

A LICENSE TO KILL: STATE SPONSORED DEATH IN THE OLDEST COLONY IN THE WORLD

ARTICLE

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INTRODUCTION

THE UNITED STATES AS A DEMOCRATIC EXPERIMENT, SETTLER-NATION,¹ A colonial empire,² and global super-power is premised—and its influence is predicated on—the rape, pillage, and destruction of native

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¹ AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 11-12 (2010) (“[T]he United States is the first example of a successful settler revolt against metropolitan rule . . . [.] [but] the success of the revolt by the thirteen British colonies spawned a unique settler ideology . . . fused [with] ethnic nationalism, protestant theology, and republicanism to combine freedom as self-rule with a commitment to territorial empire.”).

² *Id.* at 289 (“If the United States did not possess a colonial empire the size of Britain’s or France’s, it nonetheless developed an analogous bureaucratic framework in pursuing its own global ambitions.”).

people³ and other people of color. The genesis of the United States, as a sovereign entity, is one of violence and disruption, rooted in the conflation of capitalist financial interests⁴ and western philosophical notions of freedom, conquest, and a perverted sense of liberty.⁵ The political and geographical sovereignty of a nation is often achieved through violence.⁶ However, the maintenance of nation states, especially expansionist states, requires the constant use of force to either continue its expansion or create wealth.⁷ Although complicit and guilty of the systemic killing of Puerto Ricans both on and off the Island, the United States has used a combination of law, economics, and brute force to assert legal dominance and a coerced penal system over the bodies and land of Puerto Ricans. Without a voting representative in any branch of the federal government to engage in the democratic process of creating legislation, the federal death penalty looms large as a coercive act of violence over Puerto Ricans as a potential punishment for over two-dozen federal crimes.

Although Puerto Rico has not executed one of its citizens in almost 100 years,⁸ the federal government has given itself the statutory power to execute Puerto Ricans in violation various federal statutes. Despite the explicit ban of the death penalty by the Constitution of Puerto Rico,⁹ the federal government insists in its application to the Island. Although functioning as an inchoate act, the symbolic elements of a hegemonic force imposing the punishment of death are real.¹⁰ Combined with severe issues that have plagued America's capital punishment regime for decades, the federal government's power to kill Puerto Ricans is

³ See ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 56-78 (2014).

⁴ See Murray N. Rothbard, *Modern Historians Confront the American Revolution*, MISES INSTITUTE (May 12, 2007), <https://mises.org/library/modern-historians-confront-american-revolution#1b> (last visited June 24, 2017).

⁵ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690).

⁶ See 1 MICHAEL MANN, THE SOURCES OF SOCIAL POWER: A HISTORY OF POWER FROM THE BEGINNING TO A.D. 1760, 26 (1986).

⁷ See David Webster, *Warfare and the Evolution of the State: A Reconsideration*, 40 AMERICAN ANTIQUITY 464, 467 (1975). Constant warfare is all around us and has the blessing of our government by allowing the United States to engage in warfare without formal declaration of war. Instead, the United States engages in military actions authorized by Congress. See War Powers Resolution of 1973, Pub. L. 93-148, 87 Stat. 555 (1973).

⁸ I use the phrase *Puerto Rican citizen* to describe Puerto Ricans living on the Island. I respectfully borrow the phrase, although not in the same context, from Lorrin Thomas. See LORRIN THOMAS, PUERTO RICAN CITIZEN: HISTORY AND POLITICAL IDENTITY IN TWENTIETH-CENTURY NEW YORK CITY (2010). The last time a Puerto Rican citizen was executed was in 1927. See *What We Do: Death Penalty*, ACLU OF PUERTO RICO, <http://www.aclu-pr.org/EN/WhatWeDo/DeathPenalty/DeathPenalty.htm> (last visited June 24, 2017).

⁹ CONST. PR art. II, § 7 ("The death penalty shall not exist.").

¹⁰ See JOHN GALLIHER, ET AL., AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY 167-68 (2002) (discussing how the death penalty was used in Hawaii as a coercive colonial act geared towards strengthening the meaning and racial superiority of whiteness, and keeping black and brown people on the Island in check).

an impending pernicious act, ready to reinforce the criminal theories and pedagogy of the American colonizers through a simple injection. The federal government argues that it has a right to apply its laws to Puerto Rico and to apply the death penalty to its citizens even though Puerto Ricans did not consent to these laws, did not have representation in the creation and ratification of those laws, nor agree with the substance of laws requiring the death penalty as a criminal punishment. This, I argue, is nothing more than a continued act of state violence by the United States federal government.

State violence has various definitions. At its core, state violence manifests itself in a forceful encounter. As opposed to inter-state violence, the intra-state violence that I am referring to takes place outside of the context of warring nation states and instead focuses on the coercive acts of a hegemonic state—a state with political, economic, or military dominance over a subset of inhabitants—against those within its borders or within its control.¹¹ This type of state violence perpetrated against inhabitants of a nation state can range from the creation of penal and legal institutions,¹² to the act of punishing human beings for violations of law.¹³ For the purposes of this paper, I define state violence as coercive and non-consensual actions by the state which impose ideals, laws, or policies on an unrepresented population. The lynchpin of my definition is consent. Although there is certainly state violence against people who have consented to the laws of the land—either by birth or mere happenstance in a nation state—and have some form of representation in the government, I am specifically concerned here with people who have not consented to the hegemonic power's penal system, and further, lack representation in the body that creates that system. At the heart of this definition, of course, is the social contract theory. In the western world, representation is analogous with consent of the governed. Political governance—absent representation and consent—seems not only contradictory to democratic republican values, but is also the antithesis of the American project. United States history also allows that definition to go a step further. State violence necessarily includes the conscious elimination of a group's political economy and effectively neutering a group's power of or mere ability to make a choice. The patterns of American colonization are epitomized in American irregular colonial warfare and at the time innovative, method of settler warfare by which the United States government and settlers not only met opposition in the field of battle, but also employed “any means necessary” to destabilize the opposition, including: killing women and children, disrupting

¹¹ See Alan MacFarlane, *What is State Violence?*, HOW THE WORLD WORKS, (Feb. 9, 2007), <http://letters2lily.blogspot.com/2007/02/76-what-is-state-violence.html> (last visited June 24, 2017).

¹² *Id.* The discourse of state violence “is mobilized to socially construct those at the sharp end of state violence as morally stained, psychologically fractured . . . whose abnormally dangerous, anti social tendencies justify violent interventions in their lives.” Joe Sim, *Thinking about State Violence*, 82 CRIMINAL JUST. MATTERS 6 (2010). The creation of legal institutions is a means through which the state violently intervenes in society.

¹³ Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1607 (1986).

supply chains, destroying enemy land, and imposing suffocating political contours.¹⁴

In Section I, I track the historical coerced acquisition of the Puerto Rican territory and the federal jurisprudence that holds the Island's future in a juridical-legislative limbo, and one that is predicated on violence. In Section II, I briefly review death penalty jurisprudence in the United States and its application to Puerto Rico. Moreover, in Section III I look at the death penalty in Puerto Rico, and Section IV argues that the application of the death penalty to Puerto Rico is an act of violence by the federal government and Section V is a conclusion. It is impossible to understand where Puerto Rico is situated within the legislative-judicial paradigms of the United States without a brief review of our nation's colonialist and (anti-)Jeffersonian¹⁵ expansionist history through the lens of state violence and settler warfare. This, I offer in the following pages.

I. LA COLONIA

Puerto Rico has enjoyed over 500 years of colonial rule. Following Columbus's second voyage in 1493, the Spanish crown had an easy time conquering the well-organized Taino native people who offered little resistance to the conquistadors.¹⁶ Under the guise of christianity, the Spaniards enslaved the local natives, spurring their mass extinction through disease and hard labor. Much like in the rest of Latin America, the Spaniards quickly turned to another un-christianized group of people for labor: Africans. The Island's economy stagnated from the beginning due to the low population of Spaniards and African slaves. It soon became a garrison for the rest of the Spanish empire in Latin America.¹⁷ Over the next 400 years, Spain kept close watch over Puerto Rico; imposing a local government ruled by Spanish elite;¹⁸ fending off invasions by the British, French, and the Dutch; and balancing the expansion of local rights with the squashing of a local insurrection in 1869.¹⁹

¹⁴ See DUNBAR-ORTIZ *supra* note 3, at 56–60.

¹⁵ See Peter S. Onuf, "The Strongest Government on Earth": Jefferson's Republicanism, the Expansion of the Union, and the New Nation's Destiny, in THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803-1898, 41, 43-48 (Sanford Levinson & Bartholomew H. Sparrow eds. 2005) (explaining Jefferson's philosophical evolution and eventual departure from enlightenment theories of expansion).

¹⁶ JOSÉ TRIAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 5 (1997).

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 9. Although a bit complex, the general structure gave *unrestricted power* to the Spanish monarch. That unrestricted power was carried out by agents of the crown in various viceroy-type positions on the Island.

¹⁹ See *id.* at 6-12. A product of state formation is the expansion and, at times, contraction of rights during the height of contentious politics. Simply, when there is a rise in intra-state tensions for whatever reason (civil war on the horizon, unhappiness with the current ruler, etc.), the state will likely either give way to the dissenters and expand rights, or the state may attempt to quash the dissenters by contracting their rights. This is a phenomenon that we saw in the early 20th century

By 1898, when United States President McKinley ordered the invasion of Cuba and Puerto Rico under more than suspicious grounds,²⁰ the United States had taken over as one of the world's leaders in colonial conquests. Since the formal declaration of independence from the British crown in 1776, the United States had acquired almost all of the modern-day continental United States by 1898. Spurred by a burgeoning expansionist²¹ and protectionist²² mentality, the United States learned from the European conquests and perfected a system of mercantilist-type dependency and applied it to Latin America.²³ Unlike its Latin American counterparts, the United States had a different plan for Puerto Rico.

A. Economic, Spatial and Physical Subjugation

Our relationship with land has defined the course of humanity and engendered various iterations leading up to the modern nation state. Moreover, the expression of power within the land breeds hierarchical relationships with profound implications.²⁴ This special relationship was especially true in Puerto Rico. Puerto Ricans used the land to cultivate a diverse agricultural industry ranging from coffee to sugar. The *jibaros* of the countryside owned the land they worked on and proudly used the land not only to feed their families, but produce for their fellow islanders and the animals on it.²⁵ Under Spanish rule, Puerto Rico was extremely poor and a significant portion of the population was illiterate and uneducated. Adequate housing was scarce and many lived in shacks without running water or electricity.²⁶ Even though Puerto Rico was economically de-

when the Supreme Court of the United States contracted the rights of federal territories in response to contentious politics surrounding the admittance of foreign territories with non-white people to the Union. *See generally* SIDNEY TARROW, *WAR, STATES, & CONTENTION* (2015).

²⁰ JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 16 n.65 (1985).

²¹ *See generally* ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT* (1995).

²² *See* James Monroe, *Monroe Doctrine; December 2 1823*, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/19th_century/monroe.asp (last visited June 24, 2017) (President Monroe's declaration of the Monroe Doctrine).

²³ *See* PETER H. SMITH, *TALONS OF THE EAGLE: DYNAMICS OF THE U.S.-LATIN AMERICAN RELATIONS* 38-117 (1996) (describing various ways in which the United States invested in Latin American countries and took *de facto* control of their economies and local politics without a large physical presence).

²⁴ *See generally* ARTURO ESCOBAR, *TERRITORIES OF DIFFERENCE: PLACE, MOVEMENTS, LIFE, REDES* (2008).

²⁵ *See* TRÍAS MONGE, *supra* note 16, at 17.

²⁶ *Id.* at 16-17.

pendent under the Spanish crown,²⁷ the ties between Puerto Ricans and the land remained strong: Puerto Rican citizens—to some extent— owned the land.²⁸

This began to change when the United States invaded and acquired Puerto Rico in 1898. The invasion formed part of the well-oiled machinery of manifest destiny that had developed since the famous Hamilton-Jeffersonian debates foreshadowing possible courses of our nation's future.²⁹ By 1898, the United States' intentions in the western hemisphere were clear, and the invasion of Puerto Rico was no mistake. The United States was fixated on conquering and acquiring the Island.³⁰ One of the first actions of violence against the Island was stripping away the land from its residents. Another action placed the local economy in the hands of United States investors. These two actions occurred simultaneously. Soon after the end of "the splendid little war",³¹ the United States quickly imposed a military government from 1898 to about 1900,³² concluding with the *Foraker Act* applicable to Puerto Rico; creating a local government.³³

Natural and federal forces worked in tandem to destroy the local economy and bring about the plunder of Puerto Rican land. In 1899, hurricane San Ciriaco destroyed millions of dollars in property and nearly the entire year's coffee crop. The United States did not send hurricane relief, and banks swept in and bought Puerto Rican land from devastated farmers for a cheap price.³⁴ Congress passed the *Hollander Bill* in 1901,³⁵ forcing small farmers to mortgage their lands with United States banks. Over the next several years Congress outlawed Puerto Rican currency, declared the Island's *peso*—which had the global value equal to the United States dollar—to be worth only sixty American cents, raised property

²⁷ *Id.* at 16 (noting that Puerto Rico relied on Spain, and was forced to pay them for military expenses and other obligations).

²⁸ This is a simplistic statement. The *jibaros*—the poor countryside farmers— rarely owned the land they worked on. They usually worked on the land in a type of sharecropping arrangement with the owners of the land. Even though the owners of the land were usually Puerto Ricans in the sense that they lived and worked in Puerto Rico, they were usually elite Spaniards. *See id.* at 17.

²⁹ *See Hamilton vs. Jefferson*, AMERICAN HISTORY: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/outlines/history-1994/the-formation-of-a-national-government/hamilton-vs-jefferson.php> (last visited June 24, 2017).

³⁰ Judge Torruella would argue, however, that the annexation of Puerto Rico was "a secondary target" to Cuba. *See* TORRUELLA, *supra* note 20, at 18.

³¹ *See* John A. Gable, *Credit 'Splendid Little War' to John Hay*, N.Y. TIMES (July 9, 1991), <http://www.nytimes.com/1991/07/09/opinion/1-credit-splendid-little-war-to-john-hay-595391.html> (last visited June 24, 2017).

³² TORRUELLA, *supra* note 20, at 24.

³³ Foraker Act of 1900, Pub. L. No. 56-191, 31 Stat. 77.

³⁴ Nelson A. Denis, *Free Puerto Rico, America's Colony*, N.Y. TIMES (Aug. 6, 2015), http://www.nytimes.com/2015/08/06/opinion/free-puerto-rico-americas-colony.html?_r=0 (last visited June 24, 2017).

³⁵ *See* Cesar J. Ayala, *The Decline of the Plantation Economy and the Puerto Rican Migration of the 1950s*, 7 LATINO STUDIES JOURNAL 61 (1996), <http://lcw.lehman.edu/lehman/depts/latinampuerto-rican/latinoweb/PuertoRico/ayalamigration.pdf>.

taxes (forcing farmers to sell their lands),³⁶ and local administrators turned a diversified agricultural industry into a one-cash crop industry.³⁷ To make matters worse for Puerto Ricans, the passage of the *Merchant Marine Act of 1920* (hereinafter, “*Jones Act*”),³⁸ requires that only United States ships carry products into Puerto Rico. Foreign-flagged ships may enter Puerto Rico, but only after paying heavy fees. This makes it prudent for foreign companies to ship products to the United States, but makes products in an already economically strained island cost much more. These laws are still in place today, making Puerto Rico “a land of beggars and millionaires [the sugar syndicates], of flattering statistics and distressed realities.”³⁹ Puerto Ricans became an exceptionally landless people.

A third action, the physical and pedagogical subjugation of Puerto Ricans occurred over the period of the next one-hundred years. For example, the United States degraded the physical bodies of Puerto Rican women, pegging them as “dangerous to other people’s health” and making pseudo-scientific findings that “Puerto Rican women were endangered, sick, and in need of care.”⁴⁰ The federal government sponsored a population control movement on the Island—in tandem with local politicians amenable to American rule—arguing that the poverty on the Island was not due to federally sponsored poverty traps, but rather overpopulation.⁴¹ The federal government tacitly and overtly sponsored the coerced sterilization of women across the Island,⁴² and the torture and murder of Puerto Ricans by government officials.⁴³

Pedagogically the federal government divorced Puerto Ricans from the idea of autonomy and attempted to squash cultural fellowship through language. The arrival of the United States army in Puerto Rico was relatively peaceful, even though the United States was in a fully-fledged war with Spain.⁴⁴ The rest of the American experiment in Puerto Rico was not so polite. Puerto Ricans received

³⁶ *Id.*

³⁷ SUSAN S. BAKER, UNDERSTANDING MAINLAND PUERTO RICAN POVERTY 34 (2002).

³⁸ Merchant Marine Act of 1920, Pub. L. No. 66-261, ch. 250, 41 Stat. 988.

³⁹ NELSON DENIS, WAR AGAINST ALL PUERTO RICANS 31 (2015)

⁴⁰ LAURA BRIGGS, REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO 46 (2002).

⁴¹ *Id.* at 110 & 122.

⁴² In 1937, government-sponsored sterilizations were approved by Puerto Rican governor Blanton Winship (an American, appointed to the governorship), “based on the principles of eugenics, advocating the breeding of the fit and the weeding out of the unfit, namely the poor and the non-white.” *Id.* at 145. It is said, by some accounts, that the U.S. government sterilized almost 200,000 Puerto Ricans. *Id.* at 147. This became a major point of contention, especially for the Puerto Rican Nationalist Party which accused the American government of genocide. *Id.* at 147-49.

⁴³ See Ramon Bosque-Pérez, *Political Persecution against Puerto Rican Anti-Colonial Activists in the Twentieth Century*, in PUERTO RICO UNDER COLONIAL RULE: POLITICAL PERSECUTION AND THE QUEST FOR HUMAN RIGHTS, 31 & 31 n.80 (2006); FELIPE FERNÁNDEZ-ARMESTO, A HISPANIC HISTORY OF THE UNITED STATES 297 (2014).

⁴⁴ American forces only suffered four casualties and seventeen wounded soldiers. TORRUELLA, *supra* note 20, at 21 n.86.

the Americans “with open arms”⁴⁵ and American general Nelson Miles famously proclaimed the unfulfilled promise that the Americans had come to “bestow the immunities and blessing of our enlightenment and liberal institutions and government.”⁴⁶ Soon thereafter, a contingent of Puerto Rican politicians began to mobilize for political acceptance within the United States by way of citizenship,⁴⁷ whereas another contingent began to mobilize towards independence. The latter contingent did not sit very well with the federal government, although it received some support in the states.⁴⁸ The Federal Bureau of Investigation (F.B.I.) and other factions of the federal government would go on a successful campaign to physically and pedagogically quash a burgeoning revolutionary movement.⁴⁹ A few years later, the United States and Puerto Rico entered into a new relationship, known as the Commonwealth.⁵⁰ Leading up to the Commonwealth, the United States tried to establish English as the official language in Puerto Rican schools in an attempt to Americanize Puerto Ricans through cultural and linguistic changes in the nurturing of the youth.⁵¹

B. Political Subjugation

The United States has not only sustained an unrelenting barrage of economic and physical subjugation upon Puerto Ricans, but has also channeled acts of state violence through politics (primarily through federal jurisprudence and legislation).⁵² Prominent political science scholars Jack Levy and William Thompson

⁴⁵ *Id.* at 21.

⁴⁶ Annual Report of the Maj. General Commanding the Army, Nelson A. Miles, Nov. 5, 1898, Messages, 1898–1899, 31–32.

⁴⁷ See Sam Erman, *Reconstruction and Empire: Legacies of the U.S. Civil War and Puerto Rican Struggles for Home Rule, 1898–1917* (2012), <http://mylaw2.usc.edu/assets/docs/directory/1000053.pdf> (describing the various failed attempts by local political parties to convince Congress to grant full citizenship to Puerto Ricans). Puerto Ricans seeking citizenship through the congressional action ran into at least two major obstacles: the first was congressional resistance, and the second, denial of full citizenship by the Supreme Court, which I will discuss in the next section. Congress was extremely hesitant to the idea of granting Puerto Ricans American citizenship leading up to World War I.

⁴⁸ See TORRUELLA, *supra* note 20, at 126.

⁴⁹ See Bosque-Pérez, *supra* note 43.

⁵⁰ See *infra* Part II-III. The *Puerto Rican Federal Relations Act* created a new governmental structure for Puerto Rico, giving way to the Commonwealth constitution and the *new relationship* between the Island and the United States. Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950).

⁵¹ See Flavia C. Perea and Cynthia Garcia Coll, *The Social and Cultural Contexts of Bilingualism*, in AN INTRODUCTION TO BILINGUALISM: PRINCIPLES AND PROCESSES 206 (Jeanette Altarriba and Roberto R. Heredia, eds. 2008).

⁵² To wholly distinguish the Judicial Branch from the more political branches is noble but entirely inaccurate. Politics within all three branches shape both legislation, its enforcement, and constitutional/statutory interpretation. This is especially true in regards to Puerto Rico’s jurisprudence within the Supreme Court of the United States. See Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CAL. L. REV. 1181 (2014) (arguing that federal jurisprudence in respect

define war as “sustained, coordinated violence between political organizations.”⁵³ Michel Foucault famously posited that politics is war by other means.⁵⁴ Former Yale Law School professor Robert M. Cover observed that “[l]egal interpretation is either played out on the field of pain and death or it is something less (or more) than law.”⁵⁵ The United States has continually forcibly applied laws to Puerto Ricans without their consent or representation in the federal government. These are forced actions by one political organization onto another; a continuation of American expansionist ideology predicated on a theory of benevolence.

Although it is arguable that the violent act of imposing a jurisprudential structure upon Puerto Ricans began at multiple stages, I would like to choose the first Organic Act as our starting point.⁵⁶ Of course, the brief military rule by Americans was the first instance of state violence, but the Organic Act was the first time that the United States Congress—a representative body without a voting Puerto Rican member—created the legal parameters by which Puerto Ricans would be governed. At the end of the Spanish-American War, the United States and Spain signed the *Treaty of Paris* on December 10, 1898, ceding Puerto Rico, Guam, the Philippines, and Cuba to the United States.⁵⁷ The treaty specifically stated that Congress would decide the status of the territory’s inhabitants.⁵⁸ Congress decided the status question—namely what rights would apply to the inhabitants and how they would be governed—with respect to Puerto Rico in 1900.⁵⁹

By the time the Spanish-American War began, American expansion had reached its peak.⁶⁰ Although expansionist history is dense and extremely complex, for our purposes we can simplify pre-1898 history as follows. First, the United States acquired territories purely for the purposes of incorporating them

to Puerto Rico’s sovereignty and territorial relationship to the United States was not entirely juridical, as posited by previous scholars, but rather the product of all three branches dealing with economic, racial, and colonial concerns).

53 TARROW, *supra* note 19, at 17.

54 MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975-1976 15 (Mauro Bertani and Alessandro Fontana eds., David Macey trans., Picador 1997) (2003).

55 Cover, *supra* note 13, at 1606-07 (“But the relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts. The act of sentencing a convicted defendant is among these most routine of acts performed by judges.”).

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

57 Treaty of Peace (Treaty of Paris), U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

58 *Id.* at 1759.

59 Foraker Act of 1900, 31 Stat. 77.

60 Juan R. Torruella, *The Insular Cases: The Establishment of Regime of Political Apartheid*, 77 REV. JUR. UPR 1, 4 (2008) (“The war was the culmination of a process of national expansion that commenced almost from the day that the War for Independence ended in 1783 . . .”).

into the Union as states.⁶¹ Second, continental expansion usually occurred by way of American settlers into territories, forming a consensus that the territory would want to become a part of the United States followed by annexation by the federal government, or by way of purchase.⁶² The aforementioned organic acts created the legal parameters by which a territory would be governed, and also defined the relationship between the federal Constitution, federal law, and the territories. Traditionally, the organic acts mirrored the Northwest Ordinance and opted for provisions which applied the laws and the Constitution of the United States to the territories.

By 1898, the United States shifted their focus from the contiguous United States to the Caribbean. The United States was now taking over land with inhabitants who were not white within the American stratification⁶³ and who were regarded as second-class citizens.⁶⁴ To make matters worse, the Organic Act did not use the exact same language as the Northwest Ordinance (although it was substantially similar). Economic interests, in the form of tariffs and taxes, converged with theories of territorial expansionism and the Supreme Court would have to decide whether Congress intended to extend the protections of the federal Constitution and federal laws onto the new territory in a series of decisions known as the *Insular Cases*.

For some the answer was simple. Over the last one-hundred years the federal government had acquired territories with the sole purpose of admitting them into the Union as a state and the federal Constitution—under *Dred Scott v. Sandford*—barred the government from indefinitely holding territorial possessions.⁶⁵ For others, Puerto Rico and the Philippines posed a different challenge since the inhabitants were not American citizens. An academic,⁶⁶ political, and

61 In fact, to do otherwise would have been contrary to the Jeffersonian mode of expansion. See also Onuf, *supra* note 15; *Dred Scott v. Sandford*, 60 U.S. 393, 447 (1856) (holding that territories were “acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority”); Robert F. Berkhofer Jr., *The Northwest Ordinance and the Principle of Territorial Evolution*, in *THE AMERICAN TERRITORIAL SYSTEM* 45 (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.”).

62 A prime example of this is Texas. Another example is the Northwest Ordinance, which provided the blueprint for all organic acts leading up to Puerto Rico’s. See Northwest Ordinance of 1789, ch. 8, 1 Stat. 50.

63 See e.g., FERNÁNDEZ-ARMESTO, *supra* note 43.

64 BRIGGS, *supra* note 40, at 62.

65 *Dred Scott*, 60 U.S. at 447.

66 A series of Harvard Law School and Columbia Law School articles had the greatest influence on the disposition of the *Insular Cases*. See Torruella, *supra* note 60. Among these articles are: Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals, or Aliens*, 3 COLUM. L. REV. 13 (1903); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 412 (1899); Christopher C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 386 (1899); James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 466 (1899); Carman Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L.

intra-governmental debate ensued,⁶⁷ culminating in the Supreme Court's most decisive cases ranging from 1901 to 1922.

Two of these cases are particularly important. In the first, *Downes v. Bidwell*, the Supreme Court upheld a tax levied upon Puerto Rican ships entering New York harbor by the *Foraker Act*.⁷⁹ In doing so, the Court noted that the Uniformity Clause did not apply to Puerto Rico because it was "a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."⁶⁸ In the second case, *De Lima v. Bidwell*, the Court held that Puerto Rico was not a foreign country within the meaning of federal tariff statutes.⁶⁹ Together, the concurrence in *Downes* and the Court's opinion in *De Lima* held that Congress had full and complete legislative authority when it came to territories such as Puerto Rico.⁷⁰ Puerto Rico was not within the full constitutional purview of the United States when either a statute or fundamental principle of the Constitution proscribed otherwise. Second, justice White's concurrence in *Downes* adopted what would become "the unquestioned position of the Court" when he created the incorporation doctrine.⁷¹ The incorporation doctrine asked whether or not a territory was incorporated into the United States, thus extending the full privileges and immunities of the federal Constitution upon the territory.⁷² After making the determination as to whether the territory was incorporated, the Court would then analyze which portions of the Constitution apply to the unincorporated territory.⁷³ In *Downes*, the Court held that Puerto Rico was not incorporated into the United States.⁷⁴ Further, Congress determined their political status in the *Foraker Act*, and did not confer the rights of the constitution nor provide American citizenship to Puerto Ricans.⁷⁵

REV. 291, 299-301 (1898); Abbott L. Lowell, *The Status of our New Possessions- A Third View*, 13 HARV. L. REV. 155, 170 (1899).

⁶⁷ See Erman, *supra* note 47.

⁶⁸ *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

⁶⁹ *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901).

⁷⁰ *Id.* at 196-97. In *Downes* the Court specifically extracted the plenary power principle from the Territorial Clause of the Constitution. *Downes*, 182 U.S. at 279 ("[the territorial clause granted] not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be in what Chief Justice Marshall termed the 'American empire'.").

⁷¹ EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 80 (2001); see also, EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (2006).

⁷² *Downes*, 182 U.S. at 299-300 (White, J., concurring).

⁷³ *Id.* at 293.

⁷⁴ *Id.* at 339-40.

⁷⁵ *Id.* at 341-42 (As a result, Puerto Ricans were left "foreign to the United States in a domestic sense.").

In 1917, on the eve of World War I, Congress passed the *Jones Act*, granting Puerto Ricans the United States citizenship.⁷⁶ The *Jones Act* renewed the inquiry in *Downes* and in the rest of the *Insular Cases*. A major contention was that the *Foraker Act* did not give Puerto Ricans citizenship—a major provision of the Northwest Ordinance and its progeny—so the *Jones Act* surely manifests Congress's intention to incorporate Puerto Rico into the Union. However, the Supreme Court in another pivotal case, *Balzac v. Porto Rico*, held that the granting of citizenship through the *Jones Act* did not represent sufficient congressional action as to incorporate Puerto Rico.⁷⁷ It also sponsored Justice White's incorporation doctrine, and applied his *fundamental rights* doctrine by holding that the constitutional right to a trial by jury did not apply to Puerto Ricans in federal court.⁷⁸

By 1922 the Supreme Court had created the tools of political subjugation that complemented the physical, spatial, and economic subjugation of Puerto Ricans. The political/judicial act of violence by the Judicial Branch held that the federal Constitution did not apply with full force to Puerto Rico, that Puerto Ricans had no voice in Congress, and that Congress had unbridled authority to legislate with respect to Puerto Rico. In 1952, the Island became a Commonwealth of the United States.⁷⁹ This new status gave greater autonomy to the Puerto Ricans by creating a locally elected legislature on the Island, allowing it to adopt its own constitution, and allowing it to elect its own governor. However, despite the greater autonomy, Congress still exercises *de facto* plenary power over the Island,⁸⁰ leaving Puerto Rico in an "enigmatic condition".⁸¹ This had led federal courts to: deny Puerto Ricans the right to vote in presidential elections,⁸² deny the right to a trial by jury in misdemeanor cases,⁸³ sponsor a practice where Congress may provide a lower level of reimbursement and monetary caps for Aid to Families

76 Jones Act of 1917, Pub. L. No. 64-368, 39 stat. 951.

77 *Balzac v. Porto Rico*, 258 U.S. 298, 313 (1922) ("On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow.").

78 *Id.* at 304-05. Justice Taft, writing for the majority (and a known racist and xenophobe) noted that the right to a jury could not possibly apply to Puerto Ricans because they were "trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions . . ." *Id.* at 310.

79 Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950).

80 Although the Commonwealth agreement noted that the United States could not unilaterally amend the Puerto Rican Constitution, an act of Congress generally trumps the Puerto Rican Constitution. See *U.S. v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001) (holding that the federal death penalty is applicable to Puerto Rican islanders in violation of federal law, despite the Island's constitutional ban against capital punishment).

81 *Igartúa de la Rosa v. U.S.*, 229 F.3d 80, 87 (1st Cir. 2000) (Torruella, J., concurring) [hereinafter *Igartúa II*].

82 *Id.* at 83 (*per curiam*); *Igartúa de la Rosa v. U.S.*, 32 F.3d 8 (1st Cir. 1994) [hereinafter *Igartúa I*].

