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Extraterritorial Criminal Jurisdiction

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EXTRATERRITORIAL CRIMINAL JURISDICTION

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Over and over again during the past few decades, the federal government has launched ambitious international prosecutions in the service of U.S. national security goals. These extraterritorial prosecutions of terrorists, arms traffickers, and drug lords have forced courts to grapple with a question that has long been latent in the law: What outer boundaries does the Constitution place on criminal jurisdiction? Answering this question, the federal courts have crafted a new due process jurisprudence.

This Article argues that this jurisprudence is fundamentally wrong. By implicitly constitutionalizing concerns for international comity, the new due process jurisprudence usurps the popular branches' traditional foreign relations powers. And in the name of protecting defendants' presumed interests, the new due process jurisprudence may end up badly undermining them by incentivizing a turn to harsher, alternative national security measures—drone strikes, for example, and military detention in Guantánamo Bay. Moreover, because of certain structural features of the international law enforcement system, U.S. courts have applied the new due process jurisprudence generally—perhaps even exclusively—in precisely that class of cases to which it should not be applied.

None of this needs to be. Borrowing from choice-of-law doctrine, I argue that a coherent due process jurisprudence would focus solely on the unfairness, if any, that flows from actual conflicts between federal criminal law and the local criminal law of the place where the defendant acted. A due process jurisprudence reformulated to focus on actual conflicts protects both the liberty of criminal defendants and global public safety.

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Introduction

American lawyers know all about the limits the Constitution places on jurisdiction in civil cases, like *Pennoyer v. Neff*[1] or *International Shoe*.[2] But constitutional limits on criminal jurisdiction have been much more obscure. This is because, for most of the nation's history, criminal prosecutions have been purely local affairs. When New York prosecutes a New York resident for a crime she committed in New York, questions of jurisdiction can be taken for granted; they do not warrant attention. But no longer. Over and over during the past few decades, the federal government has launched ambitious international prosecutions in the service of U.S. national security goals—prosecutions of terror leaders operating in Pakistan or Libya, of notorious global arms dealers working in Russia or Spain, and of violent drug lords based in Afghanistan or Colombia. These extraterritorial prosecutions seek to hold defendants accountable for their actions abroad, wholly outside the sovereign territory of the United States. And they force us to ask and answer a fundamental question that has long been latent in the law: Namely, what are the outer boundaries that the Constitution places on criminal jurisdiction?

To answer this question, the lower federal courts have spent decades crafting a sprawling new due process jurisprudence, which allows a federal

1. 95 U.S. 714 (1878).

2. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

criminal law to reach extraterritorial conduct only if that conduct has a connection or "nexus" to the United States. And at first glance, this new jurisprudence seems sensible. In an analogous context, the Supreme Court has long required what amounts to a nexus.[3] In particular, before state civil law is permitted to reach extraterritorial conduct—before, say, the tort law of Minnesota is allowed to reach a car accident in Wisconsin—due process requires a connection between the source of the law (Minnesota) and the event in question (the accident).[4] And leading scholars have argued that there is no reason not to subject federal criminal law to these same due process limits.[5]

I argue, however, that the new due process jurisprudence that has been developed in the criminal context is fundamentally wrong. It is only in extremely rare cases that due process, properly understood, requires a nexus to the United States as a predicate to the exercise of criminal jurisdiction. As things stand, though, due process is generally—if not exclusively—being brought to bear in precisely that class of cases to which it should *not* be applied. The real world costs of this are severe. Forcing the United States to forego major extraterritorial prosecutions harms global public safety. And in the name of protecting defendants' presumed interests, the new due process jurisprudence may end up badly undermining them, by incentivizing a turn to harsher, alternative national security measures—drone strikes, for example, and military detention in Guantánamo Bay. This Article argues that none of this is necessary. A coherent due process jurisprudence protects both the liberty of criminal defendants and U.S. national security.

Due process generally limits the law's extraterritorial reach for two reasons. The first is a concern for intergovernmental structure, for keeping sovereigns from interfering with each other. The second is a concern for protecting individual defendants from unfairness.

As I argue, the first concern, for intergovernmental relations, cannot be used to justify due process limits on the extraterritorial application of federal criminal law. Structural concerns about what will or will not lead to a rupture between national governments have long been understood as ultimately the province of the popular branches, not the courts. These structural concerns should not be implicitly constitutionalized—by transposing them into a due process jurisprudence whose purpose is to limit the popular branches and, if necessary, to override their decisions. Moreover, the Constitution *already* fixes the boundaries of federal law's reach—in Article I. And so there is no reason to press due process into service. Indeed, the Supreme Court

3. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion).

4. *Id.*

5. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223–39 (1992).

has suggested, if only indirectly, that doing so would be improper.[6] Structural concerns, in sum, cannot provide a basis for due process limits on extraterritorial prosecutions.

