that the applicability of federal statutes to local activities on the Island was governed by the First Circuit's decision in *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A*[233]—an opinion which, at least in dicta, adopted the compact theory.[234]

In *Cordova*, the First Circuit was faced with the question of whether Section 3 of the Sherman Antitrust Act—which governs restraints of trade within any territory—still applied to Puerto Rico after it became a Commonwealth.[235] In 1937, the Supreme Court had found that Section 3 of the Sherman Act did apply to Puerto Rico.[236] In reaching that decision, the Supreme Court looked at the plain language of the statute, which applied to "any territory of the United States" and divined whether Puerto Rico was a "territory" as contemplated in the Act.[237] The Court explained:

> [W]hether Puerto Rico comes within a given congressional act applicable in terms to a "territory," depends upon the character and aim of the act. Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to

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230. *Maldonado-Burgos*, 844 F.3d at 341 (Breyer, J., dissenting) (quoting *Sanchez-Valle*, 136 S. Ct. at 1878).

231. *Id.*

232. Up until this point, the First Circuit had established a discernible process for determining whether an act of Congress was meant to include Puerto Rico. *See* Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000) (considering the statutory text, legislative history, and later amendments when determining the Defense Base Act applied to Puerto Rico); United States v. Acosta-Martinez, 252 F.3d 13, 18–20 (2001) ("When determining the applicability of a federal statute to Puerto Rico, courts must construe the language, if plausible, "to effectuate the intent of the lawmakers."); United States v. Maldonado-Burgos, 869 F.3d 1, 4 (1st Cir. 2017) (en banc) (Howard, J., Lynch, J., dissenting) (arguing that the panel's decision conflicts with Supreme Court and First Circuit precedent regarding how federal law applies to Puerto Rico).

233. 649 F.2d 36 (1st Cir. 1981).

234. *Id.* at 40; *see also Maldonado-Burgos*, 844 F.3d at 343–44 (applying the *Cordova* framework).

235. *Cordova & Simonpietri Ins. Agency Inc.*, 649 F.2d at 37. On this appeal, the First Circuit also confronted the question of whether Plaintiffs made a "sufficient showing of impact upon 'interstate commerce'" to bring the alleged conduct within sections 1 and 2 of the Sherman Act. *Id.* at 44.

236. Puerto Rico v. Shell Co., 302 U.S. 253, 259 (1937).

237. *Id.* at 257.

> be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.[238]

Further, Congress intended to exert all the power it possessed in respect to trade and commerce through the Sherman Act, and accordingly it was reasonable to conclude that Congress intended to include all the territories within the Act.[239]

To divine whether Puerto Rico was a "territory" under the Act, the First Circuit in *Cordova* followed the central inquiry the Supreme Court created in *Shell Co.* and asked: "[I]f aware of Puerto Rico's current constitutional status, would [Congress] have intended it to be treated as a 'state' or 'territory'" within the meaning of section 3 of the Sherman Act?[240] The court found that the new constitutional status changed the answer. Writing for the majority, then-Judge Breyer explained that the "FRA and the Puerto Rico Constitution were intended to work a significant change in the relation between Puerto Rico and the rest of the United States."[241] Indeed, the new status "was intended to end th[eir] subordinate status" and Congress' intent was manifested in the creation of Law 600, the adoption of the Island's Constitution, and the statements of federal authorities.[242] As a result:

> Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause . . . to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States Citizens.[243]

When it came to the Sherman Act, these advances were significant because the Act typically does not apply to local affairs when a territory becomes a state, thereby providing state governments with the liberty to enact their own local antitrust laws consistent with general federal policy.[244] Puerto Rico had adopted local antitrust laws, and the court

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238. *Id.* at 258 (citing Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932)); Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 86, 87–88 (1934) (describing different guiding principles for statutory interpretation).

239. *Shell Co.*, 302 U.S. at 259.

240. *Cordova & Simonpietri Ins. Agency Inc.*, 649 F.2d at 39.

241. *Id.*

242. *Id.* at 39–41.

243. *Id.* at 41.

244. *Id.*

explained that since the "states are clearly able to adopt such variations as to purely local matters . . . there is no reason of policy discernible in the Sherman Act for treating Puerto Rico differently . . . ."[245] Accordingly, given the Island's newfound appearance, or "status," the framers of the Sherman Act would have likely intended Puerto Rico to be treated as a "state" under the Act, instead of a territory.[246] Even so, the court explained that their holding did not divest Congress of its power to legislate with regards to solely local affairs, and Congress could very well do so as long as it provides "specific evidence or clear policy reasons . . . to demonstrate a statutory intent to intervene more extensively into the local affairs of post-Constitutional Puerto Rico than into the local affairs of a state."[247]

With that framework in mind,[248] the panel in *Maldonado-Burgos* posed a similar question: "[W]hether the [Mann] Act's framers, if aware of Puerto Rico's current constitutional status, would have intended it to be treated as a 'state' or 'territory' under the Act."[249] Following *Cordova*, the court searched for either an express direction in the statutory text, or some "other compelling reason[s]."[250] The language of the Mann Act did not provide an express direction since it did not explicitly indicate that Puerto Rico should be treated as a territory or that transportation within the Island is covered.[251] As a result, the court instead sought "specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post-Constitutional Puerto Rico than into the local affairs of a state."[252] Seeking that evidence, the court found none.

But the government disagreed and posited that there was sufficient evidence to discern that the framers of the Mann Act would have intended to continue intervening in Puerto Rico's local affairs.[253] The government first suggested that the Mann Act's committee reports evinced that the

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245. *Id.* at 42.
246. *Id.*
247. *Id.*
248. The government made various unsuccessful attempts to convince the court that *Cordova* was inapplicable. The court stressed, however, that the *Cordova* framework governed, most notably explaining that *Cordova* itself, in reexamining a question that was answered by the pre-Commonwealth case of *Shell Co.*, evinced that a post-Commonwealth inquiry was appropriate even in light of on point precedent. United States v. Maldonado-Burgos, 844 F.3d 339, 343–46 (1st Cir. 2016).
249. *Id.* at 347 (quoting *Cordova & Simonpietri Ins. Agency Inc.*, 649 F.2d at 39).
250. *Id.* (quoting Jusino Mercado v. Puerto Rico, 214 F.3d 34, 42 (1st Cir. 2000)).
251. *Maldonado-Burgos*, 844 F.3d at 347.
252. *Id.* (quoting *Jusino Mercado*, 214 F.3d at 42).
253. *Id.* at 347–48.

framers of the Act intended to treat Puerto Rico as a territory.[254] The panel, however, did not see it that way, noting that the reports neither mentioned Puerto Rico nor suggested "any reason why Congress might have intended to regulate transportation in Puerto Rico in particular."[255] The court conceded that the committee reports made clear that in passing the Mann Act, Congress intended to exercise its regulatory authority to the "fullest extent permissible under the Constitution" but insisted that there was still no indication of statutory intent to intervene more extensively into the local affairs of the post-Constitutional Puerto Rico than into the local affairs of a state.[256]

The government next argued that Congress had amended the Mann Act several times after 1952, and because the court must assume that Congress was aware of *Crespo*, the amendments demonstrated Congress' intent to continue applying Section 2421(a) to Puerto Rico.[257] Again, the court was unconvinced. The panel explained that the proffered reason did not satisfy "*Cordova*'s compelling-reasons hurdle."[258] The court noted that the Mann Act does not define "Territory or Possession of the United States," so, unlike other cases where there is a clearer definition, there is no post-1952 amendment indicating Congressional intent to treat Puerto Rico as a territory.[259] Moreover, virtually none of the post-1952 amendments altered the territory or possessions language of the Mann Act, further undermining the government's case.[260] With that, the First Circuit affirmed the district court's decision.

The immense significance of applying the *Cordova* framework to the Mann Act was not lost on the rest of the circuit judges. The government requested that the court reconsider the question *en banc* but a divided court denied the request, and the judicial sparring that ensued revealed an existing tension within the court.[261] Chief Judge Howard and Judge Lynch dissented, claiming that the panel decision had not only departed from

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254. *Id.*

255. *Id.* at 347.

256. *Id.* at 348. That quoted phrase was a direct response to the government's reliance on *Shell Co.*, in which the Supreme Court applied § 3 of the Sherman Act to Puerto Rico in part because Congress, in passing the Act, intended to "exercise all the power it possesses." Puerto Rico v. Shell Co., 302 U.S. 253, 259 (1937).

257. *Maldonado-Burgos*, 844 F.3d at 348.

258. *Id.* The phrase "compelling reason" does not appear in the *Cordova* decision.

259. *Id.*

260. *Id.* at 348–49. The government also offered two policy reasons that supported applying § 2421(a) to Puerto Rico, but the court was not convinced. *Id.* at 350.

261. United States v. Maldonado-Burgos, 869 F.3d 1 (1st Cir. 2017) (en banc).

Supreme Court precedent, but also effectively overruled years of circuit precedent.[262]

The panel, according to the dissent, adopted for the first time a strong presumption that Congress would not want to treat Puerto Rico as a territory under the Mann Act. That presumption, however, was not warranted given the First Circuit's own precedent[263] and especially because recent Supreme Court decisions confirmed that it would actually be perfectly reasonable to adopt just the opposite presumption. Chief Judge Howard pointed to the Supreme Court's decision in *Puerto Rico v. Sanchez Valle* in which the Court determined that the granting of Commonwealth status did not transform Puerto Rico into a state for the purpose of the Double Jeopardy Clause's dual sovereignty doctrine.[264] That decision was important for two main reasons: namely because it found that Puerto Rico's local constitutional power stems from Congress, and additionally because the Supreme Court yet again rejected the compact theory that formed the basis of the narrative driving *Maldonado-Burgos* and Judge Breyer's dissent in *Sanchez Valle*.[265] Moreover, Congress had recently explicitly referred to Puerto Rico as a territory when it passed the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")—the controversial law that created a fiscal oversight board to guide Puerto Rico through its economic woes[266]—another indicator weighing against the presumption adopted by the *Maldonado-Burgos* panel.[267]

Notwithstanding recent developments, the panel's opinion also contradicted longstanding Supreme Court and First Circuit precedent. For example, the Supreme Court's decision in *Examining Board v. Flores de*

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262. *Id.* at 1–2 (Howard, C.J., dissenting). Judge Thompson, who authored the panel opinion, also authored a defense of the applicability of the *Cordova* framework. *Id.* at 8–11 (Thompson, J., statement concerning denial). Judge Torruella wrote separately and explained that he voted for hearing the case *en banc* only because it raised a question of immense importance. *Id.* at 8 (Torruella, J., statement concerning denial).

263. The First Circuit had explained immediately following the creation of the Commonwealth that there would be a presumption that a statute that applied to Puerto Rico before, would continue to apply following the adoption of the Puerto Rican constitution. Moreno Rios v. United States, 256 F.2d 68, 72 (1st Cir. 1958).

264. *Maldonado-Burgos*, 869 F.3d at 2 (Howard, C.J., dissenting) (citing *Sanchez Valle*, 579 U.S. 59, 83–85 (2016) (Breyer, J., dissenting)).

265. *Id.*

266. Pub. L. No. 114-187, 130 Stat. 549 (codified at 48 U.S.C. § 2101–2241).

267. *Maldonado-Burgos*, 869 F.3d at 3 (Howard, C.J., dissenting). A few years later, the Supreme Court sanctioned Congress' creation of a fiscal oversight board for the Island. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. 1649, 1654–55 (2020). Justice Sotomayor, joined by Justice Breyer, concurred in the decision and, writing separately, explicitly adopted the compact theory that fueled the narrative in *Cordova* and *Maldonado-Burgos*. *Id.* at 1671, 1676, 1678 (Sotomayor, J., concurring).

Otero[268] had already established that when looking at the applicability of a federal statute to Puerto Rico, the proper inquiry is whether Congress intended to change by implication the applicability of the statute to the Island following the creation of the Commonwealth.[269] Moreover, the First Circuit in *Cordova* explicitly stated that it was not departing from the *Examining Board* framework, and instead insisted that *Cordova* was both fact-specific given the nature of anti-trust legislation and did not affect the applicability of other statutes.[270] Looking at the applicable Supreme Court and First Circuit precedent, the dissent aggregated the major rulings on the topic and found three basic principles emanating from them: (1) "if a federal statute applied in full to Puerto Rico before Puerto Rico's shift to commonwealth status, the statute also applies in full after the shift, and Congress does not need to rewrite it;" (2) "it is unlikely that the change in Puerto Rico's political status meant that Congress wanted to deprive Puerto Rico of the full protections of any given federal statute;" and (3) "post-commonwealth amendments to a given statute that fail to address Puerto Rico's shift to commonwealth status do not show that Congress intended to change the statute's previous application to Puerto Rico."[271] With those principles in mind, it is unlikely that Congress intended to change the statute's applicability to Puerto Rico. In light of such a significant

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268. 426 U.S. 572 (1976).

269. *Maldonado-Burgos*, 869 F.3d at 3 (Howard, C.J., dissenting). *Examining Board* addressed, in part, whether the creation of the Commonwealth stripped the United States District Court in Puerto Rico of jurisdiction under 28 U.S.C. § 1343. *Examining Bd. v. Flores de Otero* 426 U.S. at 594. The Court found that the creation of the Commonwealth did not strip jurisdiction from the district court, explaining that there was no reason to find that Congress intended to "leave the protection of federal rights exclusively to the local Puerto Rico courts." *Id.* at 595.

270. *Maldonado-Burgos*, 869 F.3d at 3–4 (Howard, C.J., dissenting).

271. *Id.* at 4. The dissent also argued that the panel misapplied *Cordova* and misread Congress' intent in both the passage of the statute and the post-commonwealth amendments. *Id.* at 4–5. The dissent also warned against the danger of the panel's decision. Of note, the panel's decision would allow § 2421(a)'s general prohibition against sex trafficking of adults to have a more limited scope than § 2423(a), which applies to the specific prohibition against sex trafficking of minors. *Id.* at 6–7. This is an issue that the court would confront a few years later. *See* United States v. Cotto-Flores, 970 F.3d 17 (1st Cir. 2020). Further, the dissent stressed the important policy reasons behind Congress' intent to apply § 2421(a) to local activities; namely, the use of federal resources to prosecute intra-island sex trafficking to an Island in the midst of an economic crisis. *Maldonado-Burgos*, 869 F.3d at 7–8 (Howard, C.J., dissenting). The dissent warned about more challenges to the applicability of other statutes to local activities in Puerto Rico which would severely undermine the federal government's prosecutions on the Island. *Id.*

deviation[272] from longstanding precedent, Chief Judge Howard and Judge Lynch welcomed the Supreme Court to review the decision.[273]

A few years later, a criminal defendant attempted to apply *Maldonado-Burgos* to another section of the Mann Act. In *United States v. Cotto-Flores*, the defendant, who had driven a fourteen-year-old to a motel in Puerto Rico and had sex with him,[274] was convicted at trial for transporting a minor "in any commonwealth, territory or possession of the United States" with intent to engage in criminal sexual activity under the Mann Act.[275] The defendant argued that like the Mann Act section covering adults in *Maldonado-Burgos*, Section 2423(a) covering minors did not apply to local activity in Puerto Rico.[276] The court declined the invitation to expand the scope of *Maldonado-Burgos*.

Judge Thompson, again writing for the majority, traced Puerto Rico's history and adopted the compact theory narrative.[277] Nevertheless, the opinion took a different approach to answering whether Section 2423(a) applied to local activities in Puerto Rico. This time around, the court assumed that even after 1952, Congress could still regulate intra-Puerto Rico conduct "even if doing so would break the promises it made that year"—a clear nod to the compact theory—because Cotto-Flores did not dispute that point.[278] As a result, the court did not have to resolve

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272. In another high-profile criminal appeal, the First Circuit had applied the framework described by the *en banc* dissent. United States v. Acosta-Martinez, 252 F.3d 13 (1st Cir. 2001) (Lynch, J.) (holding that the Federal Death Penalty Act was applicable to death-eligible crimes committed in Puerto Rico despite the local constitution explicitly forbidding capital punishment); *accord* United States v. Pedró-Vidal, 991 F.3d 1, 6 (1st Cir. 2021) (Howard, C.J.).

273. *Maldonado-Burgos*, 869 F.3d at 8 (Howard, C.J., dissenting).

274. This is a crime under Puerto Rican law. P.R. LAWS ANN. tit. 33, §§ 4770, 4772 (2022) (effective May 1, 2005).

275. *Cotto-Flores*, 970 F.3d 17, 24–25 (1st Cir. 2020); 18 U.S.C. § 2423(a).

276. *Cotto-Flores*, 970 F.3d at 25. Notably, every decision from the District of Puerto Rico, including the court below in this case, had found that § 2423(a) was applicable to local activities on the Island. *See*, *e.g.*, United States v. Cotto-Flores, No. 16-206, 2016 WL 5818476, at *2 (D.P.R. Oct. 5, 2016) ("Thus, Section 2423 applies to the instant set of facts as it [*sic*] statute for the criminalization of the transportation of minors within a commonwealth of the United States for the purposes of engaging in sexual acts."); Santiago-Rivera v. United States, No. 14-742, 2019 WL 3365846, at *3 (D.P.R. July 25, 2019) (finding that §2423(a) clearly applies, even if the alleged conduct takes place only in Puerto Rico).

277. *Cotto-Flores*, 970 F.3d at 28–30.

278. *Id.* at 30. But, as explained above, no such promise with legal force was made. Indeed, that tension that Judge Thompson correctly highlights can be understood through what Professor Helfeld described as the constitutional theory and political practice dichotomy. Through this lens, Professor Helfeld explained that Puerto Rico's status as an unincorporated territory leads to some tension because as a political matter

whether Puerto Rico's commonwealth status "restricts Congress's power to legislate in Puerto Rico" but rather only whether Congress attempted to include Puerto Rico when it amended Section 2423(a) to apply within a "commonwealth."[279] This was an easier question for the court. First, Section 2423(a) used much narrower language than the section at issue in *Maldonado-Burgos* (Section 2421(a)) and only applied to the transportation of minors.[280] Second, in 1998 Congress had amended Section 2423(a) to apply to illicit transportation in "any commonwealth, territory, or possession of the United States."[281] That amendment removed any doubt as to Congress' intent since the court had to assume that Congress was aware of Puerto Rico's Commonwealth status.[282]

Despite the majority's attempt at fine-tuning[283] the *Cordova* and *Maldonado-Burgos* framework, Judge Torruella wrote separately, as he often did,[284] disagreeing with the majority's endorsement of the compact

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the United States has made a promise to not meddle in local affairs. That promise, however, does not act as a legal barrier to doing so in the future. Helfeld, *Congressional Intent*, *supra* note 9, at 306–07.

279. *Cotto-Flores*, 970 F.3d at 30–31.

280. *Id.* at 32 (quoting *Maldonado-Burgos*, 844 F.3d at 351 n.11).

281. *Id.* (quoting *Maldonado-Burgos*, 844 F.3d at 350 n.10).

282. *Id.* at 32–33. The constitutional import of the term "commonwealth" differs based on the historical context of a territory. *See supra* note 136 and accompanying text. Defendant also pressed two other arguments. First, she argued that Congress must expressly use the words "Puerto Rico" in the statute before a court can apply a statute differently to Puerto Rico than to the states. The court found that precedent did not support a proposition that the inability to use two "magic words" allowed the court to disregard Congress' clearly expressed intent. Instead, the court needed to "effectuate the intent of the lawmakers" as expressed in the statute and the circumstances under which they were employed. *Cotto-Flores*, 970 F.3d at 33–34 (quoting *Maldonado-Burgos*, 844 F.3d at 347). Second, defendant insisted that since another section, § 2426(b), included the term "commonwealth" in the section's definition of "state" that Puerto Rico was a state under § 2423(a). But § 2426(b) defined the term "state" only for purposes of § 2426, and therefore did not apply to § 2423(a). *Id*. at 34–35. The panel would end up reversing defendant's conviction, in any event, because of a Sixth Amendment violation. *Id.* at 50.

283. Reading *Maldonado-Burgos* and *Cotto-Flores* together, the First Circuit certainly did not reach the conclusion that Congress could *never* legislate intra-Puerto Rico, nor could it have. That conclusion would have flown in the face of *Aurelius* and the First Circuit's own precedent where the court found that "Congress does not plainly lack plenary power under the Territorial Clause to criminalize certain intra-jurisdictional activity in [Puerto Rico] simply because it may not do so under the Commerce Clause within the fifty states." *Cotto-Flores*, 970 F.3d at 35 n.15 (quoting United States v. Ríos-Rivera, 913 F.3d 38, 44 (1st Cir. 2019)).

284. *See*, *e.g.*, United States v. Lopez Andino, 831 F.2d 1164, 1172–77 (1st Cir. 1987) (Torruella, J., concurring), *overruled by* United States v. Sanchez Valle, 579 U.S. 59

theory. He made two familiar points that undermined the majority's analysis not only in *Cotto-Flores*, but also in *Maldonado-Burgos*. First, it was clear to him[285] that Puerto Rico was constitutionally an unincorporated territory which, in a nutshell, allowed the United States to treat it differently than the states of the Union.[286] Indeed, not only had the Supreme Court recently explained that Puerto Rico "lacked[ed] sovereignty in the context of the double jeopardy clause" despite Congress having granted a measure of autonomy comparable to that of the States, but the passage—and the Supreme Court's blessing—of PROMESA pursuant to the Territorial Clause "wip[ed] out all concepts of local autonomy and/or 'compact' to which it had previously given lip service (erroneously, in [Judge Torruella's] opinion) . . . ."[287] Arguably more importantly, Judge Torruella disagreed with the existence of a "compact" between Puerto Rico and the United States. As he explained, Public Law 600 was created "'in the nature of a compact,' which is a far cry from saying there is a 'compact,' which implies mutually *binding* promises, a situation which does not and cannot exist between Puerto Rico and the United States, given Puerto Rico's unincorporated territorial status."[288] To be sure, "even ignoring the 'commonwealth' issue,

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(2016) (holding that Puerto Rico is not a separate sovereign under the Double Jeopardy Clause).

285. Judge Torruella explained that "much confusion and disenchantment would have been avoided had someone bothered to read the extensive evidence that is available as to what Congress intended and actually did in enacting the bill that authorized the 'creation' of the 'Commonwealth of Puerto Rico.'" *Cotto-Flores*, 970 F.3d at 52. As he recounted, many government officials and leading voices in the legal community had agreed that the creation of the Commonwealth would not change the jurisprudential relationship between Puerto Rico and the United States. To boot, "one cannot find an iota of language in [Public Law 600] . . . that supports the contention that a new constitutional status was being created." *Id.*

286. *Id.* at 50–52. *Montijo-Maysonet* was argued the same day as *Cotto-Flores*. *Id.* at 24 n.1.

287. *Id.* at 51. In *Aurelius*, the Supreme Court confirmed that Congress has done nothing to curb its plenary power over Puerto Rico—including its local activities—pursuant to the Territorial Clause. In contrast to the First Circuit's decision below, which Judge Torruella authored, the Supreme Court's decision found that "while the Appointments Clause *does* restrict the appointment of 'Officers of the United States' with duties in or related to the District of Columbia or an Article IV entity [such as Puerto Rico], it *does not* restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3 [the Territorial Clause], or Article I, § 8, cl. 17." Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. 1649, 1661 (2020); *see also id.* at 1666 ("The founding generation understood the phrase 'Officers of the United States' to refer to officers exercising . . . powers of the National Government, not officers solely exercising Article IV territorial power. Because the Board's members perform duties pursuant to Article IV, they do not qualify as 'Officers of the United States.'") (Thomas, J., concurring).

288. *Cotto-Flores*, 970 F.3d at 53.

there is still jurisdiction to legislate intra Puerto Rico under the present Supreme Court case law regarding unincorporated territories."[289]

A few weeks later, the First Circuit confronted a related question in *United States v. Montijo-Maysonet*.[290] There, the defendant was convicted of transporting a minor within Puerto Rico to commit sexual assault.[291] The defendant argued that Section 2423(a) violated the Equal Protection Clause of the Fifth Amendment because it treated defendants in Puerto Rico differently from those in a state of the Union.[292] Montijo-Maysonet also suggested that the court adopt strict scrutiny because people in Puerto Rico are a protected class, and that assuming strict scrutiny did not apply, Congress even lacked a rational basis to regulate conduct in Puerto Rico that it does not regulate in the states.[293] Defendant, however, did not raise the claim below, subjecting it to plain error review, thus requiring him to identify controlling precedent that made it indisputable that Section 2423(a) violated the Fifth Amendment. That precedent did not exist. In fact, about a year before his appeal, the First Circuit had rejected the same exact argument in *United States v. Ríos Rivera*.[294] The claim failed in both cases because Section 2423(a) applies to anyone who transports a minor within Puerto Rico, not just Puerto Ricans or residents of the Island. The First Circuit could not identify a case that stands for the proposition that someone joins a protected class once they set foot in Puerto Rico, even though Puerto Ricans represent the epitome of a politically powerless group.[295] Under Supreme Court precedent,[296] Congress could treat Puerto Rico differently from the states so long as there was a rational basis for doing so.[297] Just as in *Ríos Rivera*, *Montijo-Maysonet* did "not seriously

289. *Id.*

290. 974 F.3d 34, 44–45 (1st Cir. 2020). Chief Judge Howard, Judge Torruella, and Judge Thompson were on the panel for this appeal.

291. 18 U.S.C. § 2423(a); P.R. LAWS ANN. tit. 33 § 5191(a). On appeal, defendant also argued that his conviction could not stand because § 2423(a) does not apply to transportation within the Island—the exact argument rejected in *Cotto-Flores*.

292. *Montijo-Maysonet*, 974 F.3d at 44.

293. *Id.* at 44–45.

294. 913 F.3d 38, 44 (1st Cir. 2019). In *Ríos-Rivera*, the defendant also made the additional claim that Puerto Rico's commonwealth status precluded Congress from using its authority under the Territorial Clause to legislate over it. *Id.* at 43. The court rejected that view as well, under plain error review. *Id.*

295. *See, e.g.*, Igartúa-de la Rosa v. United States, 417 F.3d 145, 168–69 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) (explaining Puerto Rican's "total lack of political power" with regards to federal issues). Judge Torruella again concurred in *Montijo-Maysonet* "subject to what he stated in his separate opinion" in *Cotto-Flores*. *Montijo-Maysonet*, 974 F.3d at 37 n.1.

296. Harris v. Rosario, 446 U.S. 651, 651 (1980).

297. *Montijo-Maysonet*, 974 F.3d at 45.

challenge the notion that Congress may have limited [Section 2423(a)]'s applicability within the fifty states because it implicitly recognized potential constitutional limits on its power." [298] Accordingly, the differential treatment did not clearly lack a rational basis.

III. ¿Y Ahora Qué?[299]

Writing in the wake of Public Law 600, Professor Helfeld predicted that with "time, the tension between political reality and Constitutional theory, between the possession of home rule and the status of a territory, may grow to unmanageable proportions."[300] His prediction has certainly come true. At least in the First Circuit, the political proposition of the compact theory has led to a muddling of congressional intent in the name of keeping what was, at best, only a political promise of non-interference into local affairs. But that muddling has always been unnecessary. As traced above, the Supreme Court and the First Circuit frequently pay lip service to the compact theory but have ultimately never given it legal significance. Even in *Maldonado-Burgos*, where the compact theory narrative guided the court's legislative interpretation, the First Circuit never doubted Congress' authority under the Territorial Clause.[301] Indeed, the court merely found that they could not discern Congress' desire to apply that section of the Mann Act to local activities and left the door wide open for Congress to amend Section 2421(a) and explicitly apply it to Puerto Rico, similar to the situation in in *Cotto-Flores*. Similarly, Justice Sotomayor's concurrence in *Aurelius* and Justice Breyer's dissent in *Sanchez Valle* both invoked the compact theory in the face of a majority decision that completely undermined it and solidified Congress' plenary power over post-Commonwealth Puerto Rico.

The immediate consequence of these decisions is that the courts manage to mask the undemocratic application of statutes with a veil of liberty and sovereignty. On its face, those decisions espouse the same

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298. *Id.* (quoting *Ríos Rivera*, 913 F.3d at 44.

299. "And now what?"

300. Helfeld, *Congressional Intent*, *supra* note 9, at 315.

301. As it stands, Congress has the power to pass more criminal statutes targeted at activities that take place solely within the U.S. territories. Whether it would be politically palatable to do so at this moment remains an open question, but as made clear by the passage of PROMESA, Congress possesses the political will to intervene extensively into Puerto Rican local affairs if needed. *Congress's Responsibility for Congress*, PUERTO RICO REPORT (Jan. 4, 2017), https://www.puertoricoreport.com/congresss-responsibility-puerto-rico/#.Yji5hJrMK3I [https://perma.cc/AV9J-3TDA]. ("[L]ocal officials have never been able to do anything without at least the acquiescence of the U.S. federal government. Not that they haven't tried.").

language of self-determination and consent of the governed used by political forces on the Island and the federal executive while affirming Congress' hold on local affairs.[302] Those decisions elevate the historical significance of the "Commonwealth" status, while simultaneously gutting it. They provide fodder for an imaginary fire that heats nothing else but the proponents of a bygone era of gilded self-determination. But those empty proclamations have always been unnecessary. As precedent shows, the constitutional relationship between Puerto Rico and the United States did not change after 1952 as a matter of law. Congress still has the power to treat Puerto Ricans on the Island differently than the rest of the country. Puerto Ricans living on the Island still cannot vote for the president or vice president[303] of the United States, nor do they have a voting representative in Congress.[304] Also, as *Aurelius* made clear, Congress can still extend patently colonial legislation to Puerto Rico. Notwithstanding, the powerful political overtones regarding the effect of the compact theory have spilled over and affected the way in which the federal government, including the courts, have struggled with the practical meaning of the Puerto Rican Constitution in light of Congress' continued plenary power over the Island.

On the Island, many leaders continue welcoming federal intrusion into local criminal affairs along with its colonialist overtones, either ignorant of or indifferent to the compact theory and its implications.

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302. To be sure, this tactic is not unique to the federal judiciary. The United States Attorney likewise engages in this type of double-speak. Most recently in their opening brief of the high-profile appeal in *United States v. Vaello-Madero*, the United States echoed the typical tenets of the compact theory, especially those that highlight Puerto Rico's seemingly novel form of sovereignty, while simultaneously arguing that notwithstanding that sovereignty, Congress could still exclude Puerto Rico from receiving federal Supplemental Social Security Income ("SSI"). *See* Reply Brief of Petitioner at 2–6, 13, United States v. Vaello-Madero (No. 20-303), 2021 WL 4523580, at *2–6, *13. Moreover, the federal government also explained during oral arguments that their exclusion of Puerto Rico from SSI benefits actually worked towards supporting Puerto Rican sovereignty. Specifically, the federal government posited that the exclusion was justified, in part, because "it does, indeed, help promote territorial autonomy because it is related to the fact that, as Congress is taking fewer federal tax dollars from the Puerto Rico economy it leaves greater leeway for the territorial government to have . . . its own tax structure." Transcript of Oral Argument at 20, United States v. Vaello-Madero, (Sup. Ct. argued Nov. 9, 2021) (No. 20-303).

303. Igartúa-de la Rosa v. United States, 417 F.3d 145, 146–47 (1st Cir. 2005) (en banc).

304. The First Circuit has also rejected requests to acknowledge a right to vote for a representative to the U.S. House of Representatives from Puerto Rico and a right to have representatives from Puerto Rico in that body. *See* Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010) (affirming the dismissal of a suit demanding acknowledgment of a right to vote for a representative in the U.S. House of Representatives because Puerto Rico is not a "state" under the Constitution).

Ironically, leading up to and following the creation of PROMESA, many political leaders and activists on the Island viewed the fiscal oversight board as an overstep by the federal government given its explicit colonial nature, often calling the fiscal board a colonial oversight board.[305] But while many actors criticized PROMESA as a federal overstep, they have not had a similar response to federal participation in local crime control. The federal prosecutors in Puerto Rico, for example, defended their ability to intrude in local criminal matters in *Maldonado-Burgos*, *Cotto-Flores*, and *Montijo-Maysonet*. As local prosecutors acting as SAUSAs continue participating in the application of federal criminal statutes on the Island, the federal jail population on the Island continues climbing. When confronted with the consequences of *Maldonado-Burgos*, even federal judges lamented curtailing federal prosecutors' ability to prosecute certain crimes on the Island.[306] On the other hand, critics view the federal prosecutors' involvement in local activities as a federalization of local crimes and warn that the result would be a runaway system of federal mass incarceration that local Puerto Ricans would have no direct way of controlling.

This tension between federal authority to prosecute local crimes and Puerto Rico's territorial status adds a new wrinkle to the Island's path towards a resolution of their constitutional status, and one that should not only be taken seriously, but also accelerate the discussions about self-determination in Congress and on the Island. Typically, the conversation around decolonization focuses on what it means to afford Puerto Ricans a real alternative to their current status. But a missing proposition in this calculus is what these choices mean to the criminal justice system. As it now stands, Puerto Ricans are subject to a set of federal criminal statutes that they never had any say in creating. Of course, the

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305. *See* Ángel Carrión, *For Many Puerto Ricans, a Proposed Fiscal Control Board Smacks of U.S. Colonialism*, GLOBAL VOICES (June 7, 2016), https://globalvoices.org/2016/06/07/for-many-puerto-ricans-a-proposed-fiscal-control-board-smacks-of-us-colonialism/ [https://perma.cc/3VBC-NY7C] ("The PROMESA bill has all the earmarks of plain, old-fashioned colonialism, which for many only confirms that Puerto Rico is under the colonial rule of the US.").

306. In *Maldonado-Burgos*, the en banc denial dissent lamented that "this misinterpretation of congressional intent deprives Puerto Rico of federal prosecutorial resources—at a time when it can ill afford to lose them." 869 F.3d 1, 7 (1st Cir. 2017) (Howard, C.J., Lynch, J., dissenting). The judges pressed further noting that "Puerto Rico is in the midst of a serious economic crisis, and it will sorely miss the federal law enforcement and prosecutorial resources this decision eliminates." *Id.* To be sure, Chief Judge Howard and Judge Lynch "would not conclude that Congress wanted at any time to withhold the protection afforded to adult victims in Puerto Rico in the Mann Act, to curtail the full measure of federal resources to prosecute intra-island sex trafficking." *Id.* at 9. Given Puerto Rico government's constant collaboration with federal law enforcement, it is likely they would not have wanted to lose those resources either.

language of the PRFRA acts as a tacit acceptance of both past and future criminal statutes, but there is a fundamental uneasiness that comes about from being ruled by laws that were created a thousand miles away without the populace's input, and that apply differently based on geography.[307] Indeed, the federal government always had, and continues having, a monopoly on power, so the creation of the Commonwealth cannot seriously be taken as political assent of all future federal statutes. As a result of the current position, Puerto Ricans also have little to no control over the enforcement or application of those federal statutes within their borders. Not only do they lack autonomy over the creation of those federal statutes, but Puerto Ricans are also stripped of autonomy by being put in cages and being subjected to the eviscerating collateral consequences that come with a federal conviction.[308] As the endless discussions of decolonization and the eternal political skirmishing between pro-commonwealth and compact theory adherents rages on, the continued violence of colonialism is mapped out on Puerto Rican bodies sitting in federal detention centers, charged or convicted of crimes that no other citizen could have been charged with. All the while, the federal justice system runs largely unchecked by Islanders.

A. Today's Prominent Options

Solutions to Puerto Rico's constitutional status meaningfully intersect with federal prosecutions on the Island, and many people have put forward often overlapping options that inhabit the space between statehood and independence. Today, two competing bills that would have profound repercussions on the Island's criminal justice system sit before

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307. United States v. Santiago, 998 F. Supp. 2d 1, 2 (D.P.R. 2014) ("[Defendant], as well as more than 3.5 million other United States citizens residing in Puerto Rico, have historically lived under a system of federal laws in which the constitutional principle of *consent of the governed* is a fallacy."); United States v. Cotto-Flores, 970 F.3d 17, 24 (1st Cir. 2020) ("[I]n important ways, the U.S. government can treat the island and its residents differently."); Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 322 (1st Cir. 2012) ("As we have made pellucid, [48 U.S.C. § 734] is without force where Congress intends to treat Puerto Rico differently from the states.").

308. The collateral consequences that follow a criminal conviction are legion. For example, a convicted person "may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, be subject to impeachment when testifying as a witness, be disqualified from serving as a juror, and may be subject to divorce" among many other consequences. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1799–1800 (2012). Indeed, the effects of a criminal conviction extend to the everyday actions of a person, and subjects them to "discrimination by employers, landlords, and whoever else conducts a background check." Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

Congress.[309] One bill seeks to admit Puerto Rico as a state.[310] If passed, this bill would allow Puerto Rico to enter the United States on equal footing with all other states and be afforded the powers reserved to the states in the Federal Constitution, including the freedom from federal intrusion into its local criminal affairs. Puerto Rico could continue to form task forces with the federal government, but the federal government would lose jurisdiction over many of the crimes that it prosecutes today under the Hobbs Act or Mann Act.[311]

The other bill seeks to permit Puerto Ricans to explore a range of decolonialization options.[312] This bill is more complex and calls for a convention of delegates elected by Puerto Rican voters who would then draw up a list of status options other than the current free-associated state one. Next, those options would be voted on by Puerto Ricans through a referendum that would feature rank-choice voting and a public education campaign on the status options. If Puerto Ricans approve the referendum, Congress would then "ratify" the option approved in the referendum vote. Although more drawn out, this second proposition would allow Puerto Ricans to choose from a slate of options created by Puerto Ricans. This could mean that Puerto Rico becomes a state, but it could also mean the creation of a new relationship with the United States that does not necessarily mean statehood, but most certainly does not include the current arrangement. In doing so, Puerto Ricans would have the ability to choose and create a status that could account for increased federal intrusion in

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309. A shift away from Puerto Rico's current constitutional status would not just have profound sociopolitical consequences, but also significant economic consequences on the Island as well. For example, not only would a different constitutional status help Puerto Rico with its debt restructuring, but a new status could also free the Island from the Jones Act, which has cost Puerto Ricans billions of dollars in lost revenue. *See* Matthew Yglesias, *The Jones Act, the Obscure 1920 Shipping Regulation Strangling Puerto Rico, Explained*, VOX (Oct. 9, 2017), https://www.vox.com/policy-and-politics/2017/9/27/16373484/jones-act-puerto-rico [https://perma.cc/YQ2L-Y3NW] (discussing why the Jones Act has been incredibly detrimental to Puerto Rico); Colin Grabow, *New Reports Detail the Jones Acts' Cost to Puerto Rico*, CATO INST. (Feb. 25, 2019), https://www.cato.org/blog/new-reports-detail-jones-acts-cost-puerto-rico [https://perma.cc/QD34-4VNY] ("Using the firm's recommended model, the analysis finds the Jones Act raises the price of shipping cargo to Puerto Rico by $568.9 million and that prices are $1.1 billion higher than would be the case without the Jones Act.").

310. Puerto Rico Statehood Admission Act, H.R. 1522, 117th Cong. (1st Sess. 2021).

311. *See supra* Part II.A.

312. *See* Puerto Rico Self-Determination Act of 2021, H.R. 2070, 117th Cong. (2021) (discussing options for the decolonization of Puerto Rico including giving the legislature of Puerto Rico the authority to call a status convention and hold referendums regarding their status).

local criminal affairs, or carve out special spheres of influence in which federal intrusions are permitted, create inventive, but explicitly temporary, arrangements that respond to the causes and types of crimes that are most frequently occurring on the Island, or instead prohibit all federal intrusion altogether. In either event, the choice made on the Island will profoundly change the federal government's prosecutorial reach.

Beyond these bills, sources outside of Congress could also assist in rectifying this fundamental unfairness, although those solutions are likely less satisfying. Some have suggested finally "incorporating" Puerto Rico,[313] thereby leading the Island down a path towards statehood. This solution would lead Puerto Rico to statehood with all deliberate speed and eventually eliminate the unequal treatment of its inhabitants as a constitutional matter. But that path would destroy all semblance of self-determination in the debate because it would not allow Puerto Ricans to choose their outcome.[314] Alternatively, and probably less likely, if activists on the Island muster the political capital to press for changes, the Department of Justice could use their prosecutorial discretion to stop enforcing certain federal criminal laws that would be seen as regulating local activity, especially when state analogues exist.[315] Finally, federal criminal defendants could continue unfairly carrying the burden of litigating these issues in the First Circuit, thereby pressing the court to squarely circumscribe or instead continue sanctioning federal prosecutorial reach on the Island. But as this Article has made clear, that would most

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313. *See* Consejo de Salud Playa de Ponce v. Rullán, 586 F. Supp. 2d 22 (D.P.R. 2008) (holding that Puerto Rico is an incorporated territory of the United States).

314. Andrés González Berdecía, *Puerto Rico Before the Supreme Court*, 7 COLUM. J. RACE & L. 80, 144–46 (2016).

315. Whether this option is politically palatable is unclear. There is, to some extent, a lack of trust in the local criminal justice system. That lack of trust stems from law enforcement and local district attorneys' lack of resources and other difficulties in prosecuting cases. *See* ACLU, *Failure to Police Crimes of Domestic Violence and Sexual Assault in Puerto Rico*, https://www.aclu.org/other/failure-police-crimes-domestic-violence-and-sexual-assault-puerto-rico?redirect=human-rights/failure-police-crimes-domestic-violence-and-sexual-assault-puerto-rico [https://perma.cc/HAX7-JR6G] (last visited July 8, 2021) (highlighting one reason for the distrust in the Puerto Rican Criminal Justice system); Junta Editora, *Acceso a la Justicia: Del Verbo al Hecho*, 55 REV. DER. P.R. 69, 92–94 (2016) (discussing lack of trust in the Puerto Rican criminal justice system); Agreement for the Sustainable Reform of the Puerto Rico Police Department at § 4, United States v. Puerto Rico, No. 3:12-cv-2039 (D.P.R. July 17, 2013) ("It is critical to strengthen the community's trust in PRPD that there be timely and reliable public information about PRPD's progress and accomplishments under these reforms."); Alba N. López Arzola, *Un Nuevo Paradigma para la Gestion Judicial en Puerto Rico: Gobernanza, Transparencia, y Rendicion de Cuentas*, 85 REV. JUR. U. P.R. 941, 944, 976 (2016) (describing a perceived lack of trust in the Puerto Rican courts).

likely lead to more confusion and is certainly the least hopeful of these options.

None of these solutions are perfect, and many of them have been debated for over one hundred years. However, it is clear is that the manner in which Puerto Rico and the federal government prosecute crimes that occur within Puerto Rico's borders may significantly change depending on which route is taken. Apart from the political philosophies driving the differing narratives of decolonization, it would be both legally and normatively prudent for political leaders and activists to seriously interrogate how the path towards decolonization will affect the adjudication and prosecution of criminal activities on the Island.

CONCLUSION

Puerto Rico remains an unincorporated territory of the United States. Whatever the gray areas that attach to that reality, it remains abundantly clear that Congress may treat Puerto Rico differently than the rest of the United States. Nowhere is that more apparent than when it comes to applying federal criminal statutes to local activity on the Island. Indeed, federal prosecutors are able to prosecute local activities as federal offenses—a power that they cannot wield in any of the states of the union. In an attempt to square the continued vitality of Congress' plenary power with the fundamental tension these types of prosecutions present within U.S. federalism, the First Circuit used the narrative of the compact theory, which has long been touted by political and juridical leaders alike, to curtail federal prosecutions under Section 2421(a) of the Mann Act. In so doing, it unnecessarily muddied the waters of an otherwise clear standard that had been established by the Supreme Court and First Circuit, but nevertheless left intact Congress' accepted authority to intrude into Puerto Rican local affairs. Meanwhile, competing forces on the Island vie to cement the federal government's role in investigating and prosecuting otherwise local crimes. As Puerto Rico continues pressing the United States for a resolution of its territorial purgatory, the Island's dual systems of mass incarceration—the local and, as it stands today, an untouchable federal one—must be an essential element of that conversation in order to ensure not only legal clarity for the types of federal prosecutions that should occur on the Island, but also provide relief for current and future Puerto Ricans who are subjected to the unchecked authority of federal prosecutors on the Island.