83 *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

with Dependent Children to islanders,⁸⁴ sponsor a practice where the federal government may kill Puerto Ricans,⁸⁵ and oftentimes trample over Puerto Rican law,⁸⁶ all under the guise of the incorporation and fundamental rights doctrine.⁸⁷ This then, leaves the state of Puerto Rican political rights in the absolute hands of United States government.⁸⁸

Thus, the federal government completed its holistic approach to state violence, both through physical (or spatial) and political means. Although the physical acts of state violence are quite obvious—such as the extreme torture of nationalist party leader Pedro Albizu Campos or the massacre of peaceful Puerto Ricans manifesting in the street—⁸⁹ the acts of violence that Robert M. Cover and Michel Foucault refer to are more intangible and inchoate, hidden or at times overtly entrenched in judicial, legislative, and executive actions. In the next sections, I narrow my focus towards the implementation of the federal death penalty in Puerto Rico.

II. THE DEATH PENALTY AND THE UNITED STATES

The manner in which states kill humans has changed much over the years, but no matter how humane those practices become, the song remains the same: the death of one person for the actions they allegedly committed.⁹⁰ Although still

⁸⁴ The Court would hold that this did not violate Puerto Rican Fifth Amendment equal protection clause because, since the territorial clause governs the extent of Puerto Rican privileges, Congress is allowed to treat Puerto Ricans differently than residents so long as Congress has a rational basis to do so. Fifth Amendment equal protection applies to Puerto Ricans with less force. *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*); Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 178 (1998).

⁸⁵ *Acosta-Martinez*, 252 F.3d. 13.

⁸⁶ See *Camacho v. Autoridad de Teléfonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989) (holding that the federal Omnibus Crime Control and *Safe Streets Act* controlled over provisions of Puerto Rican law prohibiting participation in some type of wiretapping). The problem here is not a simple supremacy clause issue, or a federalism issue. Since Puerto Rico sometimes exists within the juridical purviews of the Constitution, and at other times does not, it allows the courts to pick and choose when a law applies over the voice of the Puerto Rican people without regard to fundamental issues of federalism—which are nonexistent here—since Puerto Rico is not a state.

⁸⁷ The Court occasionally finds that some parts of the Constitution apply to Puerto Rico. See *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (finding that the Fourth Amendment ban against unreasonable searches and seizures applies to Puerto Rico). The point is not that some sections apply, but rather, that the Supreme Court and Congress can pick and choose which part of the constitution applies to Puerto Rico at a whim.

⁸⁸ The Supreme Court of the United States continues to resolve constitutional questions regarding Puerto Rico on a case-by-case basis. For example, the Supreme Court was recently called upon to decide whether or not Puerto Rico is a sovereign for purposes of the constitutional double jeopardy clause. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

⁸⁹ See *Torruella*, *supra* note 60.

⁹⁰ The Supreme Court has sanctioned the killing of defendants, despite overwhelming proof that they were actually innocent. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (holding that an actual innocence claim cannot stand alone in a habeas proceeding, absent an independent constitutional

in use by many countries, the death penalty has lost favor in much of the western world, such as Colombia, Mexico, and France, and puts the United States in the company of countries such as Iran and North Korea. Within the United States, the death penalty has endured a barrage of abolition movements,⁹¹ and has been implemented as both a punishment for felonies, and as a form of social control against populations⁹² (such as African American slaves).⁹³ Vocal opposition to the death penalty at both the international⁹⁴ and domestic level has come from religious perspectives,⁹⁵ practical concerns with reliability and fairness of its application,⁹⁶ and constitutional critiques,⁹⁷ to name a few. Despite these constant critiques, federal courts sponsor the unwavering machinery of death, which in and of itself, is an act of violence perpetrated by the state.⁹⁸

violation occurring in the underlying state proceeding); *In re Davis*, 558 U.S. 813 (2009) (Scalia, J., dissenting) (“This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent”).

⁹¹ Abolition movements against the death penalty in the United States can be tracked from the mid-19th century, reaching its peak in the 1970s, with various interruptions. See NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 23-26 (3d ed. 2009).

⁹² The death penalty has proven to be an effective means of social control. In fact, the cycle of legitimization, delegitimization, and relegitimization of the death penalty is predicated on the creation of the need for social control. KAREN S. MILLER, *WRONGFUL CAPITAL CONVICTIONS AND THE LEGITIMACY OF THE DEATH PENALTY* 1-4 & 127-28 (2006).

⁹³ RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 6-7 (1991); WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, 140 (1984). Some southern states went so far as to even make distinctions in the punishment for capital crimes committed by white and black people. See *id.* at 139-40.

⁹⁴ See, e.g., SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *ABOLITION OF THE DEATH PENALTY: SAHRDC'S SUBMISSION TO THE NATIONAL COMMISSION FOR THE REVIEW OF THE WORKING OF THE CONSTITUTION* (2000).

⁹⁵ See, e.g., *ESSAYS ON THE DEATH PENALTY* (Tolbert R. Ingram ed. 1963) (providing various essays by religious scholars, such as C.S. Lewis, in favor and against the death penalty); ANTHONY SANTORO, *EXILE & EMBRACE: CONTEMPORARY RELIGIOUS DISCOURSE ON THE DEATH PENALTY* (2013); MARIO MARAZZITI, *13 WAYS OF LOOKING AT THE DEATH PENALTY* 145-63 (2015) (examining the arguments for and against the death penalty through the lens of Buddhism, Hinduism, Judaism, Islam and Christianity). In some states, religious groups have been at the forefront of their anti-death penalty campaigns. See *Methodists Leading Charge Against Death Penalty*, GREAT PLAINS UNITED METHODISTS (Mar. 7, 2016), <http://www.greatplainsumc.org/newsdetail/methodists-leading-charge-against-death-penalty-4095048> (last visited June 24, 2017) (noting that churches have been at the forefront of recent anti-death penalty movements in Kansas and Nebraska).

⁹⁶ See *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (“Apparent disparities in sentencing are an inevitable part of our criminal justice system.”).

⁹⁷ Hundreds of articles critiquing various aspects of the death penalty in the United States exist. See *Law Review and Journal Articles on the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/law-review-journal-articles-death-penalty> (last visited June 24, 2017).

⁹⁸ JOHN D. BESSLER, *KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY* 34 (2003) (“Inmates are the victims of state-sanctioned killing, in which [they] are forcibly strapped onto a gurney and executed by lethal injection.”).

The history of capital punishment in the United States finds its roots in British jurisprudential tradition. Our modern jurisprudence, however, has long departed from British counterparts, who no longer apply capital punishment. The near abolition of the death penalty in the United States, then, is an apt place to begin our sojourn of capital punishment jurisprudence. Following a long campaign by the National Association for the Advancement of Colored People Legal Defense Fund,⁹⁹ the Supreme Court of the United States struck down the death penalty as applied by Georgia and Texas in 1972.¹⁰⁰ A splintered decision left an open question as to whether or not the death penalty was *per se* unconstitutional under the Eight Amendment, or whether the Texas and Georgia statutes were insufficient to comport with the Eight Amendment.¹⁰¹ In effect, the Supreme Court gave those states an opportunity to breath and reconstruct their death penalty statutes.¹⁰² Four years later, in a massive blow to the abolition movement, the Court would hold that the death penalty did not *per se* violate the Eight and Fourteenth Amendment in *Gregg v. Georgia*.¹⁰³ In *Gregg*, the Court sponsored Georgia's *guided discretion* statute, which allegedly shielded defendants from arbitrarily imposed death sentences, and held that similar statutes did not violate the Eight Amendment as long as they provided for individualized sentencing, guided discretion at the penalty phase, and determinations with specific jury findings.¹⁰⁴ What followed, instead, would be over forty years of capital punishment jurisprudence, where the Court attempted to delineate permissible actions within the parameters of *Gregg* and its progeny. Below, I briefly review death penalty case law, and then I turn to the relevant law with respect to Puerto Rico.

A. Federal Application

Death penalty jurisprudence and post-conviction relief place a heavy emphasis on federalism concerns, taking special care not to significantly interfere in

⁹⁹ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 247 (2002).

¹⁰⁰ See *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁰¹ See John H. Blume & Sheri L. Johnson, *The Folly -and Faith- of Furman*, 13 J. APP. PRAC. & PROCESS 33, 35 (2012) ("Every Justice wrote his own opinion, and none of the Justices in the majority even joined another Justice's opinion."). The splintered decision exemplified *strategic unanimity* paving the way for a second look at the issues presented in *Furman*. See *id.*

¹⁰² See Brent E. Newton, *The Slow Wheels of Furman's Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 45-46 (2012).

¹⁰³ *Gregg v. Georgia*, 428 U.S. 153 (1976). This holding was in direct opposition of justice Brennan and justice Marshall's separate opinions in *Furman*. See *Furman*, 408 U.S. at 257-304 (Brennan, J., concurring); *Furman*, 408 U.S. at 314-71 (Marshall, J., concurring).

¹⁰⁴ *Gregg*, 428 U.S. at 153. Cf. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that the mandatory imposition of the death penalty is unconstitutional because it removes the jury's sentencing discretion).

a state's right to apply their death penalty statutes.¹⁰⁵ Since Puerto Rico's Constitution bans the death penalty, our concern with the applicable jurisprudence is limited to the permissible application of the federal death penalty statutes. However, the review of state death penalty statutes by the Supreme Court illuminates the Court's lasting ideology when handling death penalty cases. Statutes usually look like a variation of the following description. At a minimum, the Supreme Court attempts to protect defendants from death penalty statutes that would lead a jury to apply the death penalty in an arbitrary or capricious manner.¹⁰⁶ In order to control the arbitrariness of the death penalty, capital punishment statutes provide for various phases. First, a statute will give a list of crimes for which the death penalty is available and perform the important narrowing function (which narrows the class of persons for whom the death penalty is available as a possible punishment for their crime).¹⁰⁷ Following a successful conviction of the defendant for a crime for which the death penalty is available, and the proper narrowing as described in the given statute, the defendant is in a position where the death penalty is a viable punishment (assuming that the jury found the necessary narrowing elements). A conviction does not necessitate the death penalty. The jury must decide whether to impose the death penalty. The Supreme Court requires statutes to provide jurors with a manner in which they can make individualized sentencing findings.¹⁰⁸ This is accomplished by providing jurors with some baseline level of guidelines, such as aggravating circumstances,¹⁰⁹ which are then taken into account along with mitigating evidence, and any other admissible evidence during the penalty phase of a trial.¹¹⁰ Following the initial narrowing by the jury in the previous phase of trial, the jury has broad discretion in render-

105 See Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 449 (2007). The post-*Gregg* court has taken an intensely deferential approach with regards to post-conviction relief, including death penalty cases. This is a trend that was codified in the *Antiterrorism and Effective Death Penalty Act's* standards, which are extremely deferential to a state court's findings.

106 *Gregg*, 428 U.S. at 188.

107 See *Zant v. Stephens*, 462 U.S. 862 (1983) (holding that a statute requires at least one statutory aggravating circumstance in order to categorically narrow death eligible defendants, and accord each defendant an individualized determination); *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (holding that an aggravating factor can mirror one of the prongs of an underlying offense because it adequately performs the narrowing function).

108 See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that North Carolina's mandatory death penalty statute violated the Eight Amendment and Fourteenth amendment standards because it did not provide for individualized findings that the defendant's crime warranted the death penalty).

109 An aggravating circumstance does not have to be extremely specific. A circumstance such "that the offense of murder was outrageously or wantonly vile, horrible and inhuman" is sufficient for the Supreme Court, as long as the state provides the jury with a definition of what the phrase means so to channel the sentence's discretion by clear and objective standards. See *Godfrey v. Georgia*, 446 U.S. 420, 426 (1980); see also *Arave v. Creech*, 507 U.S. 463 (1993) (upholding "utter disregard for human life" as a proper aggravating circumstance).

110 See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978).

ing the ultimate decision by the time they are in the penalty phase as to sentencing the defendant to death or to spare their life.¹¹¹

At the stage of federal appellate review, the Supreme Court has taken a more hands-off approach. With regards to direct appeal, the defendant is only guaranteed one appeal as a matter of right, and during direct appeal the defendant has the last chance of adding any facts which were overlooked or unavailable at the time of the trial to the record.¹¹² As for direct appeals from the states, the Court has, at times, deferred to the appellate review of the state court, as well as created self-imposed limitations on its review.¹¹³ When reviewing the cases of a federal district court—which is where a Puerto Rican charged with the death penalty would find his or her case—the level of review is guided by similarly conservative approaches.

From a black-letter perspective, these limitations seem practical. However, in practice, the death penalty is marred with inconsistent application, results, and arbitrariness. Even with all these rules and protections, the Supreme Court still tacitly approves of racial disparities in death sentences with respect to black defendants and white victims,¹¹⁴ extremely long waits between sentencing and execution (only 15 percent of people sentenced to death between 1973 and 2009 have been executed by the end of 2009), the less researched trend in racial disparities with regards to Latino defendants and the decision by a jury and prosecutors to impose capital punishment, and the application of the death penalty to people with intellectual disabilities.¹¹⁵

Convictions alone are not the only problem. Research has consistently proven that the relationship between the victim and the defendant's race is the leading factor in filing capital charges and seeking the death penalty in the first

¹¹¹ *Zant*, 462 U.S. at 910 (Marshall, J., dissenting) (“[W]e are now told that the State need do nothing whatsoever to guide the jury’s ultimate decision whether to sentence a defendant to death or spare his life.”).

¹¹² See *Federal Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/federal-death-penalty> (last visited June 24, 2017). It is extremely important for defendants to add any facts to the record at this stage because if they reach post-conviction *habeas* review, things get very sticky and the record will likely be closed. Things get even more complicated and difficult for defendant’s seeking *habeas* review after they have exhausted all of their state remedies. See Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

¹¹³ *Barclay v. Florida*, 463 U.S. 939 (1983) (limiting the scope of review to findings which were so unprincipled or arbitrary as to somehow violate the United States Constitution); *Pulley v. Harris*, 465 U.S. 37 (1984) (holding that proportionality review of sentences is not required for death penalty statutes and death penalty application to comport with the Eighth Amendment).

¹¹⁴ See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting the famous Baldus study, which tracked racial disparities in capital sentencing, making specific findings concerning the higher potential of a death sentence in cases with a white victim and a black defendant). Baldus-like studies have been replicated with similar results in the Latino population.

¹¹⁵ COMMITTEE ON DETERRENCE AND THE DEATH PENALTY, *DETERRENCE AND THE DEATH PENALTY* 17 (Daniel S. Nagin & John V. Pepper eds., 2012). See also Brent, *supra* note 102, at 43 (noting a sharp increase in the time between sentencing a defendant to death and their eventual execution since 1984).

place.¹¹⁶ Furthermore, prosecutors generally seek the death penalty when the defendant is white only when the crime is *particularly heinous*, such as those including knives and multiple injuries to the victim.¹¹⁷ Many prosecutors have been involved in severe misconduct during trials such as hiding witnesses, withholding exculpatory evidence, suborned perjury, and coaching witnesses. Many cases have been “plagued by egregious prosecutorial misconduct”, with very little remedy to be found in the courts.¹¹⁸ Courts so regularly uphold cases in which racist jurors make decisions tainted by racial bias that The Marshall Project created a quiz to see if you could guess which convictions were upheld. Spoiler: the conviction in which a juror admitted “that’s what that nigger deserved” was upheld.¹¹⁹ The defendant in that case, Kenneth Fults, was executed on April 12, 2016. The criminal justice system is plagued by racism at both the conviction and sentencing phase of a capital trial. Racial discrimination in the seeking and conviction of black and Latino defendants is so bad that it has led some writers to peg it as the modern, *de jure*, form of lynching. More specifically, “[t]he death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America.”¹²⁰

Unique in the brief recitation of macroscopic issues that plague the application of the death penalty in the United States is democratic consent. Non-white defendants who are charged, convicted, and sentenced to death at a disproportionate rate have, arguably, a representative say in the laws that apply to their communities. Puerto Ricans do not. Voting citizens in all fifty states elected representatives into Congress who voted on bills that act in their best interest (at least, that is how it is supposed to work), and in the best interest of society in that time and place. Puerto Ricans do not have a voting member in Congress. Those members of Congress representing their respective states employ their political economy to reach certain goals in reaction to various events in the United States.¹²¹ Puerto Ricans, without any political clout in Congress, have to

¹¹⁶ MILLER, *supra* note 92, at 122. One study that Miller cites found that half of the capital cases with African-American defendants involved white victims.

¹¹⁷ *Id.* at 122-23.

¹¹⁸ *Id.* at 123.

¹¹⁹ Andrew Cohen, *How Racist is Too Racist?*, THE MARSHALL PROJECT (Apr. 10, 2016), <https://www.themarshallproject.org/2016/04/10/how-racist-is-too-racist#.CFFtIh28j> (last visited June 24, 2017).

¹²⁰ Stephen B. Bright, *Discrimination, Death and Denial: Race and the Death Penalty*, in MACHINERY OF DEATH: THE REALITY OF AMERICA’S DEATH PENALTY REGIME 45 (David R. Dow & Mark Dow eds., 2002).

¹²¹ For example, in response to the bombing of a federal building by Timothy McVeigh, Congress responded by passing *Antiterrorism and Effective Death Penalty Act of 1996*, which not only increased the amount of crimes with the punishment of death, but also made it extremely difficult for a defendant to receive *habeas* relief. See JODY L. MADEIRA, *KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE* 70 & 75-76 (2012).

fight tooth and nail for any congressional action.¹²² The Congress of the United States applies an egregiously imperfect capital punishment scheme (which necessarily implies killing innocent people) to its citizens who have consented to it through their voting representatives in Congress. To add insult to injury, Puerto Ricans have yet to consent to the death penalty scheme that Congress foisted onto their people.

B. The Federal Death Penalty and Puerto Rico

The federal government applies the death penalty to Puerto Rico by either explicitly noting so within the statutes of substantive offenses, or through the *Federal Death Penalty Act* (F.D.P.A.), which also governs the procedures of the substantive offenses. There are two different aspects from which we should approach the issue of the death penalty in Puerto Rico. The first is a brief overview of the laws which Congress applies to impose the death penalty on Puerto Rico. The second, is the juridical justifications for the application of the death penalty in Puerto Rico, which I discuss below.¹²³ One of the laws under which Congress applies the death penalty to Puerto Rico is through the FDPA.¹²⁴ The FDPA provides the death penalty for a long list of crimes, including some statutes which did not have the penalty of death before the FDPA was enacted.¹²⁵ The series of crimes, established by section 3591, include those under section 794 or section 2381. Under section 3591, the federal government must follow special procedures regardless of whether or not the death penalty was provided for under the FDPA or another federal statute.¹²⁶ These special procedures call for the federal government to provide notice of their intention to seek the death penalty, setting forth the aggravating factors they seek to prove, and the jury, or judge —after making the decision to apply the death penalty in a separate sentencing trial— must return special findings with regards to mitigating and aggravating factors.¹²⁷

The procedural parameters of the FDPA, such as providing notice to the defendants of the government's intention to seek the death penalty, covers violations of other federal statutes. For example, under section 3591, the government

¹²² For example, Puerto Ricans in the small island of Vieques are still fighting for economic, ecological, and health support following the use of Vieques as a bombing range by the United States Armed Forces from 1941 to 2003.

¹²³ See *infra* Part II.

¹²⁴ Federal Death Penalty Act of 1994, ch. 228, 108 Stat. 1959.

¹²⁵ The FDPA is found in Title VI of the Violent Crime Control and Law Enforcement Act of 1994, which provided for the applicability of the death penalty to 60 offenses under 13 existing and 28 newly-created Federal Capital statutes. See *The Federal Death Penalty Act of 1994*, UNITED STATES DEPARTMENT OF JUSTICE: OFFICE OF THE UNITED STATES ATTORNEYS, <https://www.justice.gov/usam/criminal-resource-manual-69-federal-death-penalty-act-1994> (last visited June 24, 2017).

¹²⁶ See 18 U.S.C. § 3591(a) (2012) (which sanctions the death penalty to an enumerated list of offenses including “any other offense for which a sentence of death is provided . . .”).

¹²⁷ *Id.* § 3591(a)-(e).

must provide notice to the defendant that they will seek the death penalty under section 1513(a), killing in retaliation against a witness. Even though the text of the FDPA does not mention its applicability to Puerto Rico, the federal statutes that the FDPA covers, such as section 1513(a),¹²⁸ still apply to Puerto Rico.¹²⁹

Although the procedural parameters of the FDPA do not explicitly apply to Puerto Rico, many of the substantive violations that make a defendant death eligible do explicitly apply to the Island (either by mentioning it or by territorial jurisdiction). This creates a bit of a distinction between the substantive criminal statutes and the procedural arrangements of the FDPA. Although the distinctions have been acknowledged, the First Circuit Court of Appeals, which is the federal circuit court of appeals with jurisdiction over Puerto Rico, noted that it did not affect the applicability of the FDPA's provisions with regards to the substantive crimes which apply explicitly to Puerto Rico.¹³⁰

Concerning Puerto Rico, the rules for federal juries apply in a distinct fashion in the district of Puerto Rico. Under section 1865(b) (2)-(3), jurors serving on a federal jury must be able to read, write, speak, and understand the English language "with a degree of proficiency sufficient to fill out . . . the juror qualification form."¹³¹ This is not a major issue within the states, but things are different in Puerto Rico "[b]ecause 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 ninety percent of Puerto Rico's citizenry is denied the privilege and responsibility of serving on federal juries."¹³² This reality left the courts un-phased. The First Circuit has repeatedly upheld section 1865's application to Puerto Rico,¹³³ and has denied Sixth Amendment fair-cross section of the community attacks under the justification of an "overwhelming national interest served by the use of English" in United States

¹²⁸ *Id.* § 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section.").

¹²⁹ Federal statutes will generally refer to the definition of murder under 18 U.S.C. § 1111. Congress explicitly applied that section to territories of the United States. *See id.* § 1111(b) ("Within the special maritime and territorial jurisdiction of the United States, [w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.").

¹³⁰ *United States v. Acosta-Martinez*, 252 F.3d 13, 19 (1st Cir. 2001) ("The F.D.P.A. does not of itself provide for the death penalty, but merely provides for the procedures to be followed before such a sentence is reached. Instead, the source of the penalty, here the death penalty, is in the substantive statutes which define the crimes and their punishments. Those statutes (and the statutory structure) are very clear that Puerto Rico is not exempt from these death penalty provisions.").

¹³¹ 28 U.S.C. § 1865(b)(2)-(3).

¹³² Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497, 498 (2011); *see also* HYON B. SHIN & ROSALIND BRUNO, US CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, 5 (Oct. 2003), www.census.gov/prod/2003pubs/c2kbr-29.pdf (reporting that the 2000 Census found 71.9% of residents of Puerto Rico "[s]poke English less than 'very well'").

¹³³ *See, e.g., U.S. v. Fernández-Hernández*, 652 F.3d 56, 66-67 (1st Cir. 2011).

courts.¹³⁴ The First Circuit describes the national interest as “having a branch of the national court system operate in the national language.”¹³⁵ Perhaps that *national interest* is the repeated denial and curtailment of constitutional rights to Puerto Ricans. A, perhaps, latent effect is that most qualified jurors in Puerto Rico emanate from the elite socioeconomic class of the Island.¹³⁶

III. THE DEATH PENALTY IN PUERTO RICO

Up to this point we have reviewed how the United States government systematically controlled the economic, spatial, and physical fate of Puerto Ricans. In the face of state-oriented territorial expansion, the United States decided to annex Puerto Rico without the intention of incorporating it into the Union. Following the granting of citizenship to Puerto Rico, the United States decided that citizenship was now, after history of the opposite being true, not sufficient to incorporate Puerto Rico into the Union. Following the passage of the third organic act, culminating in the creation of the Commonwealth of Puerto Rico, the United States gave Puerto Rico increased juridical and political autonomy on the island. Puerto Ricans banned the death penalty in their Constitution, and the United States promised to not interfere legislatively in the way that they had done so prior to the creation of the Commonwealth (with plenary power). However, in the face of this new stage in the Puerto Rican-United States relationship, the federal government once again turned its back on Puerto Rico. This time, the United States expressed its intent on killing Puerto Ricans in violation of federal law, thus introducing Puerto Ricans into a problematic and broken capital punishment scheme to which they never consented to. All of these actions by the government could be seen as surprising, but our excursion through history thus far situates these actions within a form of colonialist popular sovereignty.¹³⁷

A. *A Brief History of the Death Penalty in Puerto Rico*

The year 1927 marks the last time Puerto Rico applied the death penalty.¹³⁸ Although the Spanish imposed the death penalty in Puerto Rico during their

¹³⁴ See, e.g., *U.S. v. Rodríguez-Lozada*, 558 F.3d 29, 38 (1st Cir. 2009) (quoting *U.S. v. González-Vélez*, 466 F.3d 27, 40 (1st Cir. 2006)).

¹³⁵ *United States v. Benmuhar*, 658 F.2d 14, 19 (1st Cir. 1981). Interestingly, the United States has never declared a national language.

¹³⁶ See *Gonzales Rose*, *supra* note 132, at 517 (“the bulk of Puerto Rico’s inhabitants are excluded from service and juries are selected from a relatively elite socioeconomic, racial, and color group.”).

¹³⁷ See generally 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) (arguing that juridical interpretations of congressional legislation—and legislation itself—are acts of popular sovereignty which reinterpret and amend the Constitution, superseding Article V of the Constitution).

¹³⁸ Edgardo M. Román Espada, *Proceso Histórico de la Abolición de la Pena de Muerte en Puerto Rico*, 64 REV. JUR. COL. ABOG. 1, 11 (2003). Defendant Pascual Ramos was executed for beheading his boss with a machete.

control of the Island,¹³⁹ the idea of killing someone for the violation of a normative condition did not permeate Puerto Rican conscience. Throughout the nineteenth and twentieth centuries, Spain and Puerto Rican citizens imposed various death penalty statutes including *La Ley del Garrote* and *La Ley de la Horca* (the law of choking or the noose).¹⁴⁰ By 1917, Puerto Ricans had begun speaking up against the death penalty on the Island. Islanders began a fierce campaign against the death penalty, and even attempted to ban capital punishment through the legislature, however the appointed American governor consistently vetoed the bill.¹⁴¹ Following an eight year campaign, the Island's legislature banned the death penalty in 1929,¹⁴² and codified that ban in the Commonwealth Constitution in 1952.¹⁴³ In 1991, some members of the Puerto Rican legislature attempted to pass a resolution reestablishing the death penalty as a punishment for first degree murder, thus amending the Commonwealth Constitution. The resolution eventually failed.¹⁴⁴ At the turn of the twenty-first century, Puerto Ricans were still vehemently opposed to the death penalty, and the Island has refused to impose the penalty onto islanders charged under federal death eligible offenses.¹⁴⁵

B. *Puerto Rican Federal Relations Act*

The federal government has attempted to give the appearance that federal law is not forcibly applied to Puerto Rico. Puerto Ricans—who are American citizens and are only occasionally counted as part of the United States for purposes of the Constitution and federal law—expressed their stark opposition to the death penalty throughout the twentieth and twenty-first centuries. The passage of the *Puerto Rican Federal Relations Act* in 1950 (hereinafter, “Act 600”),¹⁴⁶ provided a presumption that laws affecting the lives of Puerto Ricans on the Island would be left to the Puerto Rican legislature and judiciary. Act 600 facilitated the creation of the Commonwealth Constitution, and provided for “the organ-

¹³⁹ *Puerto Rico and the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/node/881> (last visited June 24, 2017).

¹⁴⁰ Juan A. Soto González & Juan C. Rivera Rodríguez, *La Pena de Muerte, una batalla entre una ley federal y la Constitución de Puerto Rico*, 41 REV. DER. PR 1, 5 (2002).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ CONST. PR art. II, § 1.

¹⁴⁴ See Soto González & Rivera Rodríguez, *supra* note 140; see *infra* Section IV, Part A.

¹⁴⁵ Cristina M. Quiñones-Betancourt, *When Standards Collide: How the Federal Death Penalty Fails the Supreme Court's Eighth Amendment "Evolving Standards of Decency" Test When Applied to Puerto Rican Federal Capital Defendants*, 23 CORNELL J. L. & PUB. POL'Y 157, 182–83 (2013) (describing how Puerto Rican juries have refused to impose the death sentence in all six cases in which Puerto Ricans were death eligible under federal law).

¹⁴⁶ Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950).

ization of a constitutional government by the people of Puerto Rico.”¹⁴⁷ Congress finally acted by “fully recognizing the principle of government by consent” and allowed Puerto Ricans to adopt a constitution of their own (following the approval of the president and Congress).¹⁴⁸

Two major provisions guide the Commonwealth relationship. The first is the Territorial Clause of the Constitution, which gives Congress the “[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹⁴⁹ The second is section 9 of Act 600 that provides 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”¹⁵⁰ The meaning of *not locally inapplicable* is marred in confusion, prompting endless litigation¹⁵¹ and critiques.¹⁵² Generally, courts look to the intent of Congress with regards to a certain piece of legislation. If Congress intended the federal statute to apply locally to Puerto Rico, it is “not locally inapplicable” under Act 600.¹⁵³

What is clear from this treatment is that Congress still has plenary and absolute power over Puerto Rico, notwithstanding the expansion of rights through Act 600, and that the Commonwealth branding has done little to fundamentally change the relationship between the United States and Puerto Rico.¹⁵⁴ The First Circuit Court of Appeals has noted that Congress cannot unilaterally amend the Puerto Rican Constitution,¹⁵⁵ but that statement has been characterized as *dic-*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ U.S. CONST. art. IV, § 3, cl. 2.

¹⁵⁰ Jones Act of 1917, Pub. L. No. 64-368, § 9, 39 Stat. 951.

¹⁵¹ See, e.g., *U.S. v. Rivera Torres*, 826 F.2d 151, 155-56 (1st Cir. 1987) (“To be ‘locally inapplicable,’ the Puerto Rican legislation must be incompatible with or specifically exclusive of the federal legislation it seeks to supplant”); *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985); *United States v. Maldonado-Burgos*, 130 F. Supp. 3d 498 (D. P.R. 2015) (using 48 U.S.C. § 734 to decide whether a federal law banning the transportation of women for the purpose of prostitution applied to Puerto Rican defendants who transported the alleged victims solely within Puerto Rico).

¹⁵² See, e.g., Elizabeth Vicens, *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, 353 (2005) (proposing a new test to deal with the confusing nature of section 9 of the *Puerto Rico Federal Relations Act*).

¹⁵³ See, e.g., *Feliciano v. United States*, 297 F. Supp. 1356, 1361-62 (D. P.R. 1969) (holding that Congress intended to give the federal government power over the national defense in regards to Puerto Rican waters, and that Puerto Rican legislation could not supplant any federal legislation on the topic), *aff'd*, 422 F.2d 943 (1st Cir. 1970), *cert. denied*, 400 U.S. 823 (1970); *United States v. Rivera Torres*, 826 F.2d 151, 154, 156 (1987) (holding that the *Clean Water Act* applied to Puerto Rico because the broad definition of *navigable waters* under the act and the act’s inclusion of Puerto Rico in its definition of the term *state* expressed Congressional intent to not exclude Puerto Rico from the Act).

¹⁵⁴ See T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 19-20 (1994).

¹⁵⁵ *Quinones*, 758 F.2d at 42 (“Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally . . .”).

ta.¹⁵⁶ The relationship between Congressional legislative action and Act 600 certainly confirms the suggestion that the First Circuit's statement was *dicta*, and leaves the statement a bit empty. Federal courts have intimated that "Congress may unilaterally repeal the Puerto Rican Constitution . . . and replace [it] . . . with any rules or regulations of its choice," channeling the plenary powers of the Territorial Clause.¹⁵⁷

What we have here is the granting of procedural rights to Puerto Ricans with very little substantive remedies.¹⁵⁸ Act 600 and the new Commonwealth status gave the appearance that Puerto Rico has some new level of autonomy, but in reality, Congress has almost full-fledged control over Puerto Rico through federal legislation. A federalism analysis of the situation is not well-suited because although the Supremacy Clause gives Congress vested powers to legislate, each state is involved in the creation of federal law, and citizens of the states have the full privileges and immunities of the federal Constitution. Puerto Rico is not a state, nor do Puerto Ricans on the Island enjoy the full privileges and immunities of the federal Constitution. The manner in which Act 600 and judicial interpretation of Congressional acts work makes it clear that the Commonwealth and the current Puerto Rican-United States relationship are in constant flux and can be changed at any time. This type of turbulent and forceful rule of law—which imposes federal law at the whim of Congress, sponsored by the broad judicial interpretation of the federal courts—is an act of state violence.

IV. THE FEDERAL GOVERNMENT CANNOT APPLY THE DEATH PENALTY IN PUERTO RICO

We have a country, the United States, which applies the death penalty unfairly and in disproportionate ways, affecting black and brown communities as well as communities of the intellectually disabled. That same country now applies the death penalty—it's unfair death penalty, riddled with substantive issues—to a colony which has no say in the creation of that machinery of death. Apart from having no voice in the creation of such a system, or the creation of the laws for which they are death eligible, the colony is vehemently opposed to the death penalty itself. That not only raises serious due process concerns, but also functions as an act of state violence. There are two substantive critiques that I have been exploring throughout the paper: (1) a macroscopic and structural attack on the United States-Puerto Rico relationship through an analysis of state violence, which at the moment, has proven to be widely inchoate with respect to

¹⁵⁶ Aleinikoff, *supra* note 154.

¹⁵⁷ U.S. v. Sánchez, 992 F.2d 1143, 1152-53 (11th Cir. 1993).

¹⁵⁸ This is a recurring problem in the world of civil rights. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 23 (2001) (In our system, "[r]ights are almost always procedural (for example, to a fair process) rather than substantive (for example, to food, housing, or education).").

the death penalty; and (2) a systemic attack through due process, which is only a secondary focus of this paper. I will now discuss these critiques.

A. *The Coerced Imposition of the Death Penalty as an Act of State Violence*

As discussed above, the United States has instituted an arrangement that ensures the spatial, physical, economic, and political subjugation of Puerto Rico and Puerto Ricans living on the island. The United States has also foisted its laws—passed without one vote by a Puerto Rican representative—onto the Puerto Rican people. In fact, Puerto Ricans have never consented to a law passed by the Congress of the United States. Puerto Ricans did consent to the Commonwealth Constitution, as Act 600 called for, however, Puerto Ricans have never consented to an act of Congress. Even in that situation, Congress was the one that gave Puerto Ricans the choice. Puerto Ricans were not involved in voting for Act 600. Coercion and the lack of consent are the lynchpins of state violence. Killing a human being is a violent act. Killing a human being who has not consented to a set of laws (laws which were forcibly foisted onto them) under which he or she will die is also a violent act because the victim has not consciously and peacefully relinquished any level of autonomy that makes our Western rule of law ideas compatible with punishment. It appears a bit incomprehensible for a Puerto Rican to be held accountable by a political and criminal system that was forcibly imposed upon them. To illustrate this point, let us turn to some examples.

The most famous death penalty case involving a citizen of Puerto Rico, following the passage of Act 600 and the FDPA, is *United States v. Acosta-Martinez*.¹⁵⁹ The federal government charged the two defendants with firearm murder in relation to a crime of violence under section 924(j), and killing a person in retaliation for providing law enforcement officials with information relating to the possible commission of a federal offense, under section 1513(a)(1)(B). Both offenses provide for the death penalty as possible punishment. The procedural administration of the punishment is governed by section 3591 of the FDPA, and as you may recall, it is not specifically applicable to Puerto Rico. As such, the defendants in *Acosta-Martinez* were a bit surprised to have received a notice to seek the death penalty by Guillermo Gil, the United States Attorney for the District of Puerto Rico, and John Teakell, the Assistant United States Attorney for the district.¹⁶⁰ In accordance with the procedure of section 3591, the United States attorneys offered their reasons for seeking the death penalty, as well as statutory and non-statutory aggravating factors. Among the statutory aggravating factors, the state charged the defendants with what essentially functions as a catchall provision, committing the offense in a heinous, cruel or depraved man-

¹⁵⁹ *U.S. v. Acosta Martinez*, 106 F. Supp. 2d 311 (D. P.R. 2000).

¹⁶⁰ See NOTICE OF INTENTION BY THE UNITED STATES TO SEEK THE DEATH PENALTY FOR DEFENDANTS HECTOR OSCAR ACOSTA MARTINEZ AND JOEL RIVERA ALEJANDRO, *U.S. v. ACOSTA-MARTINEZ*, CRIM. NO. 99-044 (SEC) (Jan. 25, 2000).

ner.¹⁶¹ The state also offered a total of eight non-statutory aggravating factors including the very descriptive contention that both defendants “committed the offense in such a vile manner to justify capital punishment” under *Gregg v. Georgia*,¹⁶² and the hotly contested contention of future dangerousness.¹⁶³ After receiving death certification, the defendants challenged the death certification, arguing that the FDPA was “locally inapplicable” under Act 600 and that the FDPA violated the due process rights of the people of Puerto Rico.¹⁶⁴

The United States District Court for the District of Puerto Rico agreed with the defendants. They conducted an analysis of both, Act 600 and due process questions. On the first question, the defendants argued and the Court agreed, that because the Puerto Rican Constitution expressly prohibits capital punishment, the federal death penalty is locally inapplicable under section 9 of Act 600.¹⁶⁵ Second, the Court disposed of the defendant’s contention that as part of the bilateral agreement governing the federal government’s relations with Puerto Rico, Congress could not unilaterally alter the Puerto Rican Constitution, which, defendants argued, Congress would be doing, by applying the death penalty in Puerto Rico.¹⁶⁶ The Court relied on two important findings when holding that the FDPA was locally inapplicable. First, the Court cited the Supreme Court’s proclamation that the death penalty is a fundamentally different punishment than others.¹⁶⁷ Second, since death is such a fundamentally different punishment, Congress could not have intended it to apply to Puerto Rico since the FDPA was not specifically made extensive to the Island.¹⁶⁸ As I previously noted, the only mention of Puerto Rico is found in the substantive offenses that are not listed under the FDPA. The district court in *Acosta-Martinez* made note of this fact and added that since the FDPA also created new offenses, the Court could not reasonably conclude that it was “Congress’s manifest intention that the FDPA

¹⁶¹ *Id.* at 3.

¹⁶² *Id.*

¹⁶³ *Id.* (“[defendants are] likely to commit acts of violence in the future which would be a continuing and serious threat to the lives and safety of others.”). See also *Barefoot v. Estelle*, 463 U.S. 880 (1983) (holding that psychiatrists are competent to predict future dangerousness of a defendant, despite the stark opposition to the idea by the scientific community).

¹⁶⁴ *Acosta Martinez*, 106 F. Supp. 2d 311.

¹⁶⁵ *Id.* at 312.

¹⁶⁶ *Id.* at 313. Since the Commonwealth was not a statute—the Court reasoned—Congress could not amend it. The District Court reiterated that the Commonwealth arrangement did not function as a third organic act: “[T]he constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax.” (quoting *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956)). Even with this statement, the Commonwealth’s relationship with the United States seems to function similarly to when it was under the full auspices of the *Foraker Act* and the *Jones Act*, and the courts apply statutes in direct opposition to Puerto Rican interests and laws on the island.

¹⁶⁷ *Id.* at 317-18.

¹⁶⁸ *Id.* at 319.

not fall within the ‘not locally inapplicable’ provision set forth in section 9. . . .”¹⁶⁹ This would be especially true in light of the fact that Congress and the President approved the constitutional ban of the death penalty in Puerto Rico and the Island’s firm opposition against the death penalty.¹⁷⁰

On appeal, the circuit court would not be convinced. Under the First Circuit’s opinion, the Commonwealth status “granted Puerto Rico authority over its own local affairs; however, ‘Congress maintains similar powers over Puerto Rico as it possesses over the federal states.’”¹⁷¹ Further bolstering the proposition that the Commonwealth relationship functions similarly to that of an organic act, the First Circuit confirmed that Congress still had plenary powers over Puerto Rico. Since the question of *locally inapplicable* is a matter of Congressional intent, courts must simply decipher the intent of Congress with respect to Puerto Rico.¹⁷² Since the source of the death penalty in this case was found in the substantive statutes—which expressly applied to Puerto Rico—it follows that the procedural statute within the FDPA would also apply “because it would make no sense for it [not to].”¹⁷³ Congressional intent was, thus, extracted from the substantive statutes and imputed onto the procedural statute at issue.¹⁷⁴ The Court also weakened the defendant’s contentions because the FDPA did not mandate the death penalty, but rather made it an option,¹⁷⁵ which is of course unconstitutional in the first place.

The First Circuit’s decision in *Acosta-Martinez* effectively barred all Eight Amendment challenges to Act 600 and the death penalty in Puerto Rico. Since the decision in 2001, there have not been any successful challenges against the death penalty. As recent as April 1, 2016, a federal court quickly dismissed a challenge by Puerto Rican citizens who claimed that the federal death penalty, as applied to Puerto Rican residents for a crime against another Puerto Rican, violated the Eight Amendment and Act 600.¹⁷⁶ Within two paragraphs the Court quickly disposed of the attack by repeatedly citing *Acosta-Martinez*’s finding that the death penalty is applicable to Puerto Rican federal criminal defendants and is compatible with Act 600. The Court noted that Act 600 issue was already

¹⁶⁹ *Id.* (“The extraordinary nature of capital punishment requires a higher degree of clarity and precision.”).

¹⁷⁰ *See id.* at 319-20.

¹⁷¹ *United States v. Acosta-Martinez*, 252 F.3d 13, 18 (1st Cir. 2001) (citations and quotations omitted).

¹⁷² *See id.*

¹⁷³ *Id.* at 19.

¹⁷⁴ *Id.* In addition to this reasoning, the Court also noted that the definition of the *United States*—for purposes of the crimes in the federal criminal code— includes Puerto Rico and that other crimes punishable by death—which were created at the same time as the FDPA’s expansion and applicable through the procedures of the FDPA—are also explicitly made applicable to Puerto Rico. These actions functioned as indicia of Congressional intent.

¹⁷⁵ *Id.*

¹⁷⁶ *United States v. Martinez-Hernandez*, 2016 WL 1275039 (D. P.R. 2016).

litigated and that “there is no Eight Amendment issue here.”¹⁷⁷ Apparently, the federal government can punish even Puerto Ricans who commit murders of other Puerto Ricans. Furthermore, the court continued to emphasize that the language requirement of the Puerto Rican jurors serving in federal court does not pose an Eight or Sixth amendment issue.¹⁷⁸

There have been some challenges to the death penalty as cruel and unusual punishment under the Eight Amendment. Although federal courts have entertained these challenges, the federal government has yet to challenge the applicability of the Eight Amendment to Puerto Rico.¹⁷⁹ Even though the courts function under the presumption that the Eight Amendment applies to Puerto Rico — since nobody has challenged it— we do not know for certain if it applies under the incorporation doctrine.

In 2016, Puerto Ricans are subject to death penalty under a system which kills innocent people, intellectually disabled, and kills black and brown people at disproportionate rates. On top of the fact that Puerto Ricans have no say in the system that could kill them, the jury *venire* is so narrowed that only those with access to higher education (the *racially* and socioeconomically elite)¹⁸⁰ satisfy the language requirement sponsored by the federal courts. Not only are Puerto Ricans subject to a very imperfect system which bars any substantive appellate process, but also guarantees that only an extremely small, privileged, and elite part of the Puerto Rican population have the power to apply the death penalty. The application of the death penalty in the face of cultural and political opposition is evidence of coercion. Furthermore, the procedural protection of Act 600 proved to be nothing more than an empty promise as it failed to protect the most sacred part of a society from the heavy hand of the federal government: human life. *Acosta-Martinez* and the federal government’s continual application of the death penalty in federal trials against Puerto Ricans who have neither politically consented to capital punishment nor have political representation in Congress is a manifestation of state violence against Puerto Ricans in its most tangible form (the death of a human).

¹⁷⁷ *Id.* at 1.

¹⁷⁸ *Martinez-Hernandez*, 2016 WL 1275039, at 1. Cleverly, counsel tried to couch their Sixth Amendment claim within the larger Eight Amendment attack; however, the Court quickly noticed and dismissed the claim.

¹⁷⁹ The federal judiciary has a tradition of litigating cases with the presumption that certain statutes or sections of the federal Constitution apply to Puerto Rico. It is not until a party in the litigation raises the issue that the court entertains the question of whether the statute applies to the Island. See *U.S. v. Peña-González*, 62 F.Supp.2d 358 (D. P.R. 1999) (deciding whether or not counsel’s abandonment of defendant during the death certification process was improper); compare with *U.S. v. Acosta-Martinez*, 106 F. Supp. 2d 311 (D. P.R. 2000) (holding that the FDPA and death penalty are locally inapplicable in Puerto Rico).

¹⁸⁰ See Gonzales Rose, *supra* note 132. By noting *racially* elite, Gonzales Rose refers to the embedded racial and color hierarchies that exist in many Latin American countries.

B. *Due Process Concerns*

If the state violence argument does not quite leave a good taste in your mouth, it is probably because it is not every day that the benevolent master is exposed as an international oppressive force. For those of you who are more inclined towards systemic modifications and legal challenges, the First Circuit has also spoken on the hotly contested issue of substantive due process under the Fourteenth Amendment with regards to Puerto Rico.

At the broadest level, federal laws should not apply to Puerto Rico because Puerto Ricans do not have a say in the creation of those laws, thus violating their due process rights under the federal Constitution. A narrower construction of that argument is that Puerto Rico, although not a state, should still be allowed to vote for the president of the United States, the vice president, and members of Congress in the general elections.¹⁸¹ These narrowed arguments have been disposed of by federal circuit courts, but not without strong dissenting views.¹⁸² Judge Juan Torruella, a scholar and long-time critic of the *Insular Cases* and the Puerto Rican-United States relationship, argued in two different separate opinions that Puerto Ricans should be given greater constitutional rights with regards to federal elections. Even in the face of litigation, the First Circuit simply holds that since Puerto Rico is not a state, it cannot vote in federal elections, and since it “is what the Constitution itself provides,” it cannot be a violation of due process or any other constitutional right.¹⁸³ Essentially, since the Commonwealth says that it is okay, then there is no due process argument.

Acosta-Martinez exemplifies the due process concerns when applying the FDPA to Puerto Rico. The District Court held that applying the federal death penalty to Puerto Rican citizens without their consent and lack of representation would be unfair and violate substantive due process.¹⁸⁴ The Court tracked the Commonwealth of Puerto Rico history and the promise of Act 600, namely giving Puerto Rico popular sovereignty and the promise of greater legal autonomy.¹⁸⁵ The Court noted, however, that the expansion of federal statutes through Act 600 *substantially eroded* the protections that Act 600 was supposed to provide, resulting in the “concomitant *reduction* in the sphere of Commonwealth authority.”¹⁸⁶ Specifically, since the federal government unilaterally applied the federal death penalty, it would clash “with the *principle of liberty* enshrined in the Declaration of Independence and the Constitution of the United States, thereby *violating the substantive due process rights of the American citizens of*

¹⁸¹ *Igartúa v. U.S.*, 626 F.3d 592 (1st Cir. 2010) [hereinafter *Igartúa IV*].

¹⁸² See *Igartúa II*, 229 F.3d 80, 85 (1st Cir. 2000) (Torruella, J., concurring); *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 158 (1st Cir. 2005) (Torruella, J., dissenting) [hereinafter *Igartúa III*].

¹⁸³ See *Igartúa IV*, 626 F.3d at 597 (quotation omitted).

¹⁸⁴ *U.S. v. Acosta-Martinez*, 106 F. Supp. 2d 311, 312-13. (D. P.R. 2000).

¹⁸⁵ *Id.* at 322-23.

¹⁸⁶ *Id.* at 324.

Puerto Rico” as well as doing “violence to the principle of the consent of the governed” that underlies the federal Constitution.¹⁸⁷

The First Circuit disagreed. The Court disposed of the argument quickly, arguing that the application of the death penalty to Puerto Rico did not *shake the conscience* of the Court, and since the Court had enforced a variety of federal statutes which Congress intended to apply to Puerto Rico in the past, there was no due process violation with regards to the death penalty.¹⁸⁸ In the face of the argument that the federal law was applied to a group of American citizens who had no say in its creation, the First Circuit simply stated that the argument was “a political one, not a legal one.”¹⁸⁹ The argument boils down to a simple one: the United States controls the Island, and thus, can dispose of its citizens as it wishes. The Court essentially foreclosed substantive due process claims with respect to the application of the death penalty in Puerto Rico and with respect to voting representation in the federal government. Puerto Ricans are a politically subjugated class with narrow recourse in federal court, and even less through political power. This scenario looks oddly familiar, and for good reason. Puerto Rico no longer enjoys the promised autonomy of Act 600, but rather, federal legislation coupled with judicial interpretation has relegated the Commonwealth status and Act 600 right back where we started, and the third iteration of the *Organic Act*.

CONCLUSION

The United States government has exerted control over every facet of Puerto Rican life. The federal government has the power to choose if a Puerto Rican lives or dies. Death penalty jurisprudence is fraught with fundamental issues and

¹⁸⁷ *Id.* at 325.

¹⁸⁸ *United States v. Acosta-Martinez*, 252 F.3d 13, 21 (1st Cir. 2001).

¹⁸⁹ *Id.* at 21. It seems that all due process claims are *political ones* and courts cannot entertain them. Judge Boudin in *Igartúa III* made a similar argument when he noted that “[t]he case for giving Puerto Ricans the right to vote in presidential elections is fundamentally a political one and must be made through political means.” *Igartúa III*, 417 F.3d 145, 151 (1st Cir. 2005). Judge Torruella responded to the *political question* argument in *Igartúa II*: “The present conundrum cannot be justified or perpetuated further under the subterfuge of labeling it a ‘political question.’ Undoubtedly, this situation is ‘political’ in the sense that it involves the political rights of a substantial number of United States citizens. It is also ‘political’ because it is one that should, in the normal course of things, be resolved by the political process and the political branches of government. But in the final analysis, this problem is no more ‘political’ than that presented to and resolved by the Supreme Court in *Brown v. Board of Education*, one that required corrective judicial action even in the face of longstanding legal precedent.” *Igartúa II*, 229 F.3d at 88-89 (citation omitted). Much like the way Torruella suggests that the court could fix this conundrum, the Supreme Court could easily fix the issues within the federal death penalty and its application in Puerto Rico. However, the impetus to fix this conundrum would require self-reflection and a rejection from the expansionist doctrines that evolved the United States Constitution from one in which territories would be turned into states, into a nation which keeps colonies. See John H. Blume & Sheri L. Johnson, *Unholy Parallels between McCleskey v. Kemp and Plessy v. Ferguson: Why McCleskey (Still) Matters*, 10 OHIO ST. J. CRIM. L. 37, 46 (2012) (“Both *Plessy* and *McCleskey* are characterized by a willful ignorance of history, an ignorance as striking as their departures from precedent.”).

its uniquely coercive application to Puerto Rico, given its lack of representation, its colonial history with the federal government, and the opposition to capital punishment, amounts to an act of state violence. Beyond the physical violence of systemically killing Puerto Rican defendants, the application of a law that Puerto Ricans did not consent to is a coercive act. Furthermore, the application of a death penalty system riddled with issues of racial disparities, stubborn appellate processes, and serious questions of reliability (to such an extent that the modern application of the death penalty has convinced many of our Supreme Court Justices that it should not exist).¹⁹⁰ The federal government now applies that precarious machinery to unrepresented and un-consenting Puerto Ricans, sanctioning the intentional killing of a human being, without their symbolic or actual consent. Puerto Ricans have at least three paths to take: (1) submit to the will of the oppressor; (2) unite and fight for the general abolition of the federal death penalty, or (3) attempt to convince the federal government that the application of the federal death penalty is an act of state violence that falls outside of the ambit of banal state functioning.

¹⁹⁰ Brian Evans, *Three Supreme Court Justices Later Regretted Supporting the Death Penalty*, HUMAN RIGHTS NOW BLOG (Oct. 8, 2010), <http://blog.amnestyusa.org/us/what-might-have-been-3-supreme-court-justices-later-regretted-supporting-the-death-penalty/> (last visited June 24, 2017).