This leaves fairness concerns. Fairness in this context means upsetting the defendant's expectations of the substantive law that she thought would apply to her conduct. Such an upending of expectations occurs only if there is a meaningful discrepancy—a conflict—between the U.S. criminal law the defendant is prosecuted under and the law that she expected would apply, the law of the place where the crime was committed.

When such a conflict exists, whether as to substantive criminal law or as to sentencing law, an extraterritorial prosecution should indeed be permitted to go forward only if there is a "nexus" to the United States. In the absence of such a conflict, there is no cognizable unfairness. In that circumstance, the federal government should be permitted to prosecute a defendant without any regard for the nexus that her conduct has to the United States. Some countries might object to such prosecutions—and I might, too. But protecting against international frictions is a matter for Congress and the President, not the stuff of judicially imposed constitutional constraints.

This Article proceeds in five Parts. Part I introduces the new due process jurisprudence that the courts have developed to restrain federal extraterritorial prosecutions. Part II argues that concerns for the structure of the international system cannot undergird that jurisprudence—which leaves concerns for preventing unfairness as the jurisprudence's sole predicate.

Reasoning from civil choice-of-law cases, Part III demonstrates that in the context of extraterritorial prosecutions, unfairness, properly understood, principally inheres in legal conflicts. The most pointed of these are "actual conflicts," in which the conduct that is the basis for the U.S. extraterritorial prosecution was legal under the law of the place where it was committed. Part IV shows that any unfairness caused by requiring a foreign defendant to stand trial in the United States should not be understood to trigger the due process protections at issue here. Doing so would collapse an important distinction in the law of jurisdiction—in the teeth of generations of Supreme Court admonitions to the contrary. Part V shows that there are, in fact, no (or virtually no) extraterritorial prosecutions that involve actual conflicts. This means that due process jurisprudence—which under current law is brought to bear across the board, to nearly all extraterritorial prosecutions—is being routinely applied to the very class of cases to which it should have no application, cases in which there is no actual conflict. Part VI concludes by demonstrating that a reformulated due process jurisprudence, focused tightly on actual conflicts and sentencing conflicts, protects public safety and national security and helps to ensure that defendants are treated fairly.

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6. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) (rejecting the application of substantive due process to excessive force claims against law enforcement because the Fourth Amendment contains an "explicit textual source of constitutional protection").

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The Supreme Court has recently denied certiorari in a series of major extraterritorial prosecutions that turned on the new due process jurisprudence.[7] But that cannot last forever. The constitutional and practical stakes of these sorts of cases are too high. And some of the most challenging cases for the new due process jurisprudence are now winding their way through the lower courts.[8] The time for a systematic and critical assessment of due process's work is now, and it is to that assessment that I turn.

In doing so, I operate against an increasingly rich scholarly backdrop. As extraterritorial prosecutions have surged, legal scholars have begun to produce landmark works on criminal jurisdiction and its limits, generally about questions of statutory interpretation or the reach of various Article I powers.[9] No article in this area is more important than *Extraterritoriality*, published in 1992 in the *Harvard Law Review* by Professors Brilmayer and Norchi. *Extraterritoriality* argues that there is no reason why constitutional limits on state law should not be applied to federal law,[10] and in doing so it has implicitly supplied the theoretical basis for current due process jurisprudence. But there are deep gaps in *Extraterritoriality*—and these gaps, developed below,[11] together constitute the reasons why due process jurisprudence cannot be understood as animated by a concern for safeguarding the structure of the international system.

Some of the more recent scholarship in this area represents the first stirrings of a new school of thought with respect to criminal jurisdiction. This emerging school of thought brings to bear the insights of civil choice of law, and seeks to differentiate between criminal laws that clash with other countries' criminal laws and those that do not.[12] This Article builds on that work. The new scholarship suggests that, at least in some cases, there is less

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7. *E.g.*, Yousef v. United States, 135 S. Ct. 248, *denying cert. to* 750 F.3d 254 (2d Cir. 2014); Al Kassar v. United States, 132 S. Ct. 2374 (2012), *denying cert. to* 660 F.3d 108 (2d Cir. 2011).

8. *See, e.g.*, Superseding Indictment, United States v. Ahmed, No. 12-661 (S-1) (SLT) (E.D.N.Y. Nov. 15, 2012), 2012 WL 6721134. The three non-U.S. citizen defendants in *Ahmed* were charged with providing material support to an African-based terrorist organization, based on training in Africa for anticipated combat in Africa. Mosi Secret, *Three Men Appear in Court in Mysterious Terror Case*, N.Y. Times (Dec. 21, 2012), http://www.nytimes.com/2012/12/22/nyregion/3-men-accused-of-training-with-al-shabab-appear-in-new-york-court.html [http://perma.cc/FZB4-FTN3].

9. *See, e.g.*, J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 Tex. L. Rev. 843 (2007); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 Am. J. Int'l L. 351 (2010); Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191 (2009); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 Notre Dame L. Rev. 1673 (2012).

10. Brilmayer & Norchi, *supra* note 5, at 1230–31.

11. *See infra* Part II.

12. *See, e.g.*, Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019, 1103–10 (2011); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L.

unfairness involved in an extraterritorial prosecution when U.S. criminal law and foreign criminal law do not conflict with one another.[13] But it does not ask and answer the critical question: whether that lesser degree of unfairness is, nonetheless, sufficient to justify due process limits on federal law. This Article answers that question and in the course of doing so provides the first systematic study since *Extraterritoriality* of the due process limits on extraterritorial criminal jurisdiction.

I. Extraterritorial Due Process

A. *The Prosecutions*

For generations now, the federal government has mounted extraterritorial prosecutions—prosecutions concerned with actions committed entirely outside of the sovereign territory of the United States. These prosecutions were initially rare and mainly focused on white-collar offenses.[14] But starting in the 1980s, extraterritorial prosecutions became more common and began to focus on national security matters and narcotics crimes.[15] That is the current state of play. There is, now, a steady drumbeat of extraterritorial prosecutions—targeting terror leaders, global arms traffickers, and violent drug lords. The stakes of these prosecutions are like nothing else in the criminal law. Extraterritorial prosecutions have, for example, culminated in the convictions of multiple terror operatives for their roles in killing 224 people on a single day in East Africa.[16] And in the context of extraterritorial narcotics prosecutions, defendants have been convicted for selling staggering volumes of cocaine,[17] as well as surface-to-air missiles for shooting down aircraft.[18]

But it is not just the moral temperature of extraterritorial prosecutions that sets them apart. It is also that such prosecutions are tools of U.S. national security policy, devices used to project American power abroad.[19] U.S. foreign policy, for example, has long focused on helping to shore up stable

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Rev. 1057, 1113–15 (2009); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 Minn. L. Rev. 110, 164–79 (2010).

13. *E.g.*, Colangelo, *supra* note 12, at 1108; Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 164–70 (2007).

14. *See* Brilmayer & Norchi, *supra* note 5, at 1223.

15. *See id.*; *see also, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 279–80 (1990) (Brennan, J., dissenting).

16. United States v. Ghailani, 733 F.3d 29, 38 (2d Cir. 2013); *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 101–08 (2d Cir. 2008).

17. *E.g.*, United States v. Suarez, No. 11 Cr. 836(KBF), 2014 WL 1998234, at *2 (S.D.N.Y. May 15, 2014).

18. *E.g.*, United States v. Bout, 731 F.3d 233, 237 (2d Cir. 2013); United States v. Al Kassar, 660 F.3d 108, 116–17 (2d Cir. 2011).

19. Brilmayer & Norchi, *supra* note 5, at 1223; *accord* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. Nat'l Security L. & Pol'y 1, 1–3 (2011).

and legitimate government in Africa.[20] Much of that effort is military, diplomatic, and financial. But part of that effort also runs through extraterritorial prosecutions—which have targeted battlefield leaders who make war on African governments[21] and senior African leaders who terrorize their people[22] or violate international norms.[23] Similarly, after the United States committed to using all instruments of its power to check Iranian weapons procurement,[24] a cascade of extraterritorial prosecutions has followed, focused on Iranian efforts to obtain prohibited items.[25] To cite a final example, many major drug traffickers have been extradited from Colombia for prosecution in the United States.[26] Any of these men could have been prosecuted in Colombia, which outlaws cocaine selling just as the United States does. But local Colombian prosecutions of powerful drug barons would have come at the cost of deepening the motive of narcotics traffickers to make war on the Colombian government—to kill local police, bribe prosecutors, kidnap government ministers, secretly bankroll politicians who might one day offer amnesty, mount jailbreaks, and generally continue guerilla fighting, in the hopes of seeing jailed comrades one day freed.[27] U.S. extraterritorial prosecutions have incapacitated drug lords without these costs being borne by the sometimes-fragile Colombian state—and these prosecutions have accordingly served the United States' larger goal of propping up Colombia in its long battle against narcotics traffickers.

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20. *E.g.*, Barack Obama, *Presidential Policy Directive on Sub-Saharan Africa* (June 14, 2012), https://www.whitehouse.gov/sites/default/files/docs/africa_strategy_2.pdf [https://perma.cc/2Q7S-BN9P].

21. Affirmation of Benjamin Naftalis at 3–4, United States v. Warsame, No. 1:11-cr-00559 (S.D.N.Y. Mar. 26, 2013) (describing defendant leading hundreds of fighters in battle on behalf of group at war with Somali government).

22. United States v. Belfast, 611 F.3d 783, 793–800 (11th Cir. 2010) (describing torture of Liberian civilians by senior Liberian government official).

23. Press Release, U.S. Attorney's Office, S.D.N.Y., *Manhattan U.S. Attorney Announces Arrests of Drug Kingpin Jose Americo Bubo Na Tchuto, the Former Head of the Guinea-Bissau Navy, and Six Others for Narcotics Trafficking Offenses* (Apr. 5, 2013), http://www.justice.gov/usao/nys/pressreleases/April13/GuineaBissauArrestsPR.php?print=1 [http://perma.cc/52UF-FHVX] (describing prosecution of a senior Guinea-Bissau government official for large-scale narcotics offenses in Guinea-Bissau).

24. Colin H. Kahl et al., *If All Else Fails: The Challenges of Containing a Nuclear-Armed Iran*, Center for a New American Security, 7–9, 11 (2013), http://www.cnas.org/sites/default/files/publications-pdf/CNAS_IfAllElseFails.pdf [http://perma.cc/VP4N-LHG4].

25. U.S. Dep't of Justice, *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases* (Jan. 23, 2015), http://www.justice.gov/sites/default/files/nsd/pages/attachments/2015/01/23/export-case-list-201501.pdf [http://perma.cc/YPT5-5GDW] (listing prosecutions).

26. *E.g.*, U.S. Sec'y of State, *Report on International Extradition*, at tbl.B (Jan. 17, 2001), http://www.state.gov/s/l/16162.htm [http://perma.cc/WA5F-TLYB].

27. *See* Mark Bowden, Killing Pablo: The Hunt for the World's Greatest Outlaw 61–201 (2001).

B. *The Deep Problem of Extraterritorial Jurisdiction*

Contemporary extraterritorial prosecutions, as set out above, stand alone. But they also raise a basic legitimacy question: Is it permissible for a foreign citizen who commits a crime in her country to be subjected to U.S. criminal law? This question concerns the "first and fundamental question[,] . . . that of jurisdiction."[28] But for all the attention paid to jurisdiction, its domains have not been fully mapped. Judicial jurisdiction is the power of a court to hear a case.[29] Due process limits that power—as in cases like *Pennoyer v. Neff*[30] and *International Shoe*.[31] Legislative jurisdiction is different. Legislative jurisdiction is the power of a sovereign to prescribe substantive rules to govern a situation.[32] Due process limits that power, too—as in doctrines of constitutional choice of law.[33]

But all of this relates to civil cases, not criminal ones. Indeed, criminal jurisdiction is a backwater; the study of jurisdiction typically ignores criminal cases, and the study of criminal cases usually ignores jurisdiction.[34] This makes sense—or once did. In the Anglo-American tradition, criminal cases were long regarded, in Justice Story's phrase, as "altogether local, and cognizable and punishable exclusively in the country[ ] where they are committed."[35] A crime was understood to have been committed in one place and to be prosecutable "exclusively" in that place.[36] And because courts apply only the criminal law of the place where they sit,[37] there was a seamless web: the crime was committed in one place; it had to be tried in that place; and the

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28. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1998)).

29. Restatement (Third) of the Foreign Relations Law of the United States § 401(b) (Am. Law Inst. 1987).

30. 95 U.S. 714 (1878).

31. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

32. *See* Restatement (Third) of the Foreign Relations Law of the United States § 401(a) (Am. Law Inst. 1987).

33. *E.g.*, Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 814–23 (1985) (imposing due process limits on state's extraterritorial application of its substantive law); Allstate Ins. Co. v. Hague, 449 U.S. 302, 326–31 (1981) (plurality opinion) (same).

34. *See* John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 Geo. L.J. 1217, 1217 n.1 (1985); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 Tex. L. Rev. 763, 767 (1960).

35. Joseph Story, Commentaries on the Conflict of Laws 516 (Arno Press 1972) (1834); *accord* Rafael v. Verelst (1776) 96 Eng. Rep. 621 (KB) 622; 2 Black W. 1055, 1058 ("Crimes are in their nature local, and the jurisdiction of crimes is local.").

36. *See* U.S. Const. amend. VI (requiring that "all criminal prosecutions" proceed in the "district wherein the crime shall have been committed"). *But cf.* 3 A Systematic Arrangement of Lord Coke's First Institute of the Laws of England 363 (J.H. Thomas ed., London, S. Brooke 1818) (discussing certain transitory crimes that could be tried anywhere in England).

37. Restatement (Second) of Conflict of Laws § 89, cmt. e (Am. Law Inst. 1971); *see also* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.) ("The Courts of no country execute the penal laws of another . . . .").

criminal law of that place was applied at trial. The question of where the crime was committed (often self-evident) determined where the case could be tried, a question of judicial jurisdiction. And where the case could be tried determined the substantive law that could be applied, a matter of legislative jurisdiction. There was not much to be said about criminal jurisdiction in part because it was thought to be simple. When a person robbed a bank in Illinois, she had to be prosecuted in Illinois for violating Illinois law—and that was that.[38]

No longer. The classic ideal of "local" prosecutions was not always followed—and it has been disintegrating for over a hundred years.[39] But with extraterritorial prosecutions, we are a world away from the idea that there is only one body of criminal law that "exclusively" covers a given occurrence. When U.S. criminal law reaches into another country, say Spain, law is layered over law, creating redundancies (or, perhaps, conflicts); Spain has its own criminal laws, and the United States is piling its law on Spain's. This creates a deep problem. On the one hand, contemporary extraterritorial prosecutions raise difficult questions about jurisdiction—necessarily, by definition—not by the fluke of a bullet happening to fly across a border. But on the other hand, in answering these modern jurisdictional questions, the old answers will not do. This is because the necessary premise of today's extraterritorial prosecutions, that multiple bodies of criminal laws apply to a single occurrence, is wholly at odds with Justice Story's classic ideal of criminal jurisdiction, that only one body of criminal law applies to a single occurrence.[40]

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38. There were of course occasional cases that entailed border crossing; a gun fired in Massachusetts might kill a person in Connecticut. Even in those cases, though, the law was concerned almost exclusively with the question of where the crime had been committed, where its "gist" was. *See* Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 239–44 (1931) (discussing the various legal fictions that courts used to reconcile elements of a crime occurring in multiple jurisdictions); Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS. L.J. 1155, 1157–61 (1971) (discussing a restricted application of the territorial principle in which the situs of a crime was where the actor's bodily movements "took effect").

39. *See* Berge, *supra* note 38, at 248–59 (describing relevant history); Larry Kramer, Comment, *Jurisdiction over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431, 1436–38 (1983) (same).

40. To some, this basic contradiction may suggest that extraterritorial prosecutions are, as a class, unlawful. But that argument is not available. Though they have become more common only recently, the Constitution envisions extraterritorial prosecutions. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power To . . . define and punish . . . Felonies committed on the high Seas . . . ."); *id.* art. III, § 2 (describing venue rule when a crime is "not committed within any State"). Indeed, the first federal criminal statute created certain extraterritorial offenses, Crimes Act of 1790, § 8, 1 Stat. 112, and courts have long held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.); *accord* Strassheim v. Daily, 221 U.S. 280, 284–85 (1911) (Holmes, J.). Note that these cases do not purport to consider whether due process may limit the exercise of a sovereign's criminal jurisdiction outside its borders.

C. *The Extraterritorial Due Process Doctrine and Its Impact*

The lower federal courts have stepped into this breach in cases like *United States v. Al Kassar*.[41] In that case, the lead defendant was a non-U.S. citizen who largely acted in Spain.[42] He was tried in the Southern District of New York and convicted of various crimes related to conspiring to sell large quantities of surface-to-air missiles to purported South American terrorists.[43] The defendant argued that the application of U.S. criminal law to him violated due process.[44] Quoting the Ninth Circuit's 1990 decision in *United States v. Davis*,[45] the Second Circuit rejected this claim: "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair."[46]

This *Davis* standard has been broadly influential. It is followed, as noted, in the Second Circuit. It has generally been followed in the Fourth Circuit[47]—which, along with the Second Circuit, has traditionally been the venue for the nation's most significant extraterritorial criminal prosecutions. And the country's largest circuit, the Ninth, generally hews to the "nexus" standard as well.[48]

This Article refers to the dominant body of due process law that follows *Davis* as the "extraterritorial due process doctrine." And it bears emphasizing that the extraterritorial due process doctrine concerns legislative jurisdiction. Legislative jurisdiction is the power of a sovereign (here, the United

41. 660 F.3d 108 (2d Cir. 2011).

42. *See Al Kassar*, 660 F.3d at 115–16.

43. *Id.*

44. *Id.* at 116–17.

45. 905 F.2d 245 (9th Cir. 1990).

46. *Al Kassar*, 660 F.3d at 118 (quoting *Davis*, 905 F.2d at 248–49).

47. *See e.g.*, United States v. Mohammad-Omar, 323 F. App'x 259, 261 (4th Cir. 2009) (applying *Davis* standard); *see also* United States v. Ayesh, 762 F. Supp. 2d 832, 841–42 (E.D. Va. 2011) (same), *aff'd*, 702 F.3d 162 (4th Cir. 2012); United States v. Shahani-Jahromi, 286 F. Supp. 2d 723, 727–28 (E.D. Va. 2003) (same). *But see* United States v. Brehm, 691 F.3d 547, 552–54 (4th Cir. 2012) (not following prior Fourth Circuit law on this point).

48. *See e.g.*, United States v. Zakharov, 468 F.3d 1171, 1177 (9th Cir. 2006). To be sure, *Davis* has not been followed everywhere. In the D.C. Circuit, for example, the question whether a "nexus" is required has not yet been reached and resolved. *See* United States v. Ali, 718 F.3d 929, 943–44 (D.C. Cir. 2013). And some other courts have suggested that due process does not require a "nexus" to the United States. Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 359–75 (2012). But most of these cases come out of circuits that handle only a small portion of major extraterritorial prosecutions. And, in any event, most of these cases require something quite a bit like a "nexus," though not in so many words. These cases generally look to international law, and international law in this area "presupposes a nexus." *Id.* at 380.

States) to prescribe the substantive rules that reach certain conduct.[49] Criminal legislative jurisdiction is established if a criminal statute reaches certain conduct and does not exceed the constitutional limit on legislative jurisdiction—such as the limits established by the extraterritorial due process doctrine, limits that are captured in the notion of a "nexus."[50]

The extraterritorial due process doctrine has been in place now for years, limiting virtually every extraterritorial prosecution.[51] But for all its ubiquity, the doctrine's impact can be hard to see. Courts have struck down only one prosecution for noncompliance with it.[52] But this does not mean the doctrine does not do important work. The extraterritorial due process doctrine is no surprise hurdle, an impediment that unexpectedly looms up at the last minute. Prosecutors know about the doctrine. If they believe that they can satisfy its strictures by showing some connection between the defendant and the United States, they may go forward with a case. And if they do not, they will not indict, and accordingly no effort will be made to bring the defendant to the United States. There is, after all, no compulsion to mount an extraterritorial prosecution.[53] And no prosecutor wants to charge a defendant and bring him to the United States for prosecution only to have the case dismissed.[54] The practical impact of the extraterritorial due process doctrine is not mainly felt in cases that are dismissed pursuant to it. It is felt in cases that are never brought—and that impact is no less important for being hard to see.

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49. Restatement (Third) of the Foreign Relations Law of the United States § 401(a) (Am. Law Inst. 1987).

50. The extraterritorial due process doctrine is *not* concerned with judicial jurisdiction. Judicial jurisdiction is about the power of a sovereign's courts to adjudicate a given case. *See id.* § 401(b). Judicial jurisdiction is generally thought to be established in criminal cases by the simple fact that the defendant is physically present before the court. *See infra* note 216 and accompanying text.

51. The doctrine may not apply to piracy cases. *E.g.*, United States v. Shi, 525 F.3d 709, 723–724 (9th Cir. 2008). But those cases are rare, and sui generis. W.E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners*, Brit. Y.B. Int'l L., vol. 6, 1925, at 45 ("Piracy stands on such an exceptional basis that it throws no light on the question of penal jurisdiction generally."). Moreover, the doctrine may not apply to cases involving conduct on "stateless" ships on the high seas. *E.g.*, United States v. Juda, 46 F.3d 961, 966–67 (9th Cir. 1995). But, again, those are rare. This Article does not address these classes of cases, and it does not address "stings"—undercover investigations in which government agents, it is sometimes charged, function as agents provocateur. Those, too, raise their own issues.

52. *See* United States v. Perlaza, 439 F.3d 1149, 1169 (9th Cir. 2006).

53. *Cf.* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2566–67 (2004) (contrasting crimes, like locally committed murders, that are "mandatory" and must be pursued, with discretionary investigations that federal prosecutors, "free agents," are able to select and pursue).

54. *Cf.* Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 Me. L. Rev. 131, 141 (2010) (describing "political traction" of claim that Guantánamo detainees should not be brought to the United States for trial because of acquittal risk).

D. *The Theory of the Extraterritorial Due Process Doctrine*

But what is the underlying theory of the extraterritorial due process doctrine? The cases do not supply a ready answer. The Second Circuit first articulated the "nexus" standard in *United States v. Yousef*; but it did so without explanation, based solely on citation to the Ninth Circuit's *Davis* decision.[55] *Davis*, in turn, tersely cited another Ninth Circuit case,[56] which simply cited three other cases.[57] Two of those cases do not mention due process.[58] And one of the cases said that the question whether U.S. criminal law applies abroad "would appear to have no constitutional implications."[59]

But the case law's silence is not surprising in the end. The Supreme Court has not weighed in on whether due process limits the reach of extraterritorial legislative jurisdiction in *criminal* cases. But the Court has reached related questions in *civil* cases. The leading case is *Allstate Insurance Co. v. Hague*,[60] a tort action that concerned a Wisconsin motorcycle accident. The question was whether Minnesota tort law could be applied extraterritorially—across state lines—to control resolution of claims flowing from the Wisconsin accident.[61] To comport with due process, the Supreme Court established the standard of a "significant contact or significant aggregation of contacts, creating state interests," so that application of Minnesota's law to the contract dispute would be "neither arbitrary nor fundamentally unfair."[62]

Allstate and its progeny seem very clearly to undergird the extraterritorial due process doctrine.[63] First, there are unmissable overlaps between due process limits on civil legislative jurisdiction (as in *Allstate*) and due process limits on criminal legislative jurisdiction (as in the extraterritorial due process doctrine). *Allstate* requires that the application of substantive law not be

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55. 327 F.3d 56, 111 (2d Cir. 2003) (citing United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990)).

56. United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990) (citing United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987)).

57. United States v. Peterson, 812 F.2d 486, 493–94 (9th Cir. 1987) (first citing United States v. Marino-Garcia, 679 F.2d 1373, 1378 n.4 (11th Cir. 1982); then citing United States v. Baker, 609 F.2d 134 (5th Cir. 1980); and then citing United States v. Pizzarusso, 388 F.2d 8, 10–11 (2d Cir. 1968)).

58. *See* United States v. Marino-Garcia, 679 F.2d 1373, 1378 n.4 (11th Cir. 1982); United States v. Pizzarusso, 388 F.2d 8, 10–11 (2d Cir. 1968).

59. United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980).

60. 449 U.S. 302, 305 (1981) (plurality opinion).

61. *Allstate*, 449 U.S. at 304, 307–08.

62. *Id.* at 312–13.

63. *See* United States v. Shahani-Jahromi, 286 F. Supp. 2d 723, 727–28 (E.D. Va. 2003) (noting similarity between the *Davis* "nexus" standard and *Allstate*). *But cf.* United States v. Ali, 718 F.3d 929, 943–44 (D.C. Cir. 2013) (rejecting the defendant's analogies to personal jurisdiction jurisprudence while suggesting that courts have sometimes borrowed personal jurisdiction language in addressing extraterritorial due process claims).

"arbitrary" or "fundamentally unfair"[64]—and so does *Davis*.[65] *Allstate* requires some connection between the sovereign that seeks to apply its law extraterritorially, and the conduct that is being regulated: "significant contact[s]."[66] And *Davis*, under the banner of "sufficient nexus," requires much the same thing.[67]

More fundamentally, there is a deep structural similarity between the factual scenarios of *Allstate* and *Davis*—between application of state law (Minnesota tort law) across borders (into Wisconsin), and the application of federal law (criminal law) across borders (internationally). Reasoning from this similarity, Professors Brilmayer and Norchi argue that there is no satisfying reason why due process limits on the reach of state civil law should not be understood to also limit the reach of federal law, civil and criminal.[68] Their trailblazing article, *Extraterritoriality*, was present at the creation. *Extraterritoriality* applauded *Davis*.[69] And *Extraterritoriality* was cited in the opinion that enshrined *Davis* as Second Circuit law.[70]

II. Against Structure

As set out above, well-established due process limits on state civil legislative jurisdiction (as in *Allstate*) form the basis for due process limits on federal criminal legislative jurisdiction (as in *Davis*)—and the bridge from state civil cases to federal criminal cases was apparently built in part on the strength of *Extraterritoriality*. But this Part argues that this civil-to-criminal argument is not fully persuasive at a theoretical level. It is not right, as *Extraterritoriality* argues, that there are no bases for distinguishing between the relevant types of cases, between state civil cases and federal criminal cases.

To begin unpacking these arguments, note that there is "universal[ ]" agreement that, in civil cases like *Allstate*, two underlying concerns animate the imposition of constitutional limits on extraterritorial legislative jurisdiction.[71] The first is preventing unfairness to the defendant. Applying Minnesota tort law to a Wisconsin motorcycle accident may be unfair to the defendant. And the second is avoiding friction between state governments. Cross-border application of Minnesota law can cause domestic friction, between one state and another; Wisconsin might resent application of Minnesota law to an accident that happened in Wisconsin. And in some cases,

64. *Allstate*, 449 U.S. at 313.

65. United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

66. *Allstate*, 449 U.S. at 313.

67. *Davis*, 905 F.2d at 248–49.

68. *See* Brilmayer & Norchi, *supra* note 5, at 1224–39.

69. *Id.* at 1253.

70. United States v. Yousef, 327 F.3d 56, 111 n.45 (2d Cir. 2003).

71. Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. Rev. 651, 651–53 (1987) (collecting numerous references); *accord* Willis L.M. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1589 (1978).

cross-border application of state law might cause international friction between a state and a foreign country; Canada, for example, might resent application of Michigan law to a motorcycle accident that happened in Toronto. This Article refers to the problem of domestic or international intergovernmental friction as a "structural concern."

These two concerns, fairness concerns and structural concerns, together supply the underlying justification for imposing due process limits on extraterritorial legislative jurisdiction in *state civil* cases. But this Part demonstrates that structural concerns cannot form part of the basis for due process limits on extraterritorial legislative jurisdiction in *federal criminal* cases.

A. *Internal Limits: Article I and* Graham

Start with Professor Tribe's distinction between "internal" and "external" limits on an entity's power.[72] An internal limit "inheres in the definition of the power," while an external limit is imposed on a power from outside of it, limiting the scope that the power would otherwise have.[73]

For example, an entity might be granted the power to "operate nonsegregated schools," in which case its ability to run segregated schools is internally limited—by the terms themselves of the grant of power. Alternatively, another entity might be granted the power to "operate schools." This grant of power does not itself prevent the entity from running segregated schools. This entity's ability to run segregated schools would be limited, if at all, only externally—by a later-enacted statute, for example, which is external to the grant of power itself.

External and internal limits are different strategies for limiting an entity's power, and in the U.S. constitutional system, each kind of limit is classically associated with a different kind of entity. States are thought of as entities with virtually no internal limits. They have broad "police power"—to zone property or establish hospitals or punish muggings.[74] Rather than being internally constrained, limits on state power are typically of the "external" sort.[75] The Clean Water Act[76] is imposed from the outside, to limit broad preexisting state power with respect to land use.[77] Each state has wide

72. 1 Laurence H. Tribe, American Constitutional Law 794–95 (3d ed. 2000).

73. Richard Primus, *The Limits of Enumeration*, 124 Yale L.J. 576, 578 (2014) (explaining Tribe's dichotomy).

74. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (describing the "general power of governing, possessed by the States . . . as the 'police power,'" and noting that, pursuant to this power, states "can and do perform many of the vital functions of modern government," including policing, education, and zoning).

75. *E.g.*, *id.* ("The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act.").

76. 33 U.S.C. §§ 1251–1387 (2012).

77. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (holding that the Clean Water Act preempts state law that impedes federal efforts to eliminate water pollution or interferes with its chosen methods of doing so).

discretion to set economic policy, but the Dormant Commerce Clause is externally imposed, to limit the state's otherwise-extant power to take protectionist measures.[78]

Federal power, by contrast, is characterized by internal limits. This is what it means to say that the federal government is a government of enumerated powers.[79] Federal power is "defined[ ] and limited"[80] on the front end—from the get-go, under the very terms under which the power is itself first granted. Built into the federal grant of Article I power to "establish a[ ] uniform Rule of Naturalization"[81] is a requirement that immigration laws be "uniform." The Article I power to "regulate Commerce"[82] is limited by its own terms to activities that, in some sense, concern "Commerce."

There is, in short, a basic and familiar constitutional typology: external limits constrain state power, and internal limits constrain federal power.[83] And that is telling here. Structural concerns are about keeping power, state or federal, in its proper lanes (whatever those lanes might be). How to accomplish this? State power is not generally checked by internal limits—indeed, in most circumstances it is not even clear that such limits would be reasonably available. Therefore, to keep state power in its appropriate lanes, there has always been a turn to external limits. The Clean Water Act and the Dormant Commerce Clause are examples, as are the due process limits on state legislative jurisdiction[84] (and state judicial jurisdiction[85]) that are such a well-established part of constitutional law.

But federal power is generally checked by Article I internal limits, and there is, accordingly, no similar need to reach for an external limit like due process. Think of *United States v. Lopez*,[86] for example. In *Lopez*, the Supreme Court struck down a criminal statute because it was said to press out beyond the horizon of the Article I power (the Commerce Clause) that Congress had relied on to pass it.[87] *Lopez* curbed federal legislative jurisdiction by reference to internal limits (the scope of the Commerce Clause) and not by the imposition of external limits (like due process, which no one even mentioned). This is typical. Federal courts routinely test the scope of federal legislative jurisdiction against the scope of the Article I power under which

78. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624–25 (1978) (establishing "a *per se* rule" invalidating "simple economic protectionism" by states under the Dormant Commerce Clause).

79. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2577–78 (providing a history of this idea).

80. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

81. U.S. Const. art. I, § 8, cl. 4.

82. *Id.* cl. 3.

83. *See, e.g.*, *Sebelius*, 132 S. Ct at 2578.

84. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion).

85. Int'l Shoe Co. v. Washington, 326 U.S. 310, 315–16 (1945).

86. 514 U.S. 549 (1995).

87. *Lopez*, 514 U.S. at 567–68.

Congress passed the legislation in question—without reference to due process.[88]

And this is as much the case for domestic federal statutes (as in *Lopez*) as for extraterritorial federal statutes. Consider, for example, the Maritime Drug Law Enforcement Act (MDLEA), which permits federal narcotics prosecutions of people caught on non-U.S. ships even if they are thousands of miles away from the United States.[89] The Act is a bread-and-butter law-enforcement tool, especially in Florida, where it is often used to charge the crews of boats stopped by the Coast Guard in the Caribbean.[90] But in 2012, in *United States v. Bellaizac-Hurtado*,[91] the Eleventh Circuit, which includes Florida, vacated a series of MDLEA convictions on purely internal limits grounds—because the MDLEA exceeded Congress's Article I power under the Law of Nations Clause.[92] This approach is typical: courts routinely measure the scope of legislative jurisdiction in the context of extraterritorial federal prosecutions against the reach of federal Article I powