

Territoriality in American Criminal Law

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It is a bedrock principle of American criminal law that the authority to try and punish someone for a crime arises from the crime's connection to a particular place. Thus, we assume that a person who commits a crime in some location—say, Philadelphia—can be arrested by Philadelphia police for conduct deemed criminal by the Pennsylvania legislature, then prosecuted in a Philadelphia court and punished in a Pennsylvania prison. The idea that criminal law is tied to geography in this way is called the territoriality principle. This idea is so obvious and familiar that it usually goes unstated.

This Article foregrounds and challenges the territoriality principle. Drawing on a broad and eclectic set of sources, it argues that the standard account of domestic criminal law is mistaken. Although the territoriality principle is deeply embedded in American legal thought, the criminal legal system is much less territorial than conventional wisdom holds. In fact, over the past century, new statutes, doctrines, and enforcement practices have unmoored criminal law from territory. Over time, these developments have produced a criminal legal system in which borders are negotiable and often honored in the breach.

Scholars and courts have largely overlooked the deterritorialization of domestic criminal law. But the decline of the territoriality principle has unsettling implications. It undermines constitutional doctrines and academic theories that are built on the classic account of criminal law. It upsets foundational conceptual distinctions that structure public law. And it raises normative theoretical questions about just how far domestic criminal laws should reach. This Article grapples with those questions, connects them to prominent debates in criminal law scholarship, and concludes that we ought to revive the territoriality principle in order to temper the state's power to enact criminal law.

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INTRODUCTION	2
I. THE TERRITORIALITY PRINCIPLE	6
A. <i>Substantive Criminal Law</i>	6
B. <i>Constitutional Law</i>	9
C. <i>Institutional Design</i>	14
D. <i>Rhetoric</i>	16
E. <i>Territory as a Proxy</i>	18
II. EXTRATERRITORIAL CRIMINAL LAW	19
A. <i>Criminalization</i>	19
B. <i>Policing</i>	23
C. <i>Prosecution</i>	26
D. <i>Punishment</i>	29
E. <i>Criminal Law by Contract</i>	31
III. TERRITORY OR MEMBERSHIP	34
A. <i>Shibboleths</i>	34
1. Criminal Law is Local	34
2. Criminal Law is Territorial	36
B. <i>The Democracy Debate</i>	37
C. <i>A Defense of Borders</i>	42

Introduction

On March 8, 1938, Lambiris Skiriotes went sponge fishing in the Gulf of Mexico.¹ That morning, he donned a diving suit, took a boat six miles off Florida’s shore, and began to harvest the natural sponges that grow beneath the Gulf.² Hours later, the Sheriff of Pinellas County arrested Skiriotes under a law that banned sponge fishing in Florida.³ Skiriotes, though, was not in Florida; he was “caught in the act” in international waters.⁴ Nonetheless, he was tried in county court and convicted under state law, on the theory that Florida can “govern the conduct of its own citizens upon the high seas.”⁵

Sixty years later, Dustin Higgs was convicted of murder in a federal court in Maryland.⁶ After a trial before a jury composed of Maryland residents, Higgs received a death sentence.⁷ The federal law that authorized that sentence required Higgs to be executed “in the manner prescribed” by the state where the penalty was imposed—in that case, Maryland.⁸ But while

¹ Brief for Appellant at 7, *Skiriotes v. Florida*, 313 U.S. 69 (1941).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Skiriotes*, 313 U.S. at 73.

⁶ *Higgs v. U.S.*, 711 F. Supp. 2d 479, 486 (D. Md. 2010).

⁷ *Id.*

⁸ *United States v. Higgs*, 141 S. Ct. 645, 647, 592 U.S. ___ (2021) (Sotomayor, J., dissenting) (quoting 18 U.S.C. § 3596(a)).

Higgs was on death row, Maryland abolished the death penalty. So the government asked the court to designate Indiana, a state that permits capital punishment, as the site for Higgs's execution.⁹ The trial court refused, but the Supreme Court intervened.¹⁰ The United States government executed Dustin Higgs on January 16, 2021, four days before President Donald Trump left office.¹¹

These two cases, decided half a century apart, seem to have little in common. But both challenge the intuition that criminal law is tied to a particular place. In the first case, Florida's criminal code followed Lambiris Skiriotes as he went diving at sea. In the second, the government selected Indiana as the right site to impose a punishment handed down in Maryland. These cases seem strange—legal, perhaps, but off-putting and counterintuitive. On some level, it feels odd to think that Florida's criminal laws can regulate its citizens as they travel or that a crime committed in Maryland can be punished 600 miles away.

These cases are unsettling because they conflict with a basic assumption about how domestic criminal law works. It is a bedrock principle of American criminal law that the authority to try and punish someone for a crime arises from the crime's connection to territory. Thus, we assume that a person who commits a crime in some place—say, Philadelphia—can be arrested by Philadelphia police for conduct deemed criminal by the Pennsylvania legislature, then prosecuted in a Philadelphia court before a jury of Philadelphia residents, and punished in a Pennsylvania prison. The idea that criminal law is tied to geography in this way is called the territoriality principle.¹² This idea is so obvious and familiar that, outside a small group of philosophers and conflicts scholars,¹³ it often goes unstated. When it is discussed, the territoriality principle is described as a feature of domestic criminal law that distinguishes it from both civil and international law.¹⁴

This Article foregrounds and challenges the territoriality principle. Drawing on a wide and eclectic set of sources—from penal codes and constitutional cases to private contracts, police manuals, and interviews—it argues that the standard account of criminal law is wrong.

Although the territoriality principle is deeply embedded in American law, the criminal legal system is much less territorial than conventional wisdom holds. In fact, over the past century, a series of changes in American law—new statutes, new doctrines, and new enforcement practices—have unmoored criminal law from territory. This process has unfolded at every stage of the criminal legal system, from criminalization to punishment. Slowly but surely, legislatures have redefined crimes to extend beyond state borders; courts have expanded their own criminal jurisdiction; police have ventured across state lines; and prison superintendents have agreed to trade prisoners between states.¹⁵ Together, these developments have produced a criminal legal system that has remarkably flexible borders, which are negotiated ad hoc between government officials.

⁹ *Id.* at 648; see also David Cole, *A Rush to Execute*, N.Y. REV. OF BOOKS (Feb. 25, 2021), <https://www.nybooks.com/articles/2021/02/25/trump-supreme-court-execution-spree>.

¹⁰ *Higgs*, 141 S. Ct. at 645 (lifting the stay on Higgs's execution).

¹¹ Hailey Fuchs, *U.S. Executes Dustin Higgs for Role in 3 1996 Murders*, N.Y. TIMES (Jan. 16, 2021), <https://www.nytimes.com/2021/01/16/us/politics/dustin-higgs-executed.html>.

¹² See R.A. DUFF, *THE REALM OF CRIMINAL LAW* 103-04 (2018) (identifying the territoriality principle); Lucia Zedner, *Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment*, in KATJA FRANKO AAS & MARY BOSWORTH, *THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION* 40, 46 (2013) (describing the “principle of territoriality” as a central tenet of “classic accounts” of “domestic criminal law”).

¹³ See *infra* Part I.A. (summarizing debates about territoriality in the conflict of laws literature); Part III.C. (discussing philosophical debates about territorialism).

¹⁴ See *infra* Part I.A. (explaining why territorialism is thought to make domestic criminal law distinctive).

¹⁵ See *infra* Part II (documenting these and other developments).

Scholars and courts have largely overlooked this deterritorialized legal regime.¹⁶ But as this Article shows, the decline of the territoriality principle has a number of unsettling implications. Most obviously, it upsets legal doctrines and academic theories that are built on the classic account of criminal law. The idea that domestic criminal law is local and territorial runs throughout constitutional doctrine. This idea shapes federalism and criminal procedure jurisprudence; it surfaces in Commerce Clause, abstention, and habeas cases.¹⁷ All of these doctrines look more precarious in light of the deterritorialized reality of American criminal law. Some of the foundational distinctions that structure public law—between international and domestic law, civil and criminal law—start to look less stable too. The more one examines the territoriality principle, the less defensible prevailing doctrines and conceptual frameworks begin to seem.

Focusing on the territoriality principle also helps to advance academic debates about the failures of American criminal justice.¹⁸ In recent years, scholars in many corners of criminal law have begun to ask whether the criminal legal system would be better if it were not quite so territorial. Academics do not always frame their discussion in these terms, but as this Article shows, many of the most exciting and pressing debates in criminal law theory are at base disputes about criminal jurisdiction.¹⁹ The longstanding debate over whether to “democratize” criminal law, for instance, is on some level a conversation about whether we ought to abandon the territoriality principle and rebuild criminal law around concepts like membership and community.²⁰ Philosophers of criminal law have posed a similar question.²¹ This Article brings these debates together around the concept of territory. It demonstrates that American criminal law is already partially deterritorialized, and thus, that the questions scholars have been asking are much more live than they may have realized. Finally, it defends the territoriality principle as a normatively attractive basis for American criminal law.

The Article thus makes three conceptual moves: it locates the source of the territoriality principle; it uses doctrinal and practical examples to destabilize that principle; and it argues that scholars could have clearer debates about what is wrong with the criminal legal system—and how to fix it—if we focused on whether territoriality is a principle worth retaining. The piece develops these claims in three Parts.

Part I traces the origins of the territoriality principle. This Part explores why it feels so counterintuitive for state criminal laws to extend beyond state borders—for Florida to criminalize conduct in international waters, or for Maine to ship its prisoners to Kentucky. As Part I shows, a commitment to territoriality is built into the foundations of American criminal law through substantive doctrines, procedural rules, and institutional design. Part I explains how criminal law doctrines, like the *actus reus* requirement and the presumption against extraterritorial application of state criminal codes, assume and entrench the territoriality principle.²² It identifies provisions of the Constitution that seem to require territorial criminal

¹⁶ See *infra* note 30.

¹⁷ See *infra* Part I.D.

¹⁸ There is a general consensus among legal academics (and many others) that the American criminal legal system is a failure. This is why scholars often refer to the criminal “legal” system rather than the “justice” system, a framing I adopt except when describing the aspiration that criminal laws and law enforcement regimes could deliver something better.

¹⁹ See *infra* Part III.B.

²⁰ Part III describes the democratization literature in depth. For one recent overview, see John Rappaport, *Some Doubts about “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

²¹ See *infra* Part III.B. (surveying recent philosophical literature on territoriality in criminal law).

²² See *infra* Part I.A.

law.²³ And it demonstrates how procedural rules and law enforcement practices reinforce territorialism.²⁴ These examples reveal a criminal legal system that is deeply devoted to territoriality, in which it makes perfect sense to expect that domestic criminal law will start and stop at state lines.

Part II documents the decline of the territoriality principle. This Part explains how twentieth century legal developments disconnected the criminal legal system from territorial boundaries. Part II proceeds sequentially, showing how criminal law exceeds borders at every turn. In the first phase of the criminal legal process—criminalization—legislatures have stretched the definition of crimes with concepts like continuing and inchoate offenses, and courts have exerted an increasingly bold understanding of their jurisdiction over out-of-state offenses.²⁵ In the second phase—policing—local police departments have formed interjurisdictional task forces, and courts have developed doctrines that license extraterritorial policing.²⁶ In the third phase—prosecution—loose venue rules have enabled forum shopping, and the rise of plea bargaining has undermined the significance of territorial limits on jury trials.²⁷ In the final phase—punishment—state prison officials have contracted to share prisoners, and courts have concluded that prisoners have no right to be confined anywhere near the site of their crime or conviction.²⁸ Criminal law has been deterritorialized from beginning to end.

Part III spells out the implications of this account of American criminal law. It begins on a critical note, by exploring how the deterritorialization of criminal law undermines both constitutional doctrines and the basic distinctions that shape public law. It then considers how this Article’s positive account might advance debates among criminal law theorists. Part III takes up the possibility that the ongoing academic debate about democracy in criminal law is really about territorialism. It then grapples with the normative question implicit in the erosion of the territoriality principle: should domestic criminal law be territorial? Or would we all be better off if legislatures, law enforcers, and criminal law reformers could ignore the borders of criminal law? Part III concludes by defending territoriality, not as unproblematic but as a good way to limit the state’s power to enact and enforce criminal laws.

The Article thus winds up calling for a revival of territorialism. In the end, this piece takes a normative and slightly unorthodox position on the merit of borders. Its main aim, though, is to demonstrate that the territoriality principle is worth debating. At its heart, this is an Article about the relevance of criminal jurisdiction. Scholars and students of American law tend to think that the study of jurisdiction is technical and dry, or as Professor William Prosser put it in 1953, “a dismal swamp” inhabited by “eccentric professors who theorize about mysterious matters in strange and incomprehensible jargon.”²⁹ Perhaps it is unsurprising, then, that there has been so little scholarship on territoriality in domestic criminal law.³⁰ American criminal law textbooks

²³ See *infra* Part I.B. (discussing the Venue, Vicinage, and Extradition Clauses of the Federal Constitution, and state law analogues to those federal provisions).

²⁴ See *infra* Part I.C. (discussing, among other examples, state venue rules for criminal trials and the institutional design of the criminal legal system, in which police departments are typically organized and funded in territorially-defined units).

²⁵ See *infra* Part II.A.

²⁶ See *infra* Part II.B.

²⁷ See *infra* Part II.C.

²⁸ See *infra* Part II.D.

²⁹ LEA BRILMAYER, JACK GOLDSMITH, ERIN O’HARA O’CONNOR & CARLOS M. VÁZQUEZ, *CONFLICT OF LAWS* (2020) (quoting William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953)).

³⁰ The three articles that address the topic directly are: Albert Levitt, *Jurisdiction over Crimes*, 16 J. CRIM. L. & CRIM. 495 (1926); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960); and Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44 (1974). As

make no mention of jurisdiction; conflict of laws textbooks omit criminal law; and the leading article on the topic remains a piece published in 1926.³¹

But the territoriality principle has been utterly transformed over the last century. The decline of territoriality is why Florida could prosecute Lambiris Skiriotes for fishing in international waters, and why Dustin Higgs could be sentenced to death in Maryland but executed in Indiana.³² This arid topic has concrete stakes. And as this Article demonstrates, the legal system's waning commitment to the territoriality principle raises real questions about the scope and legitimacy of American criminal law.

I. The Territoriality Principle

It is natural to assume that domestic criminal law will be territorial. It seems straightforward and uncontroversial to think that a crime committed in Vermont will be policed and prosecuted in Vermont, particularly if that crime was outlawed by the Vermont legislature. This Part asks why the territoriality principle seems so obvious—how, in other words, the conventional wisdom came to be.

It uncovers a commitment to territoriality buried deep in many areas of the American law. Bringing together sources and doctrines from a variety of fields, this Part shows how territoriality is baked into substantive criminal law, constitutional law, and the institutional design of criminal legal system. This overview helps to explain why the concept of territory has so much purchase in domestic criminal law, which should make it more unsettling to discover in Part II that the territoriality principle is routinely ignored.

A. Substantive Criminal Law

Territorial borders are embedded in the basic definitions of American criminal law. In the first weeks of law school, students learn that a crime is an act that happens in a given place as a result of voluntary bodily movement.³³ This axiom, which is known as the voluntary act requirement, builds a “where” question into the foundation of criminal law. To know that a crime occurred, one must decide where the salient conduct—the *actus reus*—took place. This is why courts

this Article explains, there is a large body of literature on territoriality in adjacent fields like conflict of laws and immigration law, and in the last decade philosophers of criminal law (particularly in Canada and Europe) have grown increasingly interested in the scope of legislative criminal jurisdiction. *See infra* Part I.A. (discussing the conflicts literature); Part III.B. (discussing the philosophical debate). But little scholarship addresses territoriality in domestic criminal law, and almost none since the 1970s has examined how the territoriality principle works (or fails to work) in the United States. As Professor Markus Dubber observed in 2013, “Despite the recent upsurge of interest in criminal jurisdiction in the international sphere, domestic criminal jurisdiction remains understudied. This is a shame . . .” Markus Dubber, *Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective*, 63 UNIV. TORONTO L.J. 247, 247 (2013).

³¹ Levitt, *supra* note 30; *see infra* notes 40, 44.

³² *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); *United States v. Higgs*, 141 S. Ct. 645, 647 (2021) (Sotomayor, J., dissenting). There are of course more technical legal explanations for the holdings in these cases. (Higgs's case, for example, turned on interpretation of the Federal Death Penalty Act, 18 U.S.C. § 3596(a)). But as this Article explains, the statutes and doctrines that permit the sort of displacement involved in extending Florida criminal law into the Gulf of Mexico or redesignating a federal sentence imposed in Maryland to permit an execution in Indiana developed from the deterritorialization of criminal law. To come into existence, these statutes and doctrines required a basic shift in how the American legal system approaches criminal jurisdiction. This Article documents that shift.

³³ *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 221–27 (2017).

describe venue as “a necessary, if sometimes subtle, element of every criminal statute.”³⁴ At its core, crime is an idea tied to a location.³⁵

Traditionally, the relevant location of a crime is a legally-defined territory whose political body has deemed the action criminal. Stating this principle out loud makes it sound complicated, but the idea is familiar: when I commit an assault in Battery Park, what matters is that I am in New York because states define and prosecute assaults. (One could make the same point about federal crimes or city ordinances. The observation is simply that the ambit of domestic criminal law is territorial, and territories have formal legal boundaries.) In other words, when defining crimes, American criminal law cares about *where* you are rather than *who* you are. The relevant fact is that you are on New York land, not that you are an American citizen, a senior citizen, or a person who identifies as female, Black, or Jewish. And because of the way criminal law has developed in the United States, the operative “where” is often the state. Thus, the Model Penal Code (MPC) provides that criminal law typically extends to any offense committed “within the state.”³⁶

The territorial scope of criminal law is supposed to be one of the things that makes it distinctive. In a section of the Model Penal Code called “territorial applicability,” the MPC’s editors explain that criminal law is fundamentally different from civil law because in the criminal context “jurisdiction and choice of law . . . are merged.”³⁷ Again, the principle sounds tricky but feels simple: in a New York criminal court, New York criminal law applies. Whereas in civil actions a court can apply a sister state’s rules, in criminal court the forum state’s law governs.³⁸ A New York judge cannot choose to apply Connecticut criminal law to your case, even if you live in Connecticut or planned your crime there. No, the MPC tells us, “it has long been a maxim of American jurisprudence that a state will not enforce the penal laws of another state.”³⁹ So if you committed your crime in New York, you are prosecuted there. And if you committed a crime in Connecticut and drove to New York, you must go back to Connecticut to be prosecuted *in the right place*.

Conflicts scholars call the prohibition on interstate enforcement of criminal law “the public law taboo.”⁴⁰ The intuition animating this taboo is that there is something special about public

³⁴ United States v. Lewis, 768 F.3d 1086, 1089 (10th Cir. 2014). Appellate courts disagree about whether venue must be proven beyond a reasonable doubt. Compare United States v. Lopez, 880 F.3d 974, 982 (8th Cir. 2018) (“Proof of venue is an essential element of the Government’s case.”), with United States v. Romans, 823 F.3d 299, 309 (5th Cir. 2016) (internal citations omitted) (“This Circuit has not treated territorial jurisdiction and venue as ‘essential elements’ in the sense that proof beyond a reasonable doubt is required.” (quoting United States v. White, 611 F.2d 531, 536 (5th Cir.), cert. denied, 446 U.S. 992 (1980))). But the basic point—that the site of a crime is part of its definition, necessary to prosecution in any jurisdiction—is consistent across circuits.

³⁵ See MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 2 (2003) (“[I]ssues that criminal lawyers generally classify as matters of jurisdiction . . . as if they were merely concerned with the powers or competence of the court should properly be considered as elements relating to the *actus reus* itself.”).

³⁶ MODEL PENAL CODE § 1.03; see *infra* Part II.A. (exploring the exceptions to “strict territoriality”).

³⁷ See *infra* Part II.A.

³⁸ Lindsay Farmer, *Territorial Jurisdiction and Criminalization*, 63 UNIV. TORONTO L. J. 225, 230 n.14 (2013) (“[W]hile the civil courts will on occasion seek to apply foreign law, criminal courts can only ever apply domestic law, the law of the territory”).

³⁹ MODEL PENAL CODE § 1.03; see also HERMA HILL KAY, LARRY KRAMER, KERMIT ROOSEVELT & DAVID L. FRANKLIN, CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 84-85 (2018) (tracing this maxim to “Chief Justice Marshall’s unsupported dictum” about the law of nations in *The Antelope*, 23 U.S. (10 Wheat) 66, 123 (1825)). See *infra* note 123 (discussing *The Antelope*’s importation into domestic criminal law).

⁴⁰ William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L. L.J. 161 (2002). As Dodge notes, the “phrase is Andreas Lowenfelds.” *Id.* at 161 n.4; see also Andreas F. Lowenfeld, *Public Law in the International Arena: Conflicts of Laws, International Law, and Some Suggestions for their Interaction*, 163 RECUEIL DES COURTS 311, 322–26 (1979-II); KAY

law, and “penal” law in particular, that makes it offensive and illegitimate to apply criminal law outside the place it was enacted. It is not entirely clear why penal law is so special—why, for instance, it is more problematic for a state to impose another state’s criminal rules than its civil rules. The answer seems to lie in deeply held (if not especially concrete) beliefs about criminal law’s relationship to ideas like sovereignty and democracy. Later sections of this Article elaborate and question those beliefs.⁴¹ For now, the critical point is that criminal law is supposed to be territorial in ways that civil law is not.

To be more precise, *domestic* criminal law is supposed to be territorial. When it comes to international law, scholars and courts have long recognized several bases for criminal jurisdiction, including forms of extraterritorial jurisdiction in which nations can criminalize conduct by and against their citizens abroad.⁴² For international law scholars, it is not unusual in the least to think that criminal law could be pegged to a personal trait like citizenship status rather than to the place the crime was committed.⁴³ In fact, it is probably stranger for the international law theorist to hear that territoriality is so entrenched (and so rarely questioned) in domestic criminal law. But that is exactly the state of affairs. The territoriality principle is often assumed in domestic criminal law; as the Introduction noted, prominent textbooks on the subject omit jurisdiction.⁴⁴ When it is discussed, territoriality is understood to be the prevailing rule, the principle “we currently observe,”⁴⁵ and a feature of domestic criminal law that distinguishes it from international law, a field in which ideas about jurisdiction are more varied and flexible.⁴⁶ Territorialism is thus thought to be what makes domestic criminal law both domestic and criminal.

Of course, there are exceptions to the territoriality principle in American criminal law. The Model Penal Code explicitly recognizes states’ authority to criminalize out-of-state conduct that affects a state’s “legitimate interests,” and the MPC’s editors take pains to note that the Code sets “forth several alternative bases for jurisdiction, thus rejecting the old common law doctrines

ET AL., *supra* note 39, at 84–85 (2018) (discussing the scope of “so-called penal law exception” and stating in passing that “criminal laws obviously qualify” and are therefore unenforceable outside the jurisdiction that enacted the law). When discussing the public law taboo, conflicts scholars usually refer to “public law” generally, not to choice of criminal law in particular. My invocation of the taboo here is an effort to apply ideas from a field focused on civil litigation to criminal law theory. (Robert Lefflar made a similar move in 1974. *See* Lefflar, *supra* note 30, at 44 (“Conflict of laws treatises and casebooks usually omit material on choice of law in the criminal field almost altogether. They take up conflicts problems as though they arose only in civil litigation.”)). The reason scholars tend to treat conflict of laws as a predominantly civil field is because the territoriality principle is so entrenched in domestic criminal law.

⁴¹ *See infra* Part I.C. (exploring the connections between territorialism and ideas about sovereignty and democracy). *See generally* Dodge, *supra* note 40, at 164 (challenging the rationales for the public law taboo).

⁴² *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 104–110 (2d ed. 2015) (discussing active and passive personality jurisdiction).

⁴³ Nor is it unusual for scholars of Roman and German law, or for national security scholars who focus on federal extraterritorial prosecutions of terrorism and drug crimes. *See, e.g.*, Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 625 (2016) (discussing terrorism and drug prosecutions under U.S. federal law); Dubber, *supra* note 30, at 247 (discussing German criminal law); Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 1155, 1155 (1971) (discussing Roman criminal law). Scholars of domestic criminal law have not examined criminal jurisdiction as thoroughly as scholars in these adjacent fields.

⁴⁴ *See, e.g.*, KADISH ET AL., *supra* note 33.

⁴⁵ *See, e.g.*, DUFF, *supra* note 12, at 103 (noting, in a discussion of criminal law, that “ambit and jurisdiction are typically defined in territorial terms”); Kimberly Kessler Ferzan, *The Reach of the Realm*, 14 CRIM. LAW & PHIL. 335, 336 (2020) (comparing extraterritorial bases for international criminal jurisdiction to “the territorial boundaries we currently observe” in domestic criminal law).

⁴⁶ *See supra* notes 42–43.

of strict territoriality.”⁴⁷ But even those alternative theories of jurisdiction are territory-adjacent. The MPC imagines, for example, criminalizing out-of-state conspiracies that involve an overt act “within the state”⁴⁸ or prohibiting conduct outside the state that “constitutes an attempt to commit an offense within the state.”⁴⁹ These exceptions hardly constitute a whole-hearted rejection of territoriality. (Compare them, for instance, to a criminal law that would apply to a state’s citizen anywhere she went, such as a law against getting an abortion in another state). These are, moreover, exceptions to a baseline rule that domestic criminal law is territorial. That rule guides the MPC and explains the strong presumption against extraterritoriality when interpreting state criminal statutes,⁵⁰ which is another example in which domestic (and especially state) criminal law is treated as more territorial than its counterparts in other fields.⁵¹

The basic idea, in short, is that “paradigm” criminal law—the stuff taught in first-year criminal law classrooms in the United States—is territorial. Much of this Article is devoted to challenging that idea, to exploring when state criminal law fails to be territorial and how the deterritorialization of domestic law undermines claims about the distinctiveness of criminal law and its special relationship to democracy. These critiques make more sense and land harder if one pauses at the outset to observe just how ingrained territorialism is in domestic criminal law, and state criminal law in particular. In the conventional account, the relationship between criminal law and territory is so obvious it goes without saying. Extraterritorial criminal law is exceptional and technical, the sort of material one learns in upper-level courses and specialist subjects like international or national security law. And territorialism is one of the characteristics—perhaps *the* characteristic—that makes criminal law identifiable as a form of domestic (rather than international), criminal (rather than civil), and public (rather than private) law.

B. Constitutional Law

One finds a similar commitment to territorialism in American constitutional law. The Federal Constitution contains several provisions that appear to require territorial criminal law. The two most obvious are the Venue Clause in Article III, which fixes the place of criminal trials “in the State where the said Crimes shall have been committed,”⁵² and the vicinage provision of the Sixth Amendment, which requires juries to be drawn from “the State and district where the crime shall have been committed.”⁵³ There are important distinctions between these two provisions. They concern different issues: venue is the location of a criminal trial, while vicinage

⁴⁷ MODEL PENAL CODE § 1.03(1)(f).

⁴⁸ *Id.* § 1.03(c).

⁴⁹ *Id.* § 1.03(b).

⁵⁰ See William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1391, 1412 (2020) (noting that “state rules on extraterritoriality . . . differ from the federal presumption” and citing the California Supreme Court’s assumption in *Bernhard v. Harrah’s Club*, 546 P.2d 719, 726 (Cal. 1976), that a state dram shop law could have no extraterritorial effect because it was “a criminal statute”).

⁵¹ See, e.g., Farbiarz, *supra* note 43, at 626 (noting that “federal extraterritorial prosecutions have become an important—and entrenched—part of American criminal justice”); see also William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1586, 1593 (2020) (discussing the presumption against extraterritoriality in interpretation of federal criminal law).

⁵² U.S. CONST. art. III, § 2, cl. 3. This rule applies except in cases of impeachment or when a crime is “not committed within any State.” *Id.*

⁵³ U.S. CONST. amend. VI.

is the catchment area for the jury.⁵⁴ But the clauses are related conceptually and historically, and they are both responsible for the strong strain of territorialism that runs through American criminal law.

The Venue Clause was a response to British laws that permitted colonists to be transported to England—“3,000 miles to an alien environment”⁵⁵—for criminal trials. In a magisterial, 243-page article on venue published in 1976, Professor Drew Kershen explained that the Constitution’s authors adopted the Venue Clause with two ideas in mind. First, the Founders believed that limiting venue would protect defendants because the “legal and moral support” necessary to mount a defense was most readily available close to home.⁵⁶ Second, the drafters believed in a common law theory of criminal jurisdiction in which courts may “enforce criminal laws only with respect to crimes committed within the territory assigned to the court.”⁵⁷ Under this common law theory, venue (the proper place of a criminal trial) and jurisdiction (the power to hear a criminal case) were one and the same. Courts had no authority to enforce the criminal laws of another place, so of course criminal trials would be held within a court’s territory. This understanding of criminal law, in which venue and jurisdiction are merged, is what early Americans meant when they described criminal law as “local.”⁵⁸

The Founders expected that that the twin goals of the Venue Clause—protecting defendants and constitutionalizing territorial jurisdiction—would align. Because people usually committed crimes near their homes,⁵⁹ the Constitution’s authors assumed that tying venue to the site of a crime would have the incidental benefit of protecting defendants. But when that assumption faltered, the Founders chose territoriality as the touchstone of the Venue Clause. Rather than linking venue to a defendant’s residence, the drafters tied venue to the crime’s location. The theory behind this choice was that the government’s authority to enforce criminal laws arises from a power of self-determination that starts and stops at territorial borders—that is, from sovereignty.⁶⁰ From this perspective, the choice between tying venue to a defendant’s residence and predicating venue on a crime’s *situs* was no choice at all. Venue had to track the crime because the government’s power to enforce criminal law flowed from territory, not facts about the defendant.⁶¹

The Venue Clause thus constitutionalized territorialism. The Vicinage Clause did too, though in slightly different ways. The Sixth Amendment’s vicinage requirement began as a proposed amendment to the text of the Constitution, which James Madison introduced to the

⁵⁴ Drew L. Kershen, *Vicinage*, 20 OKLA. L. REV. 801, 805 (1976) [hereinafter Kershen I]; see also Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 1, 150 (1977) [hereinafter Kershen II]. Kershen’s article was published across two volumes of the *Oklahoma Law Review*. See also Scott Kalker, Note, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 729 n.2 (1985).

⁵⁵ Kershen I, *supra* note 54, at 806, 809.

⁵⁶ *Id.* at 808.

⁵⁷ *Id.* at 811 (citing debates at the Constitutional Convention).

⁵⁸ *Id.* at 811 n.27.

⁵⁹ *Id.* (noting, based on a review of constitutional debates, that the Venue Clause’s drafters expected that the site of a “crime and the residence of the accused [would] ordinarily coincide”).

⁶⁰ *Id.* See generally DON HERZOG, SOVEREIGNTY, RIP, AT x–xii (2020) (“denounc[ing]” the concept of sovereignty as “obsolete, confused, and pernicious,” and arguing that the term is often just a synonym for “state” or “actor with jurisdiction” or a “vacuous adjective suitable for trotting out on formal occasions”). In light of Herzog’s critique, I have tried to define the term as I use it here. But as later sections explain, see *infra* Part I.C., the real point is that sovereignty is a slippery concept that becomes intelligible and meaningful only once we attach it to things like territorial borders.

⁶¹ Kershen II, *supra* note 54, at 150 (“[A]n accused’s place of residence is irrelevant under the Constitution.”).

House in 1789.⁶² Madison’s proposal would have replaced the Venue Clause in Article III with language requiring trials before a jury “of the vicinage” in the county where the crime occurred, except when insurrectionists controlled that county (in which case the trial could be moved nearby, still within the state).⁶³ This proposal morphed several times during the First Congress and ultimately landed in the Bill of Rights.⁶⁴ At a pivotal moment in the process, the Senate rejected the term “vicinage” on the ground that it was “either too vague or too strict”⁶⁵—too vague because it did not refer to a “particular territory recognized as a political or governmental unit,”⁶⁶ and too strict because it might require trials to be held in rebellious counties where juries would not convict.⁶⁷

The dispute over the word “vicinage” is illuminating. Supporters liked the idea that vicinage could mean “neighborhood” or “community,” loose concepts that captured a preference for localism and a belief that juries were “the conscience of the community” and therefore had a role to play in interpreting criminal laws.⁶⁸ Opponents of the word “vicinage”—the Federalists—were worried about national uniformity and local rebellion, so they wanted a clear term that would not require “neighborhood” juries in every case.⁶⁹ The final language of the Sixth Amendment was a negotiated settlement between these camps. The Amendment requires juries to be drawn from the “State and district where the crime shall have been committed, which district shall have been previously ascertained by law.”⁷⁰

This rule retains and entrenches a basic form of territorialism: it makes the site of a crime the threshold issue when determining the criminal procedure. But the Sixth Amendment calls for juries from “states” and “districts” rather than the “vicinage.” The final vicinage provision is thus not *really* a vicinage provision. Instead, it summons juries from formal political units with legally-defined boundaries, and it refers to districts “ascertained by law,” a phrase that empowered the legislature to determine the jury’s geographic origins within a state. In this respect, the Sixth Amendment was a significant grant of discretion to Congress.⁷¹

⁶² I ANNALS OF CONG. 435 (1789).

⁶³ See Kershen II, *supra* note 54, at 129 (quoting Madison’s proposal).

⁶⁴ See Kershen I, *supra* note 54, at 821 (explaining that before the proposed amendment to the Venue Clause went to the Senate, the House voted “to submit the propositions to the Senate as a Bill of Rights, rather than as amendments that would be inserted at the appropriate place in the body of the Federal [C]onstitution.”).

⁶⁵ *Id.* at 822 (quoting V.G. HUNT, THE WRITINGS OF JAMES MADISON 1787–1790, at 424 (1904)).

⁶⁶ *Id.* at 823.

⁶⁷ *Id.* at 824. (quoting V.G. HUNT, *supra* note 65, at 308); see also Ramos v. Louisiana, 140 S. Ct. 1390, 1400 n.40, 590 U.S. ___ (2020) (“In private writings, Madison . . . explain[ed] some of the objections with his original phrasing of the vicinage requirement.”).

⁶⁸ Kershen I, *supra* note 54, at 823, 833–36.

⁶⁹ *Id.*

⁷⁰ U.S. CONST. amend. XI. Section 29 of the Judiciary Act of 1789, which implemented the Sixth Amendment and established the first judicial districts, created an exception for capital cases: it required trials for crimes punishable by death to be in the *county* where the crime was committed, unless “great inconvenience” would occur, in which case the trial could be moved. However, at least twelve jurors still had to “be summoned from thence.” Act of Sept. 24, 1789, ch. 20, § 29, 1 Stat. 76 (1789). This provision preserved the narrower “right to trial by a jury of the vicinage as at common law” for capital crimes. Kershen I, *supra* note 54, at 854; see also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 71–72 (1923). But it became dead letter—courts routinely found “great inconvenience”—and was repealed in 1862 Amendments to the Judiciary Act. Kershen II, *supra* note 54, at 55–61 (tracing this history).

⁷¹ Kershen II, *supra* note 54, at 46. Note, however, that the borders of federal judicial districts coincided with state borders at the time the Sixth Amendment was enacted, so at first the Amendment simply required what the Venue Clause already did, namely trial within the state. *Id.*

One could go on at some length here. The subsequent history of the venue and vicinage provisions is extremely interesting, not least because it involves protracted disputes about what happens to criminal jurisdiction⁷² and federal juries⁷³ when Congress tinkers with the boundaries of judicial districts. Part II explores some of that history—most notably, the emergence in the twentieth century of the idea that jurisdiction and venue are distinct such that the location of a criminal trial is a waivable right possessed by the defendant rather than a structural requirement for the legitimacy of criminal adjudication.⁷⁴ As Part II explains, the fracturing of jurisdiction and venue marks an important moment in the deterritorialization of American criminal law.⁷⁵

But at this stage, that history is a detour from the core point: the commitment to territorialism in American criminal law can be traced to the U.S. Constitution. The creators of the Federal Constitution treated criminal law as territorial when they debated and drafted the rules on criminal trials. As a result, courts have understood it to be a problem of *constitutional significance* when a crime is tried outside the place it was committed.⁷⁶ To be clear, the claim here is not that it is unconstitutional to try crimes extraterritorially. The whole purpose of this Article is to show that the legality of extraterritorial criminal law has shifted over time. Rather, the observation is that we tend to think criminal law is territorial because the Constitution seems to think so too.

This is true of both federal and state constitutions. The Sixth Amendment vicinage right is one of the few that is not incorporated,⁷⁷ but most state constitutions contain Sixth Amendment analogues that build territoriality into the criminal legal process.⁷⁸ Montana, for example, requires criminal trials to be held in “the county or district” where the crime occurred, before a jury from the same area.⁷⁹ Massachusetts limits criminal prosecutions to “the vicinity where [the facts] happen.”⁸⁰ In Louisiana, criminal trials must be in the proper “parish.”⁸¹ There are distinctions between these provisions, but the salient point is that state constitutions reflect and reinforce a territorial understanding of criminal law. When searching for the origins of the territoriality principle, constitutional rules on criminal trials prove to be a fruitful source.

⁷² *Id.* at 3–6 (collecting cases on whether the creations of “divisions” within judicial districts limited federal courts’ criminal jurisdiction to events that occurred within that smaller division, a question the Supreme Court answered in the negative in three cases decided in the 1890s). As Part II explains, these late nineteenth-century cases distinguished venue from jurisdiction for the first time.

⁷³ *Id.* at 46–50, 67–68 (tracing the development of vicinage doctrine, which—in broad strokes—affirms judicial discretion to summon the jury from anywhere the court chooses so long as it is within the judicial district).

⁷⁴ *See infra* Part II.

⁷⁵ *Id.*

⁷⁶ *See* Kershen II, *supra* note 54, at 3–8 (collecting cases on the constitutionality of criminal proceedings held outside the original judicial district where a crime occurred). One might cite any constitutional case alleging improper venue here too.

⁷⁷ *See, e.g.,* Caudill v. Scott, 857 F.2d 344, 345 (6th Cir. 1988) (“The term ‘district’ as used in the Sixth Amendment has never been defined to apply to states . . .”); Zicarellu v. Dietz, 633 F.2d 312, 313–14 (3d Cir. 1980) (same); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS 275 (1998) (arguing against “mechanical incorporation” of the vicinage requirement). *But see* Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1706 (2002) (“The Supreme Court has not determined the extent to which the Sixth Amendment Vicinage Clause is incorporated The arguments that the Fourteenth Amendment does not incorporate the Vicinage Clause are particularly unconvincing.”).

⁷⁸ Leflar, *supra* note 30, at 46. Leflar draws on and cites Albert Levitt’s 1926 article “Jurisdiction Over Crimes,” which catalogued state venue and vicinage requirements, “few if any of [which] have changed.” *Id.*; *see also* Levitt, *supra* note 30, at 331–35 (1925–26).

⁷⁹ MONT. CONST. art. II, § 24; *see also* Levitt, *supra* note 30, at 322 (counting eight states with identical clauses and more with similar provisions).

⁸⁰ MASS. CONST. art. XIII.

⁸¹ LA. CONST. art. 1, § 16.

Territorialism surfaces in other parts of the Constitution too. For example, the Extradition Clause in Article IV obliges states to “deliver up” alleged criminals who “flee from Justice.”⁸² This Clause, which immediately prompted disputes about the rendition of fugitive slaves,⁸³ requires interstate cooperation in criminal law enforcement. Moreover, it presumes that cooperation means *sending fugitives back* rather than trying them in the state where they are found. One could imagine a legal regime in which states authorized each other to enforce their criminal codes—so, for example, Georgia would say “Massachusetts, try that defendant for me,” rather than, “Send him back to my criminal courts.” But that is not how the U.S. Constitution works. Instead, because early Americans had sharp disagreements over the criminal laws used to regulate slavery,⁸⁴ and because the Founders assumed the common law conception of criminal jurisdiction,⁸⁵ the Constitution provides for extradition. As a result, when people “flee from Justice,”⁸⁶ we ship them back to the place where justice is supposed to happen.

American courts have also read territorialism into the Due Process Clause.⁸⁷ In cases involving crimes that cross state lines—such as a cross-border shooting or a theft in one state where stolen goods wind up in another—courts have suggested that the Due Process Clause imposes an outer limit on extraterritorial prosecution of state criminal laws.⁸⁸ As one New York court described the doctrine, the Fourteenth Amendment prohibits states from “overreaching” when they “exercise [criminal] jurisdiction over out-of-state events.”⁸⁹ Part II explains why this doctrine is not especially restrictive in practice,⁹⁰ but here the invocation of the Constitution is what matters. In due process cases, as in venue and vicinage cases, courts believe it to be a constitutional problem when state criminal law exceeds state borders.

Together, these examples portray a constitutional order committed to territorialism. Indeed, they suggest that territorial criminal law was a critical part of the project of constituting the United States. The rules on extradition and criminal procedure in American constitutions are not just rules of the road for efficient trials. These rules are how states announced their borders and enacted their power to govern within them. (You can really tell you have a state once its police arrest and imprison you.) Early Americans used criminal law to instantiate state power and to navigate interstate relations. From this perspective, the territoriality principle is bound up with ideas about what it means to be a union of sovereign states.

At a more basic level, the territoriality principle clearly has roots in constitutional law. The previous section explored how territoriality is ingrained in substantive criminal law, in concepts

⁸² U.S. CONST. art. IV, § 2, cl. 2; *see also* 18 U.S.C. § 3182 (implementing the Extradition Clause); Uniform Criminal Extradition Act, 11 U.L.A. CRIM. LAW & PROC. 51 (1974) (model extradition statute). The UCEA has been adopted by every state except Mississippi and South Carolina. *See* Utt v. Warden, 427 A.2d 1092, 1096 n.6 (Md. 1981), *aff’d sub nom.* Utt v. State, 443 A.2d 582 (1982).

⁸³ *See* Ariela Gross & David Upham, *Article IV, Section 2: Movement of Persons Throughout the Union*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/37> (last visited Aug. 1, 2021).

⁸⁴ *Id.* (describing Extradition Clause controversies beginning the year after the Constitution’s adoption, “all [of which] had to do with slavery”).

⁸⁵ *See supra* notes 57–58.

⁸⁶ U.S. CONST. art. IV, § 2, cl. 2.

⁸⁷ U.S. CONST. amend. XIV, § 1.

⁸⁸ *See, e.g.,* State v. Rimmer, 877 N.W.2d 652, 665–56 (Iowa 2016) (“We agree with the New Jersey Supreme Court that the extraterritorial application of state criminal law is subject to due process analysis under the Fourteenth Amendment.”); State v. Randle, 647 N.W. 2d 324, 329 n.4 (Wisc. Ct. App. 2002) (“Territorial jurisdiction is part of the due process restrictions on the power of a court”); *see also* MODEL PENAL CODE § 1.03 (noting that “due process” limits the permissible bases for criminal jurisdiction).

⁸⁹ People v. Puig, 378 N.Y.S. 2d 925, 934 (N.Y. Sup. Ct. 1976)

⁹⁰ *See infra* Part II.

like the actus reus requirement and the prohibition on interstate enforcement of “penal” laws. The observations in that section apply broadly to criminal law in common law regimes.⁹¹ Here, we might add that territorialism is also distinctively *American*. The country’s federal and state constitutions contain clauses mandating territorial criminal procedures, limiting extraterritorial criminal jurisdiction, and requiring states to facilitate territorial criminal law enforcement. These provisions are one key reason we tend to think criminal law must be tied to a particular place.

C. Institutional Design

Territorialism is also built into the institutional design of the American criminal legal system. The Federal Rules of Criminal Procedure require crimes to be prosecuted “in the district where the offense was committed” unless narrow exceptions apply.⁹² State criminal procedure rules mirror this requirement, usually mandating prosecution in the county or district where a crime occurs.⁹³ This summary glosses over some important variation—for instance, states use different words to limit venue, which as the Sixth Amendment “vicinage” debate discussed above suggests,⁹⁴ reflects competing views about the values protected by criminal procedure. Technically, state venue rules fall along a spectrum from more to less strictly territorial. But they all embrace a baseline territorialism in which the site of a crime determines the proper criminal procedure.

Criminal law enforcement is organized around territory as well. Typically, police are clumped into territorial units such as the “New York” and “Los Angeles” Police Departments. The Bergen County Sheriff’s Office, the New Jersey State Police, and Federal Bureau of Investigation work as examples here too. All of these law enforcement agencies are defined by geography and empowered to act within some bounded area. The same is true of state prisons and county jails, which have names like “Ohio State Penitentiary” and “Cook County Jail” and receive funding through county and state corrections budgets.⁹⁵ Each of these law enforcement units purports to act on behalf of a certain place.

⁹¹ See DUFF, *supra* note 12, at 103–04 (describing the “territorial principle in English criminal law”); HIRST, *supra* note 35, at 1 (exploring the “territorial and extraterritorial ambit of English criminal law”); Dubber, *supra* note 30, at 248 (comparing German “jurisdictional concepts” to “jurisdictional norms in common law countries”). As Dubber notes, “domestic criminal jurisdiction remains understudied.” *Id.* To the extent that modern scholars have explored the topic, their discussion tends to focus on territoriality in common law regimes rather than on American territorialism in particular. This approach highlights the pervasiveness of the territoriality principle in criminal law, but it can obscure the ways in which territorialism is built into American constitutions and tied up with ideas about American federalism.

⁹² FED. R. CRIM. P. 18 (as amended Feb. 28, 1966). For a history of this rule, detailing its origins in Section 53 of the Judicial Code of 1911, see Kershen II, *supra* note 54, at 15–20; *see also infra* Part II (exploring how revisions to criminal procedure rules in the latter half of the twentieth century liberalized and deterritorialized the venue requirement).

⁹³ With exceptions for quirky scenarios like crimes committed on a county line. *See, e.g.*, ALA. CODE §§ 15-2-2, § 15-2-7; ALASKA R. CRIM. P. 18(b); ARIZ. REV. STAT. ANN. § 13-109; CAL. PENAL CODE § 777; COLO. REV. STAT. § 18-1-202; FLA. STAT. § 910.03(1); GA. CODE ANN. § 17-2-2; IDAHO CODE § 19-2120. This list could go on and would include nearly every state, with variations in the precise language used to limit venue to some territorially-defined area.

⁹⁴ *See supra* Part I.B.

⁹⁵ *See, e.g.*, MAGGIE WEST, GREENBOOK: LBO ANALYSIS OF ENACTED BUDGET 1 (2019), <https://www.lsc.ohio.gov/documents/budget/133/MainOperating/greenbook/DRC.PDF> (outlining the Ohio state prison budget).

The United States also has a complex interstate extradition apparatus, which developed from the Extradition Clause.⁹⁶ Before a person can be sent to face criminal charges in another state, he must go through an elaborate legal process that involves written notices, communication between state Governors, approval from Secretaries of State, and hearings before an Article III court.⁹⁷ In Pennsylvania, for example, interstate extradition requires two warrants, three hearings, and twenty-two distinct steps.⁹⁸ Defendants have a federal constitutional right to this process, which they can sue to enforce.⁹⁹

All of which is to say there is a considerable edifice built up around the idea that criminal law is territorial. American governments have organized their law enforcement bureaucracies, allocated resources, and recognized enforceable rights to effectuate the presumption that criminal law has territorial boundaries. Put more simply: territorialism is shot through the entire system. In addition to being a foundational premise of substantive and constitutional law, the territoriality principle is a basic feature of how criminal law is operationalized in the United States.

And then there is the practice of punishing noncitizens, which is perhaps the clearest example of territorialism in American criminal law. The United States has always subjected noncitizens within its borders to its criminal laws. Foreign nationals have been prosecuted in state and federal criminal courts, and imprisoned in state and federal prisons, for as long as those institutions have existed.¹⁰⁰ The assumption behind this practice is that criminal law attaches as soon as a person enters the country, whether or not she is a legal member of the polity. This assumption is usually implicit, though when courts need a citation they turn to the discussion of states' police power in *New York v. Miln*, in which the Supreme Court observed that "[t]he right to punish, or to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law."¹⁰¹ Rather, the *Miln* Court explained, a state has criminal jurisdiction "over all persons . . . within its territorial limits."¹⁰² Thus, the "alien who shall just have set his foot upon the soil of the state is just as subject to the operation of the law as one who is a native citizen."¹⁰³

The idea that a person who is not a citizen can nonetheless be subjected to criminal law because the right to punish arises from "soil" is the essence of the territoriality principle. In a regime based on this principle, criminal law is egalitarian (because it is blind to personal traits like citizenship status) and state-building (because it depends on and reaffirms state borders). Later parts of this Article discuss these features of territorial criminal law and consider whether they are desirable. The goal here is simply to observe that territorialism is embedded in the institutional design of American criminal justice. Though it often goes unremarked, the

⁹⁶ U.S. CONST. art. IV, § 2, cl. 2.

⁹⁷ For example, a flow chart on Pennsylvania's government website depicts the twenty-two-step extradition process in that state. *Interstate Extradition*, PA OFF. GEN. COUNS., <https://www.ogc.pa.gov/Extradition/Pages/default.aspx> (last visited Aug. 1, 2021).

⁹⁸ *Id.*

⁹⁹ *Crumley v. Snead*, 620 F.2d 481, 483 (5th Cir. 1980) ("Almost 100 years ago . . . the Supreme Court recognized that individuals have a federal right to challenge their extradition by writ of habeas corpus Any denial of this right gives rise to a cause of action under 42 U.S.C. § 1983 . . .").

¹⁰⁰ See Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1390–94 (2019).

¹⁰¹ 36 U.S. 102, 140 (1837); see also, e.g., *In re Manuel P.*, 215 Cal. App. 3d 48, 52–54 (Cal. Ct. App. 1989) (citing *Miln* in a juvenile delinquency case involving an undocumented minor from Tijuana).

¹⁰² *Miln*, 36 U.S. at 139.

¹⁰³ *Id.* at 139–40.

territoriality principle shapes everything from the organization and funding of police departments to the criminal prosecution of hundreds of thousands of noncitizens each year.¹⁰⁴

D. Rhetoric

Territoriality is also a prominent theme in American case law. Constitutional law is particularly full of rhetoric about the “inherently local” nature of criminal law. The claim that crime is local appears in all manner of doctrine—cases on rights, cases on structure, old cases and new ones. For example, it surfaced in the Rehnquist-era Commerce Clause cases, where the Supreme Court invoked the localness of criminal law to restrict congressional power.¹⁰⁵ It features in abstention and habeas cases, where the Court has relied on the local nature of criminal law to explain why federal courts should not police state criminal proceedings.¹⁰⁶ Claims about criminal law’s quintessential localness also show up in constitutional criminal law cases, in which the Supreme Court has adopted narrow interpretations of the Eighth¹⁰⁷ and Fourteenth¹⁰⁸ Amendments on the ground that criminal law “really belongs”¹⁰⁹ to states.

¹⁰⁴ The number of noncitizens subject to criminal prosecution across all fifty states in a given year is difficult to determine because of imprecise data collection and inconsistent definitions of the term “noncitizen.” But to offer a rough sense of scale, California prosecutors filed between 4.5 and 8.2 million criminal cases each year between 2010 and 2020, and in the same period approximately one-third of the adult prison population in California was foreign-born. See JUDICIAL COUNCIL OF CAL., 2020 COURT STATISTICS REPORT 83 (2020) (counting caseloads); Kristin F. Butcher & Anne Morrison Piehl, *Crime, Corrections, and California*, CAL. COUNTS, Feb. 2008, at 1, 2 (counting noncitizen prisoners). In the federal system, prosecutors filed 57,822 criminal cases in 2020, and noncitizens made up approximately 17 percent of the federal prison population. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S ANNUAL STATISTICAL REPORT 4 (2020) (counting caseloads); *Inmate Citizenship*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp (counting noncitizen prisoners) (last visited Aug. 1, 2021). These figures suggest that huge numbers of noncitizens are subjected to state and federal criminal laws each year.

¹⁰⁵ *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local [W]e can think of no better example of the police power than the suppression of violent crime”); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1993); see also *United States v. Lamont*, 330 F.3d 1249, 1252 (9th Cir. 2003) (referring to crime as “truly local” and noting that the “Supreme Court has recently spoken with unusual force regarding the need to reserve to the states the exercise of the police power in traditional criminal cases”); cf. *Bond v. United States*, 572 U.S. 844, 858 (2014) (“Perhaps the clearest example of traditional state activity is the punishment of local criminal activity.”).

¹⁰⁶ On abstention, see, e.g., *Younger v. Harris*, 401 U.S. 37, 43–44 (1971) (announcing the doctrine); *In re Gruntz*, 202 F.3d 1074, 1084, 1087 (9th Cir. 2000) (in a bankruptcy proceeding, citing *Younger* for the “fundamental policy against federal interference with state criminal prosecutions” and stating “that [t]he right to formulate and enforce penal sanctions is an important aspect of [state] sovereignty”). On habeas, see *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (asserting that “[r]examination of state convictions on federal habeas ‘frustrate[s] . . . the States’ sovereign power to punish offenders” (quoting *Murray v. Carrier*, 477 U.S. 478, 487 (1986))); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (identifying the Great Writ’s costs “on our federal system,” including incursion on states’ “primary authority for defining and enforcing the criminal law”).

¹⁰⁷ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 999–1000 (1991) (Kennedy, J., concurring) (“[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are . . . inevitable, often beneficial [D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes.”) (citing *McCleskey*, 499 U.S. at 467); *Cocio v. Bramlett*, 872 F.2d 889, 889, 891 (9th Cir. 1989) (upholding as consistent with the Eighth Amendment a life sentence without parole for a drunk driving accident that resulted in one death, asserting “the right of a state under its police power to determine the prison sentence that should be imposed within its borders”).

¹⁰⁸ See, e.g., *Medina v. California*, 505 U.S. 437, 445–46, 452 (1992) (rejecting a due process challenge to a California law that placed the burden to prove incompetence on the defendant on the ground that “the criminal process is grounded in centuries of common-law tradition”).

¹⁰⁹ *Knapp v. Schweitzer*, 357 U.S. 371, 376, 380 (1958).

There is enormous nuance in these lines of doctrine. Each forms its own field of study. But grouping them together demonstrates just how much work the localness of criminal law is doing in constitutional jurisprudence. The idea that criminal law is local—naturally, fundamentally, traditionally, essentially—runs throughout constitutional thought. This idea has been cited to support, among other things, a state-centric conception of American federalism, a restrictive view of criminal defendants’ rights, and limits on the Article III docket (which in turn maintain the prestige of federal courts).¹¹⁰ The localness of criminal law is, in other words, part of the foundation on which American constitutionalism is built.

When making assertions about the nature of criminal law, courts are not especially clear about what it means for crime to be “inherently” local. (Usually, the claim seems to mean either that disuniform governance is desirable or that the federal government should let states manage a particular issue.) But as the previous section explained, the idea that crime is local refers to an eighteenth-century conception of criminal jurisdiction in which the power to define crimes and enforce criminal laws was limited to a particular territory.¹¹¹ At the founding, “crimes [were] considered ‘local’ in nature, *i.e.*, local to the territory of the enacting sovereign and local to the territory of the enforcing court.”¹¹² Modern references to the “essential” and “traditional” localness of crime call forth this early American understanding of criminal jurisdiction. Thus, when courts say crime is local, they are in an important sense saying that criminal law is territorial.

This is yet another way in which territorialism lurks beneath American law. The constitutional cases described above rarely include discussions of the proper scope of criminal jurisdiction. These are cases about the Commerce Clause, due process, and debt collection.¹¹³ But they rely on rhetoric about the territoriality of criminal law, and indeed gain some of their force from the looseness of that rhetoric. As we will see in Part II, the claim that criminal law is “quintessentially local” becomes less persuasive the more one examines it. But as a truism, this claim functions powerfully to support a slew of different constitutional doctrines. The territoriality principle is prevalent and potent in the background of constitutional law, as an unquestioned “maxim of American jurisprudence.”¹¹⁴ Its presence in so many corners of constitutional doctrine helps to explain why it seems so strange to think that New York could criminalize gambling in Nevada or authorize Nevada to prosecute New Yorkers who have fled the state.

E. Territory as a Proxy

It is worth pausing at this point to reflect on the purpose of all this territorialism. The preceding sections have identified the territoriality principle in an array of places, from the basic definition of crime in substantive criminal law¹¹⁵ to abstention doctrine.¹¹⁶ In each of these examples, the concept of territory is employed for a reason—and it is not, as Professor Douglas Laycock

¹¹⁰ See *supra* notes 105–109.

¹¹¹ Kershen I, *supra* note 54, at 811 (citing J. MILLER, CRIMINAL LAW §§ 178-82 (1934)).

¹¹² *Id.*

¹¹³ See *supra* notes 105–109.

¹¹⁴ MODEL PENAL CODE § 1.03.

¹¹⁵ See *supra* Part I.A.

¹¹⁶ See *supra* Part I.D.

colorfully put it, because states just care a lot about dirt.¹¹⁷ Rather, territory is proxy for three distinct ideas about American governance.

First, the territoriality principle is supposed to *protect criminal defendants*. We saw this theory of territoriality at work in the Model Penal Code, which explained that territorial limits on criminal prosecution “ensure . . . fairness to the defendant.”¹¹⁸ The defendant-protective understanding of territoriality also featured in the constitutional debates about venue and vicinage.¹¹⁹ There, the claim was that territorialism would benefit defendants by keeping trials close to home.¹²⁰ The basic belief animating this version of territorialism is that the authority to enforce criminal law is harsh, and borders can curb some of that harshness. Territory limits state power, which helps those subject to coercive state force.

Second, the territoriality principle is supposed to *protect sovereignty*. By marking out the place where a government can enact and enforce criminal laws, territorial borders are thought to preserve a right to self-determination and non-encroachment, which in turn ensures comity between (allegedly distinct and independent) states. We see this version of territorialism at work in the interstate extradition process¹²¹ and in the constitutional cases that rely on claims about criminal law’s localness to limit federal power over states.¹²² In these examples, keeping criminal law within territorial borders is a way to show that states are real and deserve respect. The basic belief animating this conception of territorialism is that the power to enforce criminal law is what makes a state a state.

Third, the territoriality principle is supposed to *ensure that criminal law is democratic*. In theory, the reason it is problematic for Texas courts to apply Florida criminal law, or for Massachusetts police to arrest a Vermonter in Vermont, is that criminal law is authorized by a democratic process in a certain state. Accordingly, the theory goes, it is undemocratic to apply the criminal laws of that state to people who had no say in their creation. This is the understanding of territoriality that animates the penal law taboo¹²³ and the Model Penal Code’s claim that in criminal law “jurisdiction and choice of law . . . are merged.”¹²⁴ The basic belief here is that the territoriality principle keeps criminal law contained to the right population, which in turn ensures that criminal law is legitimate.

¹¹⁷ Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 317 (1992) (“An exasperated interest-analyst once asked if I thought states enact laws for the benefit of their dirt.”).

¹¹⁸ MODEL PENAL CODE § 1.03 (Explanatory Note).

¹¹⁹ See *supra* Part I.B.

¹²⁰ *Id.*

¹²¹ See *id.* (discussing the Extradition Clause); Part I.C. (discussing the interstate extradition process).

¹²² See *supra* Part I.C. (discussing Commerce Clause, abstention, and habeas cases that rely on the “inherent localness” of criminal law to limit congressional power over states and federal judicial power over state criminal courts).

¹²³ See *infra* Part I.A. (introducing the prohibition against enforcement of another state’s penal laws). This “incontrovertible maxim” comes from Chief Justice Marshall’s statement about the law of nations in *The Antelope*, the first case in which the Supreme Court considered (and upheld) the international slave trade. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (“[I]t is almost superfluous to say in this Court [that] . . . the Courts of no country execute the penal laws of another.”); see also *Huntington v. Attrill*, 146 U.S. 657, 666 (1892) (considering “the true scope and meaning of [this] fundamental maxim of international law”). As noted above, the Model Penal Code adopts this maxim and converts it into a principle of domestic criminal law. See MODEL PENAL CODE § 1.03 (“[I]t has long been a maxim of American jurisprudence that a state will not enforce the penal laws of another state.”). The Supreme Court has followed suit. See *Nelson v. George*, 399 U.S. 224, 228–29 (1970) (citing *Huntington* for the proposition that “the Full Faith and Credit Clause does not require that sister States”—here California and North Carolina—enforce each other’s “foreign penal judgment[s]”).

¹²⁴ MODEL PENAL CODE § 1.03.

There are valid objections to all of these ideas. To name a few: there are better ways to protect defendants than limiting the place of criminal trials; state sovereignty is a “vacuous” concept that is often invoked to justify “pernicious” practices;¹²⁵ and it is not clear why the enforcement of another state’s penal laws is any more undemocratic than choice of law in the civil context. But the aim here is simply to identify these ideas.¹²⁶ The point is that territory is a proxy, not a value unto itself but a concept meant to protect other values—namely sovereignty, democracy, and fairness—that are understood as predicates for the legitimacy of criminal law.

These, then, are the stakes of the territoriality principle. In American criminal law, territorialism is supposed to be how we ensure that states have power, that their power does not become too abusive, and that there is link between “the people” who make criminal laws and the people subject to them. Spelling out these goals helps to clarify why the territoriality principle matters to criminal law. It also hints at why the erosion of territoriality is a notable development.

II. Extraterritorial Criminal Law

Part I introduced a series of examples of territorialism in American criminal law. The purpose of that overview was to demonstrate that territoriality is pervasive and connected to deep-rooted beliefs about what makes criminal law legitimate. After reading Part I, the territoriality principle should seem central to domestic criminal law, perhaps even required by the Constitution.

And yet, over the past century, criminal law has been divorced from territory. This Part explores the deterritorialization of American criminal law. It proceeds chronologically through the criminal legal process—from criminalization to policing, prosecution, and punishment—showing how new laws and enforcement practices have undermined the territoriality principle at every juncture. Ultimately, this Part portrays a very different version of criminal law than we saw in Part I. The criminal legal system outlined above was defined by territorial boundaries, which were supposed to instantiate and protect core values. The one below is flexible, negotiable, and remarkably unconcerned about borders.

A. Criminalization

Criminal law begins when an authoritative legal body, typically a legislature,¹²⁷ decides that some conduct is criminal. At this stage of the criminal legal process, the critical jurisdictional question is how far a criminal law reaches. Theorists call this the question of criminal law’s “geographical ambit.”¹²⁸ (So to review: venue is where a criminal trial happens, vicinage is where the jury comes from, and ambit is where the substantive criminal law applies.) As Part I noted, the traditional view is that criminal statutes reach offenses within some defined territory, say, New Jersey or Pennsylvania.¹²⁹ But legislatures and courts have expanded criminal law beyond these boundaries in several ways.

First, they have redefined crimes to stretch across multiple places. Take the continuing offense doctrine, under which crimes such as fraud and possession of contraband continue to

¹²⁵ HERZOG, *supra* note 60, at x–xii.

¹²⁶ Part III, *infra*, takes up the defense of territoriality.

¹²⁷ See KADISH ET AL., *supra* note 33, at 162 (“Nearly all American jurisdictions . . . have now abolished [by statute] the common-law doctrine that courts can create new crimes,” though “[t]he doctrine still survives in a few states” and the Supreme Court “has never held it unconstitutional for state judges to create new common-law crimes.”).

¹²⁸ Farmer, *supra* note 38, at 231; see also HIRST, *supra* note 35, at 11.

¹²⁹ See *supra* notes 36–40 and accompanying text (discussing the Model Penal Code provision on “territorial applicability” and the presumption against extraterritorial application of state criminal law).

occur over time “and possibly, in a number of different places”¹³⁰ as a person moves around. Or consider inchoate offenses like attempt and conspiracy, whose definitions and relationship to the actus reus requirement are notoriously fluid.¹³¹ Because continuing offenses travel with a person, and because the precise location of an inchoate offense is difficult to pin down, these crimes have an attenuated relationship to geography. (This problem is exacerbated when co-conspirators can be charged for each other’s actions and tried wherever an accomplice’s acts took place.)¹³² These sorts of crimes make up a significant portion of the modern criminal docket.¹³³ Often, they can be prosecuted in a number of different places.¹³⁴

To be sure, continuing and inchoate crimes are still loosely territorial. A court must determine where an ongoing or inchoate crime occurred before a criminal prosecution can proceed. Asking where a conspiracy took place is a territorial question, even if the answer feels like a legal fiction. But the approach to territoriality when conceptualizing these crimes is a far cry from the nineteenth-century understanding of criminal jurisdiction described in Part I.¹³⁵ Ongoing and inchoate offenses are at best quasi-territorial—which is why, when continuing offenses were invented in the early 1900s, defense attorneys argued that they violated the Venue Clause and the Sixth Amendment.¹³⁶ That argument resurfaced in the 1970s.¹³⁷ It has never been successful, but the constitutional objection to continuing offenses illustrates just how much how these crimes stretch the territoriality principle.

Criminal law also extends beyond territory when state courts exercise jurisdiction over out-of-state conduct. Think here about Texas prosecuting someone who forged a document concerning Texas property while in Louisiana,¹³⁸ or California prosecuting a Colorado-based doctor who prescribed pills that someone eventually ingested in California.¹³⁹ In these sorts of cases, criminal prosecutions are based on the in-state *effects* of out-of-state activity. American

¹³⁰ State v. Allah, 750 S.E.2d 903, 908 (N.C. Ct. App. 2013).

¹³¹ See GEORGE P. FLETCHER, BASIC CONCEPT OF CRIMINAL LAW 191–93 (1998) (discussing the origins and modern doctrine of conspiracy); KADISH ET AL., *supra* note 33, at 651–56 (discussing the relationship between the actus reus requirement and attempt liability).

¹³² KADISH ET AL., *supra* note 33, at 745, 774 (describing “continuing controversy over *Pinkerton*”); see also U.S. v. Cabrales, 524 U.S. 1, 8 (1998) (analyzing *Hyde v. United States*, 225 U.S. 347 (1912), in which “although none of the defendants had entered the District [of Columbia] as part of the conspiracy, venue was nevertheless appropriate . . . based on overt acts of a co-conspirator there”). Note that the discussion of ambit is bleeding into venue here. See *infra* Part II.C. (addressing venue). See generally Farmer, *supra* note 38, at 231–32 (noting that the distinction between ambit and venue is “artificial and technical” but nonetheless useful when exploring the geographic scope of criminal law).

¹³³ State-level data collection and reporting vary, but for a rough sense of prevalence: in 2020, a continuing or inchoate offense was the top charge in 15% of New York criminal arraignments, and 26.5% of New York state prisoners had a continuing or inchoate offense as their top criminal charge. See *OCT-STAT Act Report*, N.Y. OFF. CT. ADMIN., <https://ww2.nycourts.gov/oca-stat-act-31371> (last visited June 15, 2021) (providing arraignment data); *Inmates Under Custody: Beginning 2008*, OPEN N.Y., <https://data.ny.gov/w/55zc-sp6m/caer-yrvt?cur=65n9o7AxVKY&from=rsP3XmFxxvCz> (last visited June 15, 2021) (providing data on New York’s prison population). Because these data list only the top charge in an arraignment or conviction, they likely undercount continuing and inchoate offenses.

¹³⁴ See *infra* Part II.C.

¹³⁵ See *supra* Part I.B.

¹³⁶ Kershen II, *supra* note 54, at 39 (citing cases challenging the Elkins Act of 1903, in which “Congress introduced the concept of a continuing offense”).

¹³⁷ *Id.* at 159 (arguing in 1977 that “the idea of a continuing offense must be declared unconstitutional”).

¹³⁸ Hanks v. State, 13 Tex. App. 289, 290–91 (1882).

¹³⁹ Hageseth v. Superior Court, 59 Cal. Rptr. 3d 385, 400–01 (Ct. App. 2007).

courts first began to recognize this species of criminal jurisdiction in the 1860s,¹⁴⁰ and the Supreme Court upheld effects-based jurisdiction in 1911.¹⁴¹ In embracing the doctrine, Justice Holmes explained that a “civilized world” required a relaxed approach to the territoriality principle, so that even a criminal who had “never had set foot in the state” could be punished if his conduct caused in-state harm.¹⁴² To put this precedent into some historical context: at the turn of the twentieth century, as the federal government began to take shape and new forms of transportation enabled mass mobility,¹⁴³ courts grew bolder about their power over offenses committed out-of-state.

The Constitution was no barrier to this development. As Part I explained, the Due Process Clause is supposed to prevent states from “overreaching” when they exercise criminal jurisdiction over extraterritorial activity.¹⁴⁴ But one can search in vain for a meaningful due process limit on criminal prosecution of out-of-state conduct. Even the New York court that denounced jurisdictional “overreaching” was eventually overturned.¹⁴⁵ In practice, any effect inside a state—harm to a state resident, a piece of state property, and so on—can ground a state criminal prosecution.¹⁴⁶ Again, this approach to criminal law remains territorial, at least in some soft sense. In “effects” cases, courts still conjure up some connection to state soil in order to proceed. But this is a much laxer form of territorialism than the nineteenth-century theory of criminal jurisdiction.

In some cases, moreover, courts have abandoned the territoriality principle altogether. The most significant example in this category of cases is *Skiriotes v. Florida*, the 1941 precedent mentioned in the Introduction, in which the Supreme Court upheld the conviction of a Florida-based deep-sea diver who harvested sponges in the Gulf of Mexico.¹⁴⁷ The Court justified Skiriotes’s state conviction on the ground that Florida could “govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest,” in that case Florida’s “interest in the proper maintenance of sponge fishery.”¹⁴⁸ In *Skiriotes*, the Supreme Court held that Florida could predicate its criminal laws on state *citizenship* rather than state territory.

¹⁴⁰ *Simpson v. State*, 17 S.E. 984, 985–86 (Ga. 1893) (finding Georgia jurisdiction over a defendant who fired a fatal shot from across the border in South Carolina); *Commonwealth v. Macloon*, 101 Mass. 1, 6 (1869) (observing “[t]he general principle, that a man who does a criminal act in one county or state may be held liable for its continuous operation in another”); *Commonwealth v. Smith*, 93 Mass. (11 Allen) 243, 259 (1865) (establishing Massachusetts criminal jurisdiction over perjury committed out of state). The Supreme Court then cited these state cases in *Strassheim v. Daily*, 221 U.S. 280, 281, 285 (1911).

¹⁴¹ *Strassheim*, 221 U.S. at 281, 285.

¹⁴² *Id.* at 284–85 (“If a jury should believe the evidence . . . the usage of the civilized world would warrant Michigan in punishing him, although he had never set foot in the state until after the fraud was complete.”).

¹⁴³ See generally SARAH SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* (2019).

¹⁴⁴ See *supra* Part I.B. (citing *People v. Puig*, 378 N.Y.S. 2d 925, 934 (Sup. Ct. 1976), in which a New York court observed that criminal jurisdiction under the relevant statute was limited to “out-of-state offenses which by their nature produce palpably harmful consequences which are of necessary local and peculiarly injurious to the rights of the state or its citizens,” not out-of-state “offenses pertaining to the general community welfare.”).

¹⁴⁵ *People v. Kassebaum*, 696 N.Y.S.2d 23, 24 (App. Div. 1999), *aff’d* 95 N.Y.2d 611 (2001) (rejecting the jurisdictional limitation in *Puig*).

¹⁴⁶ For a few of the many cases grounding criminal jurisdiction on the in-state effects of extraterritorial activity, see notes 138–142. For more, see, e.g., *In re Vasquez*, 705 N.E.2d 606, 610–12 (Mass. 1999); *State v. Kane*, 625 A.2d 1361, 1363 (R.I. 1993); *Roberts v. State*, 619 S.W.2d 161, 164 (Tex. Crim. App. 1981); *State v. Doyen*, 676 A.2d 345, 349 (Vt. 1996).

¹⁴⁷ 313 U.S. 69, 79 (1941).

¹⁴⁸ *Id.* at 76–77.

This is a remarkable holding. The Supreme Court has never clarified the outer boundaries of *Skiriotos*. Because the defendant was in international waters rather than another state, it is not clear what would happen if Florida criminalized its residents' behavior in, say, Georgia or Alabama.¹⁴⁹ While scholars have opined that such a statute might implicate “multiple complicated doctrines”—including due process, the Sixth Amendment, the Dormant Commerce Clause, and the right to travel¹⁵⁰—*Skiriotos* made clear that criminal law can attach to citizenship rather than territory. If there is a limit on the ambit of criminal law, it will have to come from as-yet-unannounced constitutional rules, not a requirement that criminal law must be territorial.

Skiriotos is the most prominent example of deterritorialized domestic criminal law. But the basic proposition in the case is that state criminal law can proceed without a clear territorial hook. This precept guides all sorts of more run-of-the-mill cases. Sometimes, for example, courts ground criminal jurisdiction on a state's general interests in some industry or value rather than on the concrete effects of a crime. In 2017, Florida invoked its interest in the cruise ship industry to try an attempted sexual assault between two noncitizens at sea.¹⁵¹ Alaska succeeded with a similar prosecution in 2005.¹⁵² These sorts of cases extend the theory of effects-based criminal jurisdiction to include abstract harms to a state's economic and political order. At that point, territoriality has more or less disappeared.

There are technical distinctions between the various examples in this section. Conceptually, there is a difference between a legislature's power to deem conduct criminal (legislative jurisdiction) and a court's power to adjudicate criminal cases (judicial jurisdiction). The former power is what the term “criminalization” calls to mind. By contrast, the exercise of subject-matter jurisdiction is usually understood as an assertion of judicial power rather than an instance of criminalization. But courts treat the two powers similarly,¹⁵³ and both extend the reach of criminal law. When legislatures define crimes to cover a broad range of conduct and courts exert jurisdiction over out-of-state activities, both acts expand state criminal law beyond its traditional boundaries. The result is a corpus of criminal law that is detached from territorial borders—not wholly, but much more than one might expect.

¹⁴⁹ Conflicts scholars considered these questions in the 1990s after the Supreme Court granted certiorari in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The prospect that abortion “would be remitted entirely to the political process” prompted academics to examine whether states could prohibit their residents from traveling to other states to obtain abortions. Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 907 (1993); see also Lea Brilmayer, *Interstate Preemption: The Right to Travel, The Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 880 (1993). More recently, scholars have explored a similar question with respect to state marijuana laws. See, e.g., Mark D. Rosen, *Marijuana, Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1015 (2017).

¹⁵⁰ Rosen, *supra* note 149, at 1015 (listing these and other constitutional doctrines implicated by extraterritorial state regulation).

¹⁵¹ *Paul v. State*, 233 So. 3d 1181, 1183 (Fla. Dist. Ct. App. 2017).

¹⁵² *State v. Jack*, 125 P.3d 311, 322 (Alaska 2005) (invoking Alaska's interest in safe ferries to justify criminal prosecution of a sexual assault on an offshore ferry).

¹⁵³ See, e.g., *Adventure Comms., Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 435–36 (4th Cir. 1999) (noting that although legislative and judicial jurisdiction are distinct, “the concepts are closely related” in that both are governed “by the due process clause” and the standards for evaluating each of kind jurisdiction “substantial[ly] overlap”).

B. Policing

The deterritorialization of American criminal law is even more pronounced in law enforcement. As Part I noted, police are typically organized into territorial units. Police officers wear badges engraved with city insignia¹⁵⁴ and swear oaths to state constitutions.¹⁵⁵ Yet in practice, a constellation of agreements and doctrines mean policing is only loosely tied to boundary lines.

Sometimes the deterritorialization of policing is formal, as when police departments sign agreements to provide “mutual aid.”¹⁵⁶ Many states permit local law enforcement agencies to enter partnerships under which they can police each other’s territory.¹⁵⁷ These mutual aid agreements, which are essentially private contracts between police departments, create standing commitments to share resources and jointly enforce criminal laws.¹⁵⁸ Police departments also enter “memoranda of understanding” (MOUs) and more informal agreements to pool their powers.¹⁵⁹ These contracts expand the footprint of local police departments—or as a 1988 white paper put it, mutual aid agreements “knit jurisdictions together.”¹⁶⁰

The paradigm mutual aid agreement merges the staff and resources of two small, neighboring police departments within a single state.¹⁶¹ But mutual aid compacts can extend “local” policing much further. In some states, municipal police can contract to provide services outside the state. In Nebraska, for example, “any city or village” can authorize its police to assist another state’s police force.¹⁶² Local police departments can also join multijurisdictional task forces that span state boundaries.¹⁶³ These task forces are designed to overcome territorial

¹⁵⁴ Ray Rivera, *The Officer is Real, The Badge May be an Imposter*, N.Y. TIMES, Nov. 30, 2009, <https://www.nytimes.com/2009/12/01/nyregion/01badge.html>.

¹⁵⁵ N.Y. CIV. SERV. LAW § 62; *see also* Personnel Service Bulletin from William J. Diamond, Comm’r, New York City Dep’t of Admin. Services (Mar. 21, 1997), https://www1.nyc.gov/assets/dcas/downloads/pdf/reports/100_6.pdf.

¹⁵⁶ *See, e.g.*, NORTHAMPTON POLICE DEP’T, ADMIN. & OPERATIONS MANUAL, POLICY AOM A-107 (1998) (on file with author). I obtained this agreement and many other police policy documents through a series of record requests under state open records laws.

¹⁵⁷ *See, e.g.*, FLA. STAT. ANN. § 23.1225(1)(a); MASS. GEN. LAWS ANN. ch. 40 §4J; N.H. REV. STAT. ANN. § 48:11-a; W. VA. CODE ANN. § 15.-10-4(a). *See generally* JOHN M. BAINES, ROBERT HEGGESTAD, DALE A. KELLEY & CHARLES P. WHITE, MUTUAL AID PLANNING: A MANUAL DESIGNED TO ASSIST IN THE DEVELOPMENT OF LAW ENFORCEMENT MUTUAL AID SYSTEMS 9 (1973) (providing a national overview of mutual aid statutes).

¹⁵⁸ *Ball v. City of Coral Gables*, 301 F. App’x 865, 866 (11th Cir. 2008); *see also, e.g.*, *Commonwealth v. Pike*, 41 N.E.3d 332, 332 (2015) (Mass. App. Ct. 2015) (reading a mutual aid agreement to grant a police officer “the authority to effectuate an extraterritorial stop”).

¹⁵⁹ *See, e.g.*, Memorandum of Agreement Between the Town of Glastonbury and the Town of East Hampton (May 6, 2016) (on file with author) [hereinafter “East Hampton MOU”]. On the practice of “pooling” of statutory powers through interagency cooperation, *see* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015).

¹⁶⁰ ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN ORGANIZATION: THE ST. LOUIS CASE (1988).

¹⁶¹ *See, e.g.*, East Hampton MOU, *supra* note 159; Non-Emergency Interagency Agreement Between Darien, Greenwich, New Canaan & Stamford Police Departments (Nov. 30, 2012) (on file with author).

¹⁶² *See, e.g.*, NEB. REV. STAT. § 18-1706 (“Any city or village may by resolution authorize . . . police departments or any portion thereof to provide . . . police[] and emergency service outside of the limits of the municipality either within or without the state.”).

¹⁶³ *See, e.g.*, *Four Arrests Linked to 24 Robberies of Elderly*, ABC NEWS (Mar. 21, 2008), <https://abc7chicago.com/archive/6035045/> (describing a task force between Chicago and Indiana police) [hereinafter *Four Arrests*]; *see also* DAVID W. HAYESLIP & MALCOLM L. RUSSELL-EINHORN, EVALUATION OF MULTI-JURISDICTIONAL TASK FORCES PROJECT: PHASE I FINAL REPORT FOR THE NATIONAL INSTITUTE OF JUSTICE 10 (2002) (describing a federal grant program created in 1988 to encourage multijurisdictional task forces “to target gangs, illegal firearms, specific crimes and other cross-jurisdictional crime-related problems”).

jurisdictional limits.¹⁶⁴ Thus, “city and suburban cops in Illinois and Indiana” can “work[] a case together.”¹⁶⁵

At a high level of generality, cooperative policing is nothing new. American police departments have always shared equipment and “backup forces,” particularly during emergencies.¹⁶⁶ But these sharing practices were interlocal and “strictly informal” until the 1930s, when increased mobility prompted a movement to expand and institutionalize interjurisdictional policing.¹⁶⁷ In 1934, citing concerns about “the interstate nature of crime and the growing complexity of law enforcement,” Congress passed the Crime Prevention Compact Act (CPCA).¹⁶⁸ That statute authorized states to enter compacts “for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies.”¹⁶⁹ The CPCA explicitly permitted states to establish “such agencies, joint or otherwise, as they may deem desirable for making [cooperative policing] effective.”¹⁷⁰

A flurry of state laws followed. In the wake of the CPCA, states passed statutes enabling cooperative policing and establishing interjurisdictional criminal task forces.¹⁷¹ States also entered regional compacts that provided for joint policing and created centralized “criminal intelligence bureau[s]” to gather and disseminate information about crime.¹⁷² This cooperative model flourished during World War II as local law enforcement agencies coordinated their training programs and emergency plans for “civil defense.”¹⁷³ It then expanded in the 1960s, when police turned to mutual aid agreements to manage civil unrest, Vietnam protests, and “rock festivals.”¹⁷⁴ Between 1960 and 1972, twenty-eight states passed laws enabling interjurisdictional policing.¹⁷⁵ By the 1980s, federal commissions were studying how best to coordinate local police forces¹⁷⁶ and the federal government was awarding grants to encourage

¹⁶⁴ *Four Arrests*, supra note 163 (explaining that a Chicago-area task force developed after police “noticed that our gangbangers and other criminals utilized our borders to commit crimes . . . in Chicago and flee to neighboring suburbs and into Indiana”).

¹⁶⁵ *Id.*

¹⁶⁶ BAINES ET AL., supra note 157, at 1 (tracing “the origins and development of law enforcement mutual aid in the United States”).

¹⁶⁷ *Id.*

¹⁶⁸ Crime Prevention Compact Act, ch. 406, 48 Stat. 909 (1934).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ In order of passage, see, e.g., LA. STAT. ANN. § 40:1391 (1936); N.Y. GEN. MUN. §§ 209-f, 209-g (1946); ALASKA STAT. § 18.65.100 (1953); OHIO REV. CODE ANN. § 737.04 (1953); 42 R.I. GEN. LAWS §§ 42-29-25, 42-16-6 (1956); KAN. STAT. ANN. § 12-904 (1957).

¹⁷² See, e.g., CONN. GEN. STAT. § 29-162 (forming the “New England State Police Compact”); LA. STAT. ANN. § 40:1312.1 (forming the Southern State Police Compact).

¹⁷³ BAINES ET AL., supra note 157, at 2 (“During World War III the Mutual Aid concept expanded . . . [C]ontingency plans were developed and training commenced . . . to enable law enforcement agencies to better cope with possible enemy attack or invasion.”).

¹⁷⁴ *Id.*

¹⁷⁵ In chronological order: VA. CODE ANN. § 15.1-131; ILL. COMP. STAT. 5/1-4-8; KY. REV. STAT. ANN. § 65-255; COLO. REV. STAT. § 29-5-103; TEXAS CODE CRIM. PROC. ANN. art. 14.03; CONN. GEN. STAT. § 29-162.; MASS. GEN. LAWS ch. 147, App., § 1-1; ME. STAT. tit. 25, § 1665; 42 R.I. GEN. LAWS § 42-37-1; 20 VT. STAT. ANN. tit. 20, § 1951; ALA. CODE § 1059(14e-j); CONN. GEN. STAT. § 7-277(a); MICH. COMP. LAWS § 123.811; N.H. REV. STAT. ANN. § 106-D:1; N.C. GEN. STAT. § 160A-288; WIS. STAT. § 66.0313; CAL. PENAL CODE § 830.1; S.C. CODE ANN. § 47-232.1; D.C. CODE § 2-209.01; FLA. STAT. § 23.121(1)(g); MD. CODE ANN., art. 27, § 602B; 11 OKLA. STAT. tit. 11, § 34-103; W. VA. CODE § 61-6-4; DEL. CODE tit. 11, § 1941; ARIZ. REV. STAT. ANN. § 26.309; N.J. STAT. ANN. § 40A:14-156; N.M. STAT. ANN. § 29-8-3.

¹⁷⁶ See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, supra note 160.

multi-jurisdictional task forces.¹⁷⁷ Federal funds for these local partnerships ballooned after September 11, 2001 as police associations argued that only an “interjurisdictional enforcement approach” could “address the threats of international and domestic terrorism.”¹⁷⁸

The rise of cooperative policing deserves its own separate study.¹⁷⁹ The birth and expansion of mutual aid agreements is a fascinating case of sub-federal coordination and bureaucratic state-building. This model of policing provides a counternarrative to the dominant account of twentieth-century criminal law, which emphasizes the proliferation of federal criminal laws and the emergence of a federal enforcement bureaucracy that (the story goes) displaced local police.¹⁸⁰ Mutual aid agreements complicate this federalization story and merit their own extended analysis. But even the quick version illustrates that modern policing is significantly less tied to jurisdictional boundaries than the phrase “local police” suggests. Over the course of the twentieth century, contracts to provide emergency aid became broader agreements to combine both the resources and the jurisdictional authority of local police forces. Today, mutual aid agreements are routine.

Sometimes, moreover, agreements are not even necessary. Although compacts and task forces are particularly clear examples of interjurisdictional policing, local law enforcement is deterritorialized in other ways as well. Some states, for example, empower nominally local police to act anywhere in the state.¹⁸¹ In California, a peace officer’s authority extends to any offense he witnesses;¹⁸² in Connecticut, “active members or any police force in a town, city, or borough” can execute warrants statewide.¹⁸³ In Texas and Tennessee, police officers from other states can enter state territory to make arrests for any felony, including those committed outside the state.¹⁸⁴ Tennessee also has a “special enforcement unit” focused on Medicaid fraud, whose police routinely arrest people “in Alabama, Mississippi, and Georgia.”¹⁸⁵ These practices blur territorial boundaries.

Most states also have “citizen’s arrest” statutes that allow private citizens to apprehend alleged criminals.¹⁸⁶ Courts have relied on these statutes, which are controversial relics of the Reconstruction era,¹⁸⁷ to uphold arrests made by police officers outside of their territorial

¹⁷⁷ HAYESLIP & RUSSELL-EINHORN, *supra* note 163, at 4.

¹⁷⁸ U.S. DEPT OF JUSTICE, MUTUAL AID: MULTIJURISDICTIONAL PARTNERSHIPS FOR MEETING REGIONAL THREATS, at viii-1 (2005).

¹⁷⁹ Elizabeth Hinton’s work on the Law Enforcement Assistance Administration (LEAA) is in a sense one such study, focused on policing in the latter half of the twentieth century. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2-3 (2016).

¹⁸⁰ See Daniel Richman & Sarah Seo, *Driving Toward Autonomy? The FBI in the Federal System, 1908-1960*, at 3 (Colum. Pub. Law Res., Paper No. 14-632, at 3 (Oct. 2019) (identifying and critiquing this federalization narrative).

¹⁸¹ See, e.g., CAL. PENAL CODE § 830.1 (outlining when the authority of municipal police officers “extends to any place in the state”); CONN. GEN. STAT. § 7-281 (authorizing local police to execute warrants “in any part of the state”); see also *Armendariz v. State*, 123 S.W.3d 401, 404–05 (Tex. Crim. App. 2003) (construing Texas’s criminal code, which authorizes local “peace officers” to make arrests when they observe illegal conduct, to permit an arrest outside “the Odessa police officers’ geographic jurisdiction”).

¹⁸² CAL. PENAL CODE § 830.1.

¹⁸³ CONN. GEN. STAT. ANN. § 7-281.

¹⁸⁴ TEX. CODE CRIM. PRO. ANN. art. 14.051.

¹⁸⁵ Amy Yurkanin, *The TennCare Trap*, AL.COM (Apr. 28, 2021), <https://www.al.com/news/2021/04/the-tennessee-trap-how-one-states-war-on-medicaid-fraud-ensnares-working-moms-in-alabama.html>.

¹⁸⁶ See Citizen’s Arrest Laws by State, *Solutions Institute*, July 1, 2021, <https://solutions-institute.org/tools/citizens-arrest-laws-by-state/> (providing links to every state citizen’s arrest statute).

¹⁸⁷ See *Kemp Hails Passage of Legislation to Repeal Citizen’s Arrest Law in Georgia*, WRDW (Apr. 1, 2021, 11:45 a.m.), <https://www.wrdw.com/2021/04/01/kemp-hails-passage-of-legislation-to-repeal-citizens-arrest-law-in-georgia>

jurisdiction.¹⁸⁸ Some states even relax “the requirements for a citizen’s arrest” when the citizen in question is a police officer—a doctrine that turns police into sort of roving super-citizens.¹⁸⁹ Courts use “hot pursuit” doctrines to a similar effect.¹⁹⁰ These doctrines create exceptions to “the territorial limits of [police] jurisdiction” and expand the scope of criminal law enforcement.¹⁹¹ In adopting a wide interpretation of the state’s hot pursuit law in 1991, the Pennsylvania Supreme Court explained that “constructing impenetrable jurisdictional walls benefit[s] only the criminals hidden in their shadows.”¹⁹²

One could go on and on with gripping stories of extraterritorial policing—of late-night arrests outside city limits¹⁹³ and NYPD raids in Newark.¹⁹⁴ Together, these examples demonstrate that the borders of police jurisdiction are negotiable. Mutual aid agreements, task forces, compacts, citizen’s arrest statutes, hot pursuit doctrines: all of these legal devices detach policing from geography. Of course, territorial jurisdiction is not meaningless; the technical limits of police authority matter to police, to defendants, and to some courts. But the insignia on police uniforms belie a nuanced, interjurisdictional reality in which “local” and “state” police have more than local and state power. When it comes to policing, the territoriality principle is often honored in the breach.

C. Prosecution

Perhaps it is unsurprising that police exceed territorial limits. Policing is, after all, an infamously discretionary activity.¹⁹⁵ But one would expect prosecution to be different. Given the Constitution’s focus on criminal trials—the presumption of innocence, the Sixth Amendment, all the debate over venue and vicinage at the Founding¹⁹⁶—it would seem like prosecution must have geographic boundaries.¹⁹⁷ Even at this phase of the criminal legal process, though, territorialism has receded.

(describing the history and controversy of Georgia’s citizen’s arrest statute, which was amended after the murder of Ahmaud Arbery).

¹⁸⁸ See, e.g., *State ex rel. State v. Gustke*, 516 S.E.2d 283, 290–91 (W. Va. 1999) (upholding such an arrest and citing cases from eighteen states in which courts had done the same); *People v. Lahr*, 566 N.E.2d 12, 13 (Ill. App. Ct. 1991) (“An extensive line of cases in Illinois has upheld the validity of extraterritorial arrests made by police officers who, lacking official authority, were found to have been authorized to make citizen’s arrests.”).

¹⁸⁹ See, e.g., *Commonwealth v. Claiborne*, 667 N.E.2d 873, 876 (Mass. 1996).

¹⁹⁰ See, e.g., *Commonwealth v. Peters*, 965 A.2d 222, 225 (Pa. 2009) (“[W]e note that the [hot pursuit statute] is to be construed liberally to give effect to its purposes.”)

¹⁹¹ *Peters*, 600 Pa at 270 (citing 42 Pa C.S. § 8953(a)).

¹⁹² *Commonwealth v. Merchant*, 595 A.2d 1135, 1139 (Pa. 1991). This dicta has become something of a maxim in hot pursuit cases. See *Peters*, 965 A.2d at 225 (citing a line of cases quoting this phrase).

¹⁹³ *State ex rel. State v. Gustke*, 205 516 S.E.2d 283, 286 (W. Va. 1999).

¹⁹⁴ Adam Goldman & Matt Apuzzo, *NYPD Built Secret Files on NJ, Long Island Mosques Outside*, NBC N.Y. (Feb. 22, 2012, 10:13 a.m.), <https://www.nbcnewyork.com/news/local/muslim-surveillance-nypd-newark-cory-booker-mosque/1972322>.

¹⁹⁵ See John Paul Stevens, *Our ‘Broken System’ of Criminal Justice*, N.Y. REV. BOOKS (Nov. 10, 2011), <https://www.nybooks.com/articles/2011/11/10/our-broken-system-criminal-justice> (discussing the expansion of police discretion in a review of William J. Stuntz’s *The Collapse of American Criminal Justice*).

¹⁹⁶ See *Coffin v. U.S.*, 156 U.S. 432, 402–03 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elemental, and its enforcement lies at the foundation of the administration of our criminal law.”); see *infra* Part I.B. (describing state and federal constitutional limitations on the location of criminal trials).

¹⁹⁷ See *infra* Part I.B.

Four historical developments contributed to the deterritorialization of prosecution. First, in the late nineteenth century, courts began to distinguish jurisdiction from venue.¹⁹⁸ As Part I explained, early American legislators and courts adopted the common-law understanding of criminal jurisdiction in which the power to hear a criminal case and the location of a criminal trial were coextensive because crime was “inherently local.”¹⁹⁹ That conception of criminal jurisdiction started to splinter in the 1890s as Congress began to separate federal judicial districts into smaller divisions.²⁰⁰ The subdivision of judicial districts raised the question whether federal trial courts could adjudicate criminal cases involving crimes in another division within the same district. The Supreme Court answered that question in the affirmative in a trio of cases between 1892 and 1897.²⁰¹ Those cases began to carve out a distinction between the power to conduct criminal proceedings and the proper place for a criminal trial.

That distinction deepened between 1925 and 1931, when appellate courts—first the Fifth Circuit,²⁰² then the D.C. Circuit²⁰³—held that venue was a criminal procedure right that could be waived. Once venue was a right that belonged to criminal defendants rather than a limit on judicial power or a structural requirement for the legitimacy of criminal trials, the separation of jurisdiction and venue was “complete.”²⁰⁴ Defendants could agree to move trials (or simply fail to make a timely venue objection)²⁰⁵ and so long as the court could find a hook for its jurisdiction, the criminal prosecution could proceed. Recall, moreover, that the Supreme Court expanded the bases for criminal jurisdiction to include the effects of a crime in 1911.²⁰⁶ Alongside that ruling, venue’s transformation into a criminal procedure right meant that criminal trials could be prosecuted in a wider range of places. By the middle of the twentieth century, venue was a right that defendants could forfeit or waive. Jurisdiction was a separate matter, satisfied so long as a crime caused harm or implicated an interest in the place where the court sat.²⁰⁷

Second, once courts had distinguished jurisdiction from venue, legislatures started to pass more venue laws dislocating criminal prosecution. These laws take several forms. The most common is the “specific” venue statute, which designates the place of trial for a certain type of offense. Specific venue statutes can provide for venue in a particular court or in multiple places—for example, anywhere a stolen item is taken, carried, or found.²⁰⁸ Their close cousin, the “buffer” statute, allows prosecutors to choose between neighboring counties when trying crimes that occur in multiple jurisdictions or near a county boundary line.²⁰⁹ In addition, state laws and procedural rules sometimes allow criminal prosecutions to proceed where a person is

¹⁹⁸ Kershen II, *supra* note 54, at 3–6 (providing a detailed account of this history).

¹⁹⁹ See *infra* Part I.B.

²⁰⁰ Kershen II, *supra* note 54, at 4.

²⁰¹ *Id.* (discussing *Logan v. United States*, 144 U.S. 263 (1892), *Post v. United States*, 161 U.S. 583 (1896), and *Rosencrans v. United States*, 165 U.S. 257 (1897)).

²⁰² *Silverberg v. United States*, 4 F.2d 908, 909 (5th Cir. 1925).

²⁰³ *Hagner v. United States*, 54 F.2d 446, 448 (D.C. Cir. 1931), *aff’d*, 285 U.S. 427 (1932).

²⁰⁴ Kershen II, *supra* note 54, at 9.

²⁰⁵ See, e.g., *People v. Simon*, 25 P.3d 598 (Cal. 2001) (holding that a criminal defendant had forfeited his venue challenge).

²⁰⁶ See *supra* Part II.A. (discussing *Strassheim v. Daily*, 221 U.S. 280, 281 (1911)).

²⁰⁷ See *supra* Part II.A. (describing the emergence of effects-based criminal jurisdiction in the early twentieth century).

²⁰⁸ See, e.g., 18 U.S.C. § 3238; see also *infra* note 210 (citing state law sources).

²⁰⁹ See Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 WASH. L. REV. 271, 274 (2005) (surveying these statutes and arguing that “buffer statutes should be eliminated”).

arrested or resides rather than where a crime occurred.²¹⁰ These laws are exceptional; as Part I explained, venue is usually proper in the county or district where the crime takes place.²¹¹ But special venue statutes demonstrate that, in modern criminal law, legislatures can move trials where they wish. (Courts participate here too, by treating venue defects as harmless.)²¹² All of these laws depart from the territoriality principle and permit a measure of forum shopping in criminal prosecution.²¹³

Third, American courts have relaxed the rules around extradition. Part I outlined the development of an elaborate legal apparatus to facilitate interstate extradition.²¹⁴ Initially, state governments used that apparatus to regulate and denounce each other's criminal legal systems. In 1860, for example, Ohio's Governor refused to extradite a man who helped to free a slave in Kentucky.²¹⁵ In the 1930s, New Jersey's Governor declined to extradite Robert Elliott Burns after reading his memoir, *I Am a Fugitive from a Georgia Chain Gang!*²¹⁶ In 1975, the Governor of Tennessee "ignored Oklahoma's request for country singer Faron Young, who was wanted on a morals charge."²¹⁷ Until the 1970s, state courts policed extradition too, denying requests when they felt a sister state had failed to show probable cause.²¹⁸ The Supreme Court put a stop to that practice in 1978 when it held that, whatever a Governor's discretion to deny extradition, state courts should not opine on the sufficiency of extradition requests.²¹⁹ Instead, the Court emphasized, judicial approval of extradition is supposed to be "summary and mandatory."²²⁰

In a sense, the Supreme Court's permissive approach to interstate extradition promotes territorialism. Summary extradition procedures make it easier for fugitives to be sent back to the "right" state to be tried, which enables territorial criminal law. But easy extradition also means that state borders matter *less* because crossing them does not really place a person beyond the reach of the state laws he violated. Imagine two countries: one that refuses to extradite a

²¹⁰ See, e.g., TENN. R. CRIM. P. 18(d)(2) ("An offense committed wholly outside Tennessee may be prosecuted in any Tennessee county in which the offender is found."); TEX. CODE CRIM. PROC. ANN. art. 13.01 ("Offenses committed wholly or in part outside the State . . . may be prosecuted in any county where the offender is found."); UTAH CODE ANN. § 76-1-202(g) (providing for trials in the county where a defendant resides, is apprehended, or to which he is extradited in cases where the site of the crime is unclear); ARIZ. REV. STAT. ANN. § 13-109(C) (same); OR. REV. STAT. § 131.325 (same); VA. CODE ANN. § 19.2-244(b) (same).

²¹¹ See *supra* Part I.B.

²¹² See, e.g., *People v. Houthoofd*, 790 N.W.2d 315, 330 (Mich. 2010) ("[L]ack of proper venue is subject to a harmless error analysis."); *State v. Blankenship*, 170 S.W.3d 676, 682 (Tx. Ct. App. 2005) ("[V]enue is not a constituent element of the offense. It need only be proved by a preponderance of the evidence, and the failure to prove venue does not negate the guilt of the defendant.")

²¹³ See Kalt, *supra* note 209, at 274 (denouncing buffer statutes for "reward[ing] forum shopping by prosecutors").

²¹⁴ See *infra* Part I.C.

²¹⁵ *Kentucky v. Dennison*, 65 U.S. 66, 66 (1860), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219, 224 (1987) (overruling *Dennison's* holding that the federal court could not compel compliance with the Extradition Clause).

²¹⁶ Kenyon Bunch & Richard J. Hardy, *Continuity or Change in Interstate Extradition? Assessing Puerto Rico v. Branstad*, 21 *PUBLIUS* 51, 55 (1991).

²¹⁷ *Id.* (citing this and other "historical examples of governors refusing to grant extradition"); see also *Tenn. Gov. Refused to Extradite Young*, *LONGVIEW NEWS-J.*, Dec. 4, 1975, at 25.

²¹⁸ *Michigan v. Doran*, 439 U.S. 282, 289–90 (1978) (overruling the Michigan Supreme Court's holding that Arizona's probable cause determination was deficient); see also *Wellington v. South Dakota*, 413 F. Supp. 151, 154 (D.S.D. 1976) (denying extradition on the ground that Minnesota had failed to establish probable cause "to the satisfaction of the State court"); *Ierardi v. Gunter*, 528 F.2d 929, 932 (1st Cir. 1976) (drawing the same conclusion in a case involving rendition to Florida from Massachusetts).

²¹⁹ *Doran*, 439 U.S. at 289.

²²⁰ *Id.* at 288–89. The Supreme Court's permissive approach to extradition is particularly important because the Court has "interpreted the crimes for which a person is subject to extradition very broadly, to include every offense punishable by the law of the [requesting] state." Gross & Upham, *supra* note 83.

criminal, and one where extradition is routine. Territorial borders matter more in the first country—the one where you are safe once you touch its soil. The scope of criminal law feels more territorial there too, since the offended country’s laws cannot reach you.

In other words, denying extradition is one way to make clear that criminal law has geographic limits. By requiring summary extradition between states, the Supreme Court ensures that Arizona’s criminal laws reach Vermont, and vice versa. The Court has recognized as much; in *Michigan v. Doran*, the leading extradition case, Justice Burger explained that mandatory extradition prevents states from “balkaniz[ing] the administration of criminal justice.”²²¹ Extradition doctrine thus extends the reach of state criminal laws. And as a practical matter, summary extradition means that it is not particularly difficult to prosecute someone who flees across state lines.

Fourth, and perhaps most important, the twentieth century witnessed the rise of the plea bargain. The exponential growth of negotiated pleas is one of the most documented and lamented features of the criminal legal system.²²² Today, plea bargains account for almost all criminal convictions in the United States.²²³ Professor John Langbein famously observed that the American system of pleas “recapitulate[s] much of the doctrinal folly of the law of torture.”²²⁴ Plea bargaining also displaces the jury, which makes geographic limits on the jury’s origins a much less effective means of promoting territorialism. The “triumph”²²⁵ of plea bargaining has turned vicinage into a rather weak criminal procedure right. Ironically, given the Founders’ fixation on juries, the Constitution requires territoriality at the least important moment of the criminal process.

These four developments—the splintering of jurisdiction and venue, the proliferation of venue statutes, the relaxation of extradition proceedings, and the plea-bargaining revolution—mean that prosecution is not as territorial as one would think. In the modern criminal justice system, a court’s power to hear a case is different than where it may be heard. Legislatures can designate special places for criminal trials, and prosecutors can forum shop. Rather than reinforcing state borders, extradition is summary and routine. And plea bargains have largely undermined the relevance of the jury. The cumulative result is a criminal justice system in which even prosecution, the lodestar of constitutional criminal procedure, is less territorial than it used to be.

D. Punishment

Finally, there is punishment. The last phase of the criminal legal process is the least tied to territorial boundaries. Take imprisonment, the most well-known criminal sanction. American law does not require people to be imprisoned in the jurisdiction whose laws they violated, nor do prisoners need to be held near the site of their crime.²²⁶ To the contrary, prison officials may send federal prisoners across the country no matter where they were convicted. State prisoners can also be transferred (sometimes thousands of miles) to serve their sentence in another state’s

²²¹ *Doran*, 439 U.S. at 287.

²²² See, e.g., Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762 (2006); Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721 (2005).

²²³ Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 24 (2008) (“[T]he overwhelming majority of criminal cases—90% to 95%—are resolved with plea bargains.”).

²²⁴ John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 17 (1978).

²²⁵ George Fisher, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

²²⁶ Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1823, 1856 (2020).

prisons.²²⁷ And noncitizens convicted in American courts can be repatriated to their country of origin—so a Massachusetts or Texas prison sentence can lead to prison time in Australia or Germany.²²⁸

My previous research has explored the history of these prisoner transfer systems. As that work explains, the prison was originally conceived in the late eighteenth century as a territorial alternative to transportation punishment, the reigning noncapital sanction at the time.²²⁹ Early Americans believed that imprisonment was a local and therefore more democratic alternative to transportation, a “monarchical” sanction used by “kings and despots.”²³⁰ (One can hear echoes of how the term “local” was used in early debates about criminal jurisdiction here.)²³¹ The first American prison systems were built on this “positive republican theory of crime,” in which territorial punishment connected prisons to the polity that enacted criminal laws and promised to reintegrate prisoners into that polity upon release.²³²

This philosophy of punishment ebbed with the rise of the administrative state and the professionalization of a prison bureaucracy.²³³ As prison systems expanded in the 1940s and 1950s, state prison officials began to sign contracts to share prisoners and prison bed space.²³⁴ Those contracts turned into regional compacts, and then a national prison network in which states can send their prisoners across the country.²³⁵ The Supreme Court upheld interstate punishment in 1983 when it ruled that prisoners have no due process right to in-state confinement, even if prison transfers “involve[] long distances and an ocean crossing.”²³⁶ Thus, between 1930 and 1990, it became both normal and legal to punish prisoners far from the site of their crime.

International prisoner repatriation proceeded along a similar timeline. In the mid-1970s, after high-profile news reports and congressional hearings on the treatment of Americans imprisoned abroad, the United States entered its first bilateral treaty for international prisoner transfers, with Mexico.²³⁷ A series of other treaties followed, and by 1985 the United States was a party to agreements providing for repatriation to and from sixty-seven countries.²³⁸ That number has since grown to more than one hundred.²³⁹ Under the terms of these treaties, the United States can repatriate both federal and state prisoners to serve prison sentences in their countries of origin. The U.S. can also receive and “resentence”²⁴⁰ Americans convicted abroad,

²²⁷ *Id.*

²²⁸ Emma Kaufman, *Extraterritorial Punishment*, 20 NEW CRIM. L. REV. 66 (2017).

²²⁹ Kaufman, *supra* note 226, at 1823, 1856.

²³⁰ *Id.* at 1823.

²³¹ See *supra* Parts I.B, I.D (connecting early American debates over the “inherently local” nature of criminal law to a theory of criminal jurisdiction under which territorialism protects both sovereignty and democracy).

²³² REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT* 19 (2008).

²³³ Kaufman, *supra* note 226, at 1826–27.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Olim v. Wakinekona*, 461 U.S. 238, 247 (1983).

²³⁷ Kaufman, *supra* note 228, at 70.

²³⁸ *Id.* at 71.

²³⁹ *Id.*

²⁴⁰ American citizens repatriated to the United States are “resentenced” by the United States Parole Commission “as though they were convicted in a United States district court of a similar offense.” 18 U.S.C. § 4106(b)(1)(A). This process embarrasses the conventional story about the separation of powers in which judges impose prison sentences. Kaufman, *supra* note 228, at 74.

though in practice a treaty regime born for that purpose is used mainly to export noncitizens out of the United States.²⁴¹

Interestingly, the systems for both interstate and international prison transfers are underused.²⁴² Prisoners are outsourced less than the law would permit—a testament to durability of the territoriality norm.²⁴³ But the emergence of prisoner transfer systems represents a remarkable shift away from the belief that punishment has to be local to be lawful or democratic. Over the course of the twentieth century, courts and prison bureaucrats concluded that punishment need not be connected to the place where criminal law is made.

By now, the arc of this narrative should feel familiar. The history of American imprisonment parallels the deterritorialization of policing and prosecution, with glimmers of interjurisdictional cooperation in the early twentieth century giving way to more systematic coordination by the 1970s. In each of these contexts, increased mobility and state capacity put pressure on the territoriality principle and encouraged more creative—which is to say extraterritorial—forms of criminal law enforcement.

Once again, moreover, the Due Process Clause was no real impediment to the expansion of criminal law.²⁴⁴ The Supreme Court has never policed the location of prisons, and the Court explicitly declined to constitutionalize prison placement in the early 1980s.²⁴⁵ As a result, constitutional law imposes very few limits on where prisoners may be held. American prison officials can move prisoners all over country (in some cases all over the world) and the site of a crime is barely related to where punishment occurs. Instead, personal facts about a prisoner—his sentence length, disciplinary record, family’s location, citizenship status—determine where he will be confined.²⁴⁶ This is a legal regime that has long since given up on the idea that punishment must be local to be legitimate.

E. Criminal Law by Contract

In the end, then, every stage of criminal law has been deterritorialized. This transformation has been uneven; some parts of criminal procedure, such as jury trials, remain more territorial than others. If forced to rank the system by its commitment to borders, the right response is probably that criminalization is the most territorial phase of American criminal law, followed by prosecution, policing, and then punishment. But these are differences in degree rather than kind.

²⁴¹ *Id.* at 78–79 (describing how repatriation “transformed into a vehicle for prisoner exportation” in the mid-1990s).

²⁴² This is a descriptive claim about government actors’ uptake of legal transfer regimes, not a normative assertion that prisoners should be transferred more. *See id.* at 67 (explaining that repatriation is “remarkably rare” neither because prisoners wish to stay in the United States nor because the law prevents transfers but rather because prison bureaucrats deny transfer applications on the ground that prisoners are either “too American” or committed a crime too serious to justify punishment abroad); Kaufman, *supra* note 226, at 1842, 1861 (noting that the overall number of interstate prisoner transfers is small relative to the total American prison population and connecting this trend to political and financial incentives to keep prisoners in-state).

²⁴³ Resistance to prison transfers is a testament both to the lingering territoriality norm in American criminal law and to other political dynamics—including bureaucratic turf wars and concerns about prisoners’ proximity to family—that lead to in-state punishment. *See* Kaufman, *supra* note 226, at 1863 (exploring these trends). These political dynamics keep imprisonment loosely territorial even as American courts have given up on the territoriality principle as a necessary basis for punishment.

²⁴⁴ *See supra* notes 144–146 (discussing the absence of clear due process limits to criminal prosecution of out-of-state conduct).

²⁴⁵ *Olim v. Wakinekona*, 461 U.S. 238, 247 (1983).

²⁴⁶ *See* Kaufman, *supra* note 226 (explaining how prison officials determine prison placement); *see also* Kaufman, *supra* note 100 (describing the rise of “all-foreign” prisons, where placements depend on citizenship status).

At every point in the process of making and applying domestic criminal law, the territoriality principle has waned.

This observation should be surprising. In thinking about when American criminal law is territorial, one might expect to discover a disconnect between criminalization and criminal law enforcement—that is, a system where legislatures define crimes with territorial borders in mind and courts understand their jurisdiction in territorial terms, but police and prison officials go rogue when implementing legal rules. On this account, the deterritorialization of criminal law would be an enforcement pathology. This story would be consistent with the view that criminal law “on the books” always looks different than criminal law “in action,” particularly in a country where law enforcement is so harsh and discretionary.²⁴⁷

Alternatively, one could imagine a criminal legal system that was territorial before conviction, but extraterritorial afterward. In such a system, prosecution and policing would be tied to place; prisons would not be. On this account, territoriality would be a mechanism for providing fair and accurate criminal adjudication, and deterritorialized punishment would simply reflect the Constitution’s fixation on protecting innocence.²⁴⁸ This version of criminal law would be consistent with the view that criminal procedure exists to ensure that only the guilty are convicted.²⁴⁹ It would also accord with the basic thesis of the sociology of punishment, which is that “criminal law and punishment are distinct social and cultural practices.”²⁵⁰ For both the constitutional theorist and the sociologist of punishment, it would not be especially remarkable to discover that punishment looks different from pre-conviction criminal justice.

Given the stories we tell about criminal law, it would make sense if deterritorialization were the product of unruly officers or a general disregard for the convicted. If these molds fit, the conclusion would be that criminal law is still territorial, notwithstanding some predictable nuance. Yet neither of these two models captures the current legal system. In reality, criminal law is more deeply conflicted: it is sometimes territorial, sometimes predicated on alternative ideas like citizenship or state interests, and most territorial at the parts of the criminal process that matter the least. It strains reality to call this an essentially territorial legal regime. In fact, American criminal law is split between territorialism and a different theory of state power in which criminal law applies to a state’s members and interests wherever they go.

Recall, for instance, that after *Skiriotes* state criminal laws can follow citizens outside state territory; that the separation of venue and jurisdiction enables both prosecutors and defendants to move criminal trials; that local police forces can pool their powers across state lines; and that state prison officials can trade prisoners and rent prison beds in another state.²⁵¹ These are formal, legal instances of deterritorialized criminal law, not aberrations or pathologies so much

²⁴⁷ Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in SHARON DOLOVICH & ALEXANDRA NATAPOFF, *THE NEW CRIMINAL JUSTICE THINKING* 246, 247 (2017).

²⁴⁸ AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) (“The commonsensical point, I submit, is the essence of our Constitution’s rules about criminal procedure, and so I shall repeat it: the Constitution seeks to protect the innocent.”)

²⁴⁹ *Id.* But see Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 *YALE L.J.* 2281, 2282 (1998) (critiquing Amar’s argument for “a general reorientation of criminal procedure toward factual guilt and innocence”).

²⁵⁰ LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW* 21 (2016) (citing David Garland for this proposition); see also DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 19 (1990) (“Like architecture or diet or clothing or table manners, punishment has an instrumental purpose, but also a culture style and a historical tradition.”)

²⁵¹ See *supra* Parts II.A. (discussing *Skiriotes*, 313 U.S. 69 (1941)); II.B. (venue’s transformation into a waivable right and prosecutorial forum shopping); II.C. (interjurisdictional policing); II.D. (interstate punishment).

as evidence of a post-territorial legal regime that has been warped over time by new rules and enforcement practices. Over the course of the twentieth century, tectonic social shifts—increased mobility, the birth of a criminal enforcement bureaucracy, the rise of interstate compacts, a turn to private contracting—changed the character of criminal justice and made territorialism seem cumbersome and antiquated. These social developments have produced a criminal legal system that is home to several competing ideas about the source and outer limits of the state’s power to enact criminal law.

Part III considers the implications of this post-territorial system. For the moment, two final observations bear mentioning. First, the deterritorialization of American criminal law has been a collective effort. The state actors involved in this process run the gamut: legislatures invented continuing offenses and passed special venue laws; courts expanded criminal jurisdiction and read the Constitution to permit extraterritorial prosecution and punishment; local police joined forces; prison officials contracted to export prisoners; and so on. There is no neat separation of powers narrative about which department disconnected criminal law from territory.²⁵² Instead, a wide range of government actors have worked together, or at least in tandem, to remake criminal law, which is why despite enormous variation in the country’s criminal laws and enforcement practices this Article speaks in terms of the American criminal legal “system” as a whole.²⁵³

Second, this is a system dominated by private agreements. It is remarkable how frequently the deterritorialization of criminal law occurs out of public view, in contracts and compacts and memoranda of understanding that can be uncovered only (if at all) through public records requests.²⁵⁴ The borders of criminal law are determined when police departments form task forces and prison agencies agree to trade prisoners—in other words, in choices made behind closed doors.

Of course, criminal law enforcement decisions are always opaque. Though that fact can be roiling for scholars who want to understand the operation of America’s criminal legal system, the deeper point is that even when the deterritorialization of criminal law is transparent, it unfolds through agreements between state actors over which the people subject to criminal laws have very little control. The criminal legal system outlined above has flexible boundaries, which are brokered between the officials who sign compacts and MOUs. This is a system of criminal law by contract—not the social contract of ideal theory, in which criminal law is premised on the consent of the governed,²⁵⁵ but a much more private sort of agreement in which government officers get to negotiate the reach of criminal law.

²⁵² See KADISH ET AL., *supra* note 33, at 161–62 (describing and critiquing the conventional wisdom that legislatures, not courts (or other actors) determine “the reach of the criminal law”).

²⁵³ See Kaufman, *supra* note 226, at 1826 n.50 (citing criminal law scholars who object to the phrase criminal legal “system” on the ground that it overstates the coherence of criminal law enforcement and obscures local variation). Though these observations are accurate, conceptualizing criminal law as an integrated system can help to reveal broader trends in the use of state power.

²⁵⁴ See *supra* Part II.B., II.C. (relying on contracts, MOUs, and other materials obtained through public records requests to describe the deterritorialization of policing and imprisonment); see also Kaufman, *supra* note 226, at 1840 (discussing the use of open records laws to expose the “black box of prison management”).

²⁵⁵ See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 36–39 (2001) (discussing liberal theories of punishment based on the social contract); FARMER, *supra* note 250, at 27 (discussing ideal theories of criminal law premised on the social contract). See generally DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989).

III. Territory or Membership

The foregoing account has a number of doctrinal and theoretical implications. To review briefly, Part I showed that the territoriality principle is built into the foundations of American criminal law, where it serves as a proxy for values associated with good governance in a liberal democracy. Part II demonstrated that territorialism has a weaker hold on criminal law than the conventional wisdom assumes.

This Part explores the consequences of territoriality's decline. It begins by observing that the deterritorialization of criminal law unsettles constitutional doctrines and upends some of the basic conceptual distinctions in American public law. It then considers how the account of criminal law in Parts I and II might advance criminal law theory, in particular the longstanding debate about whether to "democratize" criminal law.²⁵⁶ The piece closes with a qualified defense of territorialism and a call to reinvigorate borders to improve the American criminal legal system. Part III thus starts by asking how my account of criminal law is disruptive. It then considers whether this Article's positive claims might be generative, and it concludes by imagining a few possibilities for criminal law reform.

A. Shibboleths

There are a few things one cannot say with a straight face after reading Part II. One is that criminal law is inherently local. Another is that domestic criminal law is territorial. As it turns out, these are outdated views, and debunking them offers several lessons about the state of American criminal law.

1. *Criminal Law is Local.* — The claim that criminal law is local props up a number of constitutional doctrines. As Part I explained, that claim has supported lines of case law limiting the commerce power²⁵⁷ and restraining federal court oversight of state criminal courts.²⁵⁸ The assertion of "inherent localness" has also justified Eighth Amendment and due process precedents upholding harsh sentences and prosecution-friendly procedural rules.²⁵⁹ To summarize several bodies of law in sentence: American courts have relied on the proposition that criminal law is local to restrict both federal power and criminal defendants' rights.

All of these doctrines look suspect in light of Part II. As that Part showed, criminal law is no longer local—at least not exclusively, and certainly not essentially. Over the past century, every part of criminal law has spread outward, beyond territorial jurisdictional boundaries and in many cases beyond state lines. Often, the extension of criminal law has resulted from interlocal coordination and interstate compacts, which is to say, from *sub-federal* alliances rather than federal usurpation of a local domain. In the twentieth century, criminal law expanded not just because the federal government ballooned but also because, in the shadow of a growing federal government, states and localities formed regional unions that detached criminal law from territorial borders and upended nineteenth-century ideas about criminal jurisdiction. As Part II pointed out, this history poses a challenge to the common claim that criminal law has been "over-federalized."²⁶⁰ The deterritorialization of criminal law also undermines the idea that

²⁵⁶ See *infra* Part III.B.

²⁵⁷ See *supra* note 105 and accompanying text (discussing *United States v. Morrison*, 529 U.S. 598, 618 (2009), and *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1993)).

²⁵⁸ See *supra* note 106 (discussing abstention and habeas jurisprudence).

²⁵⁹ See *supra* note 105–07.

²⁶⁰ See Richman & Seo, *supra* note 180, at 3 (collecting the "over-federalization" literature).

criminal law is quintessentially local, and all the constitutional doctrines that depend on that idea.

To be fair, judicial rhetoric about the “inherent localness” of criminal law may simply be strategic. One gets the sense that abstention and Eighth Amendment cases are less about a view of criminal law’s history and proper place in “our federalism”²⁶¹ than a desire to limit congressional power and manage federal court dockets. If the real goal of constitutional doctrine is to advance a libertarian philosophy of government or to limit civil rights litigation, it is not particularly earth-shattering to learn that courts rely on a shibboleth to achieve their aims. But it is still worth pointing out that a number of constitutional doctrines depend on a folk tale about criminal law. To the extent that courts believe that criminal law is local when they write that phrase, they are building doctrine on an outmoded understanding of how American criminal law works.

Specifically, courts are constructing constitutional doctrine based on a century-old theory of criminal jurisdiction, which has long since been abandoned. As Part I explained, the claim that criminal law is local is not just a description about where crime tends to happen. This maxim refers to a common law conception of criminal jurisdiction in which territorial borders were the source and the limit of a court’s power to hear a criminal case.²⁶² Part II documented that theory’s demise in the early twentieth century, when courts distinguished jurisdiction from venue and invented new, more expansive theories of judicial power to adjudicate criminal cases.²⁶³ This history—in which judicial power over criminal cases grew precisely because courts rejected the view that crime is inherently local—sits awkwardly alongside constitutional doctrines that insist on crime’s localness to limit courts’ power to regulate harsh criminal justice practices. When it comes to judicial authority to hear criminal cases, crime is no longer local. But when it comes to judicial enforcement of criminal defendants’ constitutional rights, the localness of crime means federal courts should stay their hand. The dissonance between these two positions is sharp.

Indeed, the irony in this doctrine goes further. Recall from Part II that courts have enabled the deterritorialization of criminal law through loose interpretations of the Due Process Clause, citizens’ arrest statutes, and “hot pursuit” exceptions to limits on police jurisdiction.²⁶⁴ As Part II explained, courts have interpreted both statutes and the Constitution to permit extraterritorial policing, prosecution, and punishment. When they make this conceptual move, courts typically describe territorial borders as outdated relics of another era in American criminal justice. As Justice Blackmun wrote in *Olim v. Wakinekona*, the case that upheld interstate prisoner transfers, in today’s “overcrowd[ed]” prison system, “it is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted.”²⁶⁵ Or to recall the Pennsylvania Supreme Court’s position on the hot pursuit

²⁶¹ *Younger v. Harris*, 401 U.S. 37, 44 (1971). See generally Heather Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012).

²⁶² See *supra* Part I.B. (introducing this early theory of criminal jurisdiction and describing Professor Drew Kershen’s seminal research on the origins of the federal constitutional venue and vicinage provisions); see also Kershen I, *supra* note 54, at 811 n.27.

²⁶³ See *supra* Part II.C.

²⁶⁴ See *supra* Part II.A. (noting that flexible interpretation of the Due Process Clause has extended state criminal court jurisdiction over of out-of-state conduct), Part II.B. (explaining how capacious readings of hot pursuit and citizen’s arrest doctrines work to permit extraterritorial policing); Part III.C. (exploring how the doctrinal distinction between jurisdiction and venue and courts’ permissive venue analysis have deterritorialized prosecution); Part III.D. (explaining why the Due Process Clause fails to limit extraterritorial punishment).

²⁶⁵ 461 U.S. 238, 246 (1983).

doctrine: enforcing “impenetrable jurisdictional walls” benefits “only the criminals hidden in their shadows.”²⁶⁶

These cases treat territorial limits to criminal law enforcement as impractical and needlessly formal. On this account, criminal law is a system of administrative governance that requires flexibility and practicality about borders. True enough, one might say; there is no question that modern criminal law enforcement exceeds formal legal boundaries. But this functionalist approach to criminal law sits rather uncomfortably with constitutional doctrines predicated on criminal law’s “inherent” localness.

In short, constitutional doctrine evinces an erratic and questionable reliance on the idea that criminal law is local. In cases restricting congressional power and criminal defendants’ rights, criminal law has formal, enforceable borders. But in cases where borders would serve to limit state power—for instance, by invalidating an extraterritorial arrest or requiring in-state imprisonment—criminal law’s boundaries are “unreasonable.”²⁶⁷ This inconsistency is worth highlighting (even for the cynic who never took Commerce Clause or Eighth Amendment jurisprudence at face value) because it shows that courts’ claims about the true nature of criminal law are selective and contingent. When elaborating the Constitution, modern courts ought not insist that criminal law is local, not only because that view is historically inaccurate but also because courts only seem to care about criminal law’s limits some of the time.

2. *Criminal Law is Territorial.* — Part II also upends the idea that domestic criminal law is territorial. As Part I explained, the territoriality principle is supposed to be what makes domestic criminal law different from other bodies of law.²⁶⁸ According to the conventional wisdom, domestic criminal law is “defined in territorial terms.”²⁶⁹ This commitment to territorialism is thought to make domestic criminal law different from international criminal law, where jurisdiction is more flexible, and from civil law, where courts can enforce the laws of another territory.²⁷⁰ On the standard account, territorialism is what makes domestic criminal law distinctive.

Territorialism is also what makes domestic criminal law *real*. As Professors Jack Goldsmith and Daryl Levinson have observed, Anglo-American legal scholars tend to treat domestic law as real and concrete, by contrast to the purportedly unstable and unenforceable world of international law, where legal rules inevitably devolve into power relations.²⁷¹ In this framework, domestic law is taken to be the “paradigm” version of law, while international law is a “lesser species of law—if it qualifies as law at all.”²⁷² To extend Goldsmith and Levinson’s argument: domestic criminal law is supposed to be the paradigm sort of law, with clear rules, boundaries, and sources of authority. And it belongs in the category of “real” law because of its dedication to the territoriality principle, which as Part I noted, stands in for the idea that criminal law is the product of a sovereign, democratic polity. Because domestic law is territorial, it is not supposed to be plagued by the same insecurities as international law.

The territoriality principle is thus central to how scholars conceptualize American criminal law. It is what divides domestic from international criminal law. It is what distinguishes criminal from civil law. And it is what makes domestic criminal law into the sort of content that belongs

²⁶⁶ Commonwealth v. Merchant, 595 A.2d 1135, 1139 (Pa. 1991).

²⁶⁷ *Wakinekona*, 461 U.S. at 246.

²⁶⁸ See *supra* Part I.A.

²⁶⁹ DUFF, *supra* note 12, at 103.

²⁷⁰ See *supra* Part I.A. (elaborating on these comparisons).

²⁷¹ Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1792 (2009).

²⁷² *Id.*

in a first-year legal curriculum rather than some upper-level seminar on the meaning of democracy or the limits of sovereignty. But as Part III demonstrated, domestic criminal law is much less territorial than it seems at first pass. Modern criminal law is riddled with exceptions to the territoriality principle: criminal laws that follow Florida citizens into the Gulf of Mexico; prosecutorial forum shopping; regional police task forces; a prison system that pays no attention to the place a person is convicted.²⁷³ The list goes on, and as these exceptions stack up, domestic criminal law starts to seem much less committed to the principle that allegedly makes it distinctive.

To be clear, the claim here is not that American criminal law is wholly or even mostly deterritorialized. Both the substance and the enforcement of state criminal law *are* often territorial. Rather, the point is that even run-of-the-mill, “normal” criminal law is less tied to territory than one would expect given that territorialism is supposed to be what makes this body of law normal. In reality, domestic criminal law is split between competing theories of jurisdiction and is so thoroughly saturated with discretion that territorial borders can be ignored by both law enforcers and courts. As a result, domestic criminal law is just as unsettled and prone to power dynamics as “lesser” bodies of law.²⁷⁴ Its justification and scope are just as contested. When all is said and done, domestic criminal law is not all that territorial—which means it is not all that distinctive, either.

It would require a separate article (perhaps a few) to explore the implications of the observation that criminal law is not distinctive. The big, underlying thesis here is that the principle that divides criminal law from civil law, and domestic law from international law, has been undermined over the last century such that these conceptual divisions no longer withstand scrutiny. That claim leads to a series of new and interesting questions about why domestic criminal law should be different than other fields. For instance: if international and domestic criminal law are not particularly distinct, why not develop an even looser approach to jurisdiction in state criminal courts? And if criminal and civil law are not distinct, why is there no choice of criminal law? Why can’t California authorize Texas to apply its criminal code? What, exactly, would be wrong with a legal system where Ohio imposed Pennsylvania’s criminal law? And what is the difference between that system and one where Ohio can police and imprison Pennsylvania’s criminals?

These questions lie beyond the scope of this Article, but the goal is to bring them into view by pointing out that the territoriality principle, which is supposed to be defining, is receding. The territoriality principle undergirds the intellectual framework of public law. It separates disciplines like international and domestic criminal law, and it justifies unusual features of criminal law, such as the prohibition on shared enforcement of criminal codes. But over the course of the twentieth century, the criminal legal system has become much less committed to territorialism. This development means that American criminal law is no more settled, no more domestic, and no more real than any other field.

B. The Democracy Debate

The previous section argued that the decline of territorialism poses a challenge to constitutional doctrine and public law theory. The aim of that section was to show why the account of criminal law laid out in Parts I and II is destabilizing. This section asks whether my account might also

²⁷³ See *supra* Part II (introducing each of these examples).

²⁷⁴ Goldsmith and Levinson, *supra* note 271, at 1792.

be clarifying, specifically, whether it might help to reorient the longstanding academic debate over whether to “democratize” criminal law.²⁷⁵

The basic contours of the democracy debate are well known. In recent years, there has been a resurgence of interest in the possibility of making criminal law more democratic.²⁷⁶ Citing the failures of America’s criminal legal system—its inequality, severity, endemic racism—a number of legal scholars have argued that criminal law is too detached from the people subject to law enforcement.²⁷⁷ Scholars who take this position trace the pathologies of the criminal legal system to “the retreat of local democratic control” and call for increased lay participation in the creation and enforcement of criminal laws.²⁷⁸ Though their proposals vary, “the democratizers”²⁷⁹ tend to favor practices that bring “ordinary people” into criminal law, such as jury trials, citizen-led oversight groups, and community policing.²⁸⁰

Typically, the democracy debate is framed as a battle over expertise. In one camp, the democratizers argue that deference to criminal justice “experts” has promoted liberal elitism and made the criminal legal system more alienating and cruel.²⁸¹ In the other camp, the technocrats argue that expertise is valuable, populist control of criminal justice is dangerous, and laypeople are more punitive than the democratizers would like to think.²⁸² This debate is ongoing,²⁸³ but its general framework is established. Decades in, the democracy debate is usually understood as a dispute between democrats and technocrats, and most criminal law scholars know if they are skeptics or defenders of criminal justice expertise.

But the democracy debate also has another dimension. Often, when democratizers mount their critique, they seem to want something different than participation by laypeople—something closer to participation by the *right* people, namely the disfavored groups most affected by criminal laws. Take, for instance, Professor Jocelyn Simonson’s argument that the interests of “marginalized groups” are not represented by prosecutors who purport to act on behalf of “the people.”²⁸⁴ Think about the heated debate over whether New York City police

²⁷⁵ See Rappaport, *supra* note 20, at 711.

²⁷⁶ The American democratization movement in many ways recasts Progressive-era debates about the value of technocratic expertise and, more recently, debates in British criminology about the merits of liberal elitism. See Ian Loader, *Fall of the “Platonic Guardians”: Liberalism, Criminology, and Political Responses to Crime in England and Wales*, 46 BRIT. J. CRIMINOLOGY 561 (2006); see also Rappaport, *supra* note 20, at 720 (“[T]hese are, in a sense, old battles being refought.”)

²⁷⁷ Rappaport, *supra* note 20, at 721–29 (collecting the American democratization literature and tracing its origins to Professor Stuntz’s work).

²⁷⁸ *Id.*; see also Jocelyn Simonson, *The Place of ‘the People’ in Criminal Procedure*, 119 COLUM. L. REV. 249, 249–50 (2019) (advocating “bottom-up resistance to local police actions and prosecutions”).

²⁷⁹ Rappaport, *supra* note 20, at 714; see also Elizabeth Jánosky, *Defining the “Local” in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318, 1320 (2019).

²⁸⁰ Rappaport, *supra* note 20, at 727; see also K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 681 (2020).

²⁸¹ Rappaport, *supra* note 20, at 718 (describing “an aversion to bureaucratic and expert control” as the defining feature of an otherwise broad and eclectic collection of scholars committed to democratizing criminal law); Loader, *supra* note 276, at 566 (noting that the midcentury, liberal elitist “disposition toward the governance of crime” has “fallen into disrepute” over the last two decades).

²⁸² Rappaport, *supra* note 20, at 732; see also RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 165–68 (2019) (endorsing “expert oversight”).

²⁸³ And there are sub-camps within camps. See Jánosky, *supra* note 279, at 1230 (identifying a “sub-group of democratizers,” the “localizers,” who aim to decentralize criminal law).

²⁸⁴ Simonson, *supra* note 278, at 256.

should have to live in the boroughs they patrol.²⁸⁵ Or consider the widely-cited *White Paper of Democratic Criminal Justice*, in which nineteen law professors proposed reforms aimed at empowering “groups that share a cultural world” to “direct their collective life.”²⁸⁶ These calls for democracy are not about expertise so much as membership and belonging. In other words, the question for these democratizers is not whether bureaucracy is a good idea. It is whether it is fair to apply criminal laws to marginalized people in a society riven with racial and economic inequality.

This strand of the democracy critique tends to get lost, subsumed within the debate over expertise. But perhaps it can be recovered and made more explicit by focusing on the territoriality principle, and specifically, on the tension between territorial and membership-based forms of criminal law. Part II introduced the idea that the American criminal legal system contains two competing theories of criminal law: a territorial theory, in which the power to punish is predicated on a person’s presence within certain borders; and a membership-based theory, in which the state’s authority to apply criminal law is premised on a person’s membership in some political community.²⁸⁷ To simplify the dichotomy, criminal law can attach either to places (like Florida) or to members (like citizens of Florida, wherever they go).

This dichotomy helps to refine the democratizers’ critique. In a sense, what many democratizers appear to be saying is not that expertise is particularly good or bad, but rather that equal membership in a political community is required before the application of criminal law can be legitimate. Consider how clear the critique sounds in these terms: “I am not a full member of this society, and you cannot apply its criminal laws to me until I am.” This, it seems, is what some scholars really mean when they call for democracy in criminal justice. That is, some democratizers seem to want membership-based criminal law, and to object to American criminal law on the ground that it is routinely applied to people who have continually been denied full membership in American society. From this perspective, the democratizers have an underappreciated objection to territorial criminal law, which is that it is insensitive to unequal membership and in particular to the history of American racism.

The democratizers do not usually make their case in these terms. The democracy debate does not focus on questions of criminal jurisdiction; almost no scholarship on domestic criminal law does.²⁸⁸ But many of the democratizers’ proposals—for community policing, for local lawmaking, for empowering shared cultural groups—sound like a call for criminal law that is less tied to arbitrary territorial units and more attuned to the traits that turn a collection of people into a community.²⁸⁹ To put a finer point on it, some democratizers would probably prefer a system in which people with similar lived experiences (of racism, excessive force, over-policing, under-policing, and mass incarceration) created their own criminal laws to the current territorial system, where the laws of some state (which invariably serve the ruling class) just happen to apply. On some level, then, the democracy debate is really about jurisdiction, and specifically, whether criminal law ought to be predicated on membership rather than territory.

²⁸⁵ See, e.g., Stephen M. Lepore, *New York City Council Adopts Resolution to Require New NYPD Hires to Live in NYC*, ABC NEWS (Mar. 26, 2021), <https://www.news10.com/news/ny-news/new-york-city-council-adopts-resolution-to-require-new-nypd-hires-live-in-nyc>.

²⁸⁶ Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1696 (2017).

²⁸⁷ See *supra* Part II.E.

²⁸⁸ See Dubber, *supra* note 30, at 247.

²⁸⁹ See generally ANDREW REHFELD, THE CONCEPT OF CONSTITUENCY 37–49 (2005) (exploring the meaning of concepts such as “constituency” and “community of interest”).

Recasting the debate in these terms brings the democratizers' deep critique to the fore: criminal law is illegitimate in the absence of full citizenship, in the broadest sense of the word.²⁹⁰

Framing the democracy debate as a dispute over jurisdiction thus sharpens the democratizers' objection to American criminal law. This framework also exposes some new possibilities for criminal law reform.²⁹¹ For example, if criminal law need not hew to territorial boundaries, why not redistrict police departments or regionalize criminal lawmaking? Why not have "the criminal law of Chicagoland" or of Chicago's South Side? Or for that matter, why not apply criminal laws only to people who had equal access to the polls when electing the legislators who create criminal laws? Why not have a "democracy defense" to criminal prosecutions? Lest one protest that these proposals are outlandish, recall from Part II that criminal law is already partially deterritorialized. In the current system, police task forces span states lines, courts adjudicate cases involving out-of-state conduct, and state prison officials outsource prisoners. The upshot of this deterritorialized system is that alternative models of criminal law start to seem more feasible—after all, the criminal legal system is already home to several different theories of jurisdiction. Or as the democratizer might point out: it does not seem quite right that police can ignore territorial boundaries but people who want to improve criminal justice cannot.

One would have to say much more to defend any of these proposals. The list above only hints at what it could mean to reorient criminal law around membership rather than territory, and the goal here is not to urge such a shift. As the next section explains, my own view is that the territorial version of criminal law may be worth preserving. Instead, the observation is that a range of systemic reforms are within bounds if criminal law does not have to be territorial. Once you abandon territorialism in favor of membership-based criminal law, seemingly unorthodox proposals—like letting communities build their own criminal laws or limiting criminal law enforcement to full and equal members—become intelligible. More to the point, the critical question becomes how to define membership: which groups of people should get to construct their own criminal laws, which traits matter to the legitimacy of criminal law, which criteria make a person a member of a society such that its criminal laws can attach. In short, the focus of the democracy debate shifts from the merits of expertise to the terms of membership in a polity—which, I think, is what many democratizers actually want to discuss.

Now, perhaps the democratizers will not agree with this gloss on their debate. Some of the academics who get classified as democratizers seem genuinely interested in lay influences on criminal law (whether or not those laypeople are marginalized).²⁹² And some democratizers who want to elevate marginalized voices might not want to go so far as endorsing membership-based criminal law. If pressed to choose between territory and membership, some democratizers might stick with territorialism. Even then, though, it will have proved useful to ask whether the democracy debate is really about rethinking the scope and justification of criminal law. The democratization movement has been critiqued for having unclear and internally contradictory goals.²⁹³ The suggestion here is that the debate might be clarified and advanced by distinguishing two distinct issues: whether expertise is good, and whether territory is the right basis for criminal law. At least some democratizers seem more interested in the second question.

²⁹⁰ See generally T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950).

²⁹¹ I use the term "reform" capaciously here to refer both to those who want to reorient the basic purpose of the criminal legal system and those who prefer more incremental change.

²⁹² See, e.g., Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017); STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2013).

²⁹³ Rappaport, *supra* note 20, at 721.

When cast in this light, the democracy debate is not at all that different from a conversation that has been developing among criminal law philosophers in the last several years. Led by Antony Duff, a group of criminal law theorists (particularly though not exclusively European and Canadian philosophers of criminal law) have spent the better of a decade debating the conditions under which criminal law can be legitimate.²⁹⁴ This debate was inspired by Duff's suggestion, in writing published in 2010, that criminal law should be founded on the concept of citizenship.²⁹⁵ As Duff put it at the time, legitimate criminal law is “addressed to citizens,” “binds and protects all citizens equally,” and uses punishment to bring wayward citizens back into the community.²⁹⁶ In response to Duff's theory, scholars pressed back, questioning what exactly he meant by “citizenship.”²⁹⁷ That question, in turn, led theorists to ask if the best version of criminal law would be territorial or would instead apply to citizens (qua citizens) and follow them wherever they travel.²⁹⁸

Thus, in philosophical circles, criminal law scholars are already having a debate about the benefits and drawbacks of territorialism. Their version of the debate focuses on criminalization—on the act of defining criminal conduct rather than the enforcement of criminal laws through policing, prosecution, or punishment.²⁹⁹ The philosophical debate about territorialism also tends to proceed in the language of ideal theory, around questions like whether a normatively desirable legal system would permit extraterritorial jurisdiction rather than whether our actual criminal legal system already does.³⁰⁰ (Like everyone else, criminal law theorists usually assume that domestic criminal law is still territorial.)³⁰¹ In broad terms, the philosophical debate is more abstract and less concerned with law enforcement than the democracy debate. But like the democratizers, philosophers are interested in the possibility that criminal law would be more legitimate and egalitarian if it were premised on membership rather than territory.

Everyone, then, is debating criminal jurisdiction. Though the democratizers do not speak in those terms, and the philosophers rarely engage with concrete concepts like community policing, both groups are curious about what it would mean to predicate criminal law on

²⁹⁴ See, e.g., DUFF, *supra* note 12; R.A. DUFF, LINDSAY L. FARMER, S.E. MARSHALL, MASSIMO M. RENZO & VICTOR V. TADROS, *THE BOUNDARIES OF THE CRIMINAL LAW* (2010); R.A. DUFF, LINDSAY FARMER, S.E. MARSHALL, MASSIMO RENZO & VICTOR TADROS, *THE CONSTITUTION OF THE CRIMINAL LAW* (2013); FARMER, *supra* note 250; VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* (2019); Dubber, *supra* note 30; Ferzan, *supra* note 45; Zedner, *supra* note 12.

²⁹⁵ R.A. Duff, *A Criminal Law for Citizens*, 14 *THEORETICAL CRIM.* 293, 300 (2010).

²⁹⁶ *Id.* at 301.

²⁹⁷ Zedner, *supra* note 12.

²⁹⁸ See Ferzan, *supra* note 45, at 335 (“I question whether the most normatively attractive conception of a [polity founded on Duff's theory of criminal law] would be bounded by territory, or whether it would exercise far more extension jurisdiction over its citizens wherever they may be . . .”).

²⁹⁹ See DUFF, *supra* note 12, at 1–3 (explaining the “criminalization” project undertaken by a group of European criminal law theorists, who sought to develop a normative account “about what to criminalize and how to define offenses”); FARMER, *supra* note 250, at 6–7 (discussing “the idea of criminalization”).

³⁰⁰ Philosophers of criminal law are sensitive to the proposition that “ideal theory” is particularly ill-suited to criminal law, which is characterized by non-ideal practices like plea bargaining. See Nicola Lacey, *Approaching or Rethinking the Realm of Criminal Law?*, 14 *CRIM. L & PHIL.* 307, 312 (2020) (noting that Duff, among other “powerful voices [in] the philosophical literature on criminal justice,” aims to take real-world constraints into account, but arguing that his theory nonetheless excludes a “substantial . . . part of the terrain of contemporary criminal law”). Setting aside the question whether particular philosophers of criminal law are sufficiently attuned to lived realities, the basic point here is that the philosophical debate about territorialism asks which version of criminal law is best rather than which version we currently have.

³⁰¹ See *supra* note 45 and accompanying (discussing literature that proceeds from this assumption).

membership in a community defined by something other than territorial borders. This Article’s contribution is to bring these two debates together and to suggest that criminal law based on membership is not nearly as exotic as it seems. In fact, we already have pockets of such law in the United States, and we are much less committed to territorialism than many scholars seem to have noticed. Accordingly, the real question is whether the criminal legal system would be better off if we abandoned territorialism. The next section argues that answer to that question is no.

C. A Defense of Borders

This Article has documented the erosion of the territoriality principle and considered its implications. To this point, the project has been to challenge the standard account of domestic criminal law—to debunk a myth, and the theories that depend on it. This final section takes up the normative question implicit in territoriality’s decline: should we keep going? If domestic criminal law is not committed to territoriality, why retain the territoriality principle at all?

To the extent that criminal law theorists have addressed this question, they have defended territorialism on instrumental grounds. Antony Duff, perhaps the leading theorist on the issue, has described the territoriality principle as the most “efficient” way to structure domestic criminal law.³⁰² According to Duff, in a system of nation-states, territorial criminal law represents a reasonable “division of labor” and ensures “proper respect for state sovereignty.”³⁰³ In other words, territorialism is a pragmatic rule for deciding when governments have jurisdiction to regulate criminal conduct (and where their power ends). When pressed to defend this rule, Duff has added that territorialism is “modest,” a less imperial approach to state power than a criminal legal regime in which a polity claims the authority to govern its citizens and criminalize conduct outside its geographic borders.³⁰⁴

The prevailing defense of territorialism is thus that it is workable—a practical, restrained solution to a world where states have neighbors who may see things differently. This is no doubt true, but efficiency is neither the only nor the best justification for the territoriality principle. There are other good reasons to retain territoriality, which have less to do with ensuring comity than with the virtues of a criminal legal system that applies equally to everyone in a given place.

To appreciate these virtues, think back to Part I. At the conclusion of that section, this Article identified several purposes that the territoriality principle is meant to serve.³⁰⁵ First, territoriality is supposed to *instantiate sovereignty* by identifying the borders of a government’s power to make and enforce criminal laws. Second, territoriality is supposed to *protect defendants* by limiting state power to a defined region. Third, the territoriality principle is supposed to *safeguard democracy* by containing criminal laws to the area that a government’s elected officials represent. The territoriality principle thus has three distinct rationales. It is meant not just to protect sovereignty, but to promote democratic accountability and to temper abusive state power as well.

The problem is that borders are only serving the first purpose. As explained above, in the current criminal legal system in the United States, borders do a fairly good job of preserving state sovereignty. States get to make their own criminal laws; state criminal courts refuse to

³⁰² DUFF, *supra* note 12, at 108–09; *see also* R.A. Duff, *Defending the Realm of Criminal Law*, 14 CRIM. L. & PHIL. 465, 479 (2020).

³⁰³ DUFF, *supra* note 12, at 108–09.

³⁰⁴ Duff, *supra* note 302, at 447.

³⁰⁵ *See supra* Part I.E.

apply sister states' "foreign" criminal codes; and the Supreme Court cites variation among state criminal laws and procedures as evidence that states enjoy autonomy and self-determination.³⁰⁶ In each of these examples, the territoriality principle is doing its work as a proxy for sovereignty. But when it comes to limiting state power—for instance, by containing where police officers can make arrests or by requiring corrections officials to keep prisoners in the jurisdiction that convicted them—the territoriality principle has eroded. This creates a strange asymmetry. On one hand, the borders of criminal law matter and enable claims to sovereignty. On the other, borders no longer matter and fail to protect people subject to criminal laws. The problem, then, is not borders themselves. The problem is asymmetric enforcement of the territoriality principle to advance only one of the three values it is meant to protect.

For those who think the country's criminal legal system is excessive and illegitimate, this account of American criminal law reveals a new goal: restore balance to the territorialism in domestic criminal law. Imagine if the corollary to state sovereignty were robust doctrines prohibiting extraterritorial arrests, restricting extraterritorial punishment, and narrowing the conditions under which states could criminalize out-of-state conduct. To be even more concrete, imagine a legal system in which the territoriality principle authorized Tennessee to govern criminal behavior in Tennessee *but also* prohibited Tennessee police from arresting people in Georgia. Or a system in which territory empowered Vermont to make criminal laws *but then also* required Vermont to keep its prisoners in the state rather than outsourcing them to Kentucky. In such a system, the territoriality principle would both license and limit the state.

The normal objection here is that such rules would be terribly inefficient. (How absurd, one might say, to want to return society to the days where police cars screeched to a halt at state lines!) But inefficiency is precisely the point. As constitutional scholars who study the separation of powers well know, the whole purpose of structural rules in American public law is to protect individuals by making it difficult for state power to become too potent.³⁰⁷ In the American constitutional system, we separate branches and split authority between different levels of government so that governance is just the right amount of inefficient. A divided, slightly creaky state is supposed to be good for individual liberty.³⁰⁸ We hobble the state on purpose, to protect the people inside it. And we accomplish that task by imposing structural limits—such as territorial boundaries—on governments.

This protective, state-limiting aspect of territorialism is what the efficiency defense of the territoriality principle misses. Territorialism is not just a pragmatic way to determine the ambit of criminal law. It is not only an easy rule of thumb for determining whether Connecticut or New York should prosecute an alleged criminal (and for making sure the two states get along). The territoriality principle is also inefficient, in just the way one would hope to ensure that the criminal legal system does not become too well-functioning and thus too abusive. Or rather, the territoriality principle *could* be protective if it were revived to limit state power—to keep the NYPD out of Newark, to keep Hawaii's prisoners in Hawaii, to discipline prosecutorial forum shopping, and so on. Once this version of territorialism comes into view, the territoriality principle starts to seem not just workable but desirable as a tool to keep the criminal legal system in check.

³⁰⁶ See *supra* Part I.

³⁰⁷ Daryl Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33–34 (2016) (“From the Founding to the present, the central organizing principle of the structural constitution has been that power must be divided, diffused, or balanced to prevent—as Madison put it, in language that has become a maxim of structural constitutional law—the ‘accumulation of all powers in the same hands’ . . .”).

³⁰⁸ *Id.*

Indeed, territorialism even starts to look like it might be preferable to a system of criminal law premised on membership. As the previous section observed, much of the intellectual energy in criminal law scholarship appears to be moving away from territorialism, toward theories of criminal jurisdiction and criminal legal reforms based on membership.³⁰⁹ This shift is in its infancy, but there is a definite sense in criminal law theory that concepts like citizenship, membership, and community can provide a more egalitarian basis for criminal law than the current territorial system offers. One of this Article's aims is to sound a note of caution about the turn toward membership. As criminal law scholars who study policing and the rise of mass incarceration have noted, it is never easy to decide when someone counts as a member of a community.³¹⁰ Efforts to determine what a community wants often turn into difficult debates about identity—about who qualifies as a real member and whose views get to be authoritative.

Moreover, as immigration scholars might add, predicating a legal regime on membership can wind up being exclusionary. The distinction between membership and territory runs deep in constitutional immigration law.³¹¹ In that field, courts have long vacillated between a territorial theory of the Constitution, in which rights attach as soon as person is physically present in the country regardless of his citizenship status, and a membership-based theory of constitutional rights, in which only legal citizens enjoy the full panoply of constitutional guarantees.³¹² In immigration law, territoriality is the more generous foundation for a legal regime. Territory offers migrants more legal protection than concepts like membership and citizenship because territorial law is agnostic about the status of people inside the border. For the immigration scholar, then, a legal regime premised on membership sounds inherently hierarchical and no less likely to result in inequality than a territorial legal system.³¹³

There is more one could say about this comparison to immigration law. Because both immigration and criminal law deal with the treatment of outsiders, there is much to learn by contrasting the two fields. For these purposes, though, the analogy is meant to give criminal law scholars pause as we contemplate what to make of territoriality's decline. In one respect, the lesson of the preceding pages is that the territoriality principle is up for debate. Domestic criminal law has been deterritorialized over the last century such that it is now possible to imagine a very different version of the American criminal legal system. It is not absurd to think that criminal law could be premised on community membership and unhitched from the arbitrary constraints of county, city, or state boundary lines.

In another respect, though, the thesis of this Article is that territorialism is not all bad. As scholars ponder the future of criminal law, we might want to revisit the origins and upsides of the territoriality principle. This Article has shown that territorialism is unbalanced and statist in its current incarnation, but also that territoriality is a means to curb the government's authority to define and regulate crime. If the goal is to improve the criminal legal system—to constrain coercive government action, to restrain the excesses and abuses that make American criminal

³⁰⁹ See *supra* Part III.B.

³¹⁰ See, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); see also Tracey L. Meares, *Law Enforcement for Lawabiders*, 8 *IDEAS AM. POLICING* 1, 2 (2007) (exploring different types of communities, including those with more and less social cohesion).

³¹¹ See Emma Kaufman, *The New Legal Liberalism*, 86 *U. CHI. L. REV.* 187, 209 n.129 (2019) (collecting academic sources describing this division and cases exemplifying it).

³¹² *Id.*

³¹³ See Zedner, *supra* note 12 (expressing concern about the exclusionary aspect of the concept of citizenship); *c.f.* Gideon Yaffe, *Punishing Non-citizens*, 14 *CRIM. L. & PHIL.* 347, 364 (2020) (advancing a theoretical defense of the punishment of noncitizens, notwithstanding their status as non-members).

justice feel so unjust—perhaps imposing borders on criminal law is an underappreciated way to discipline the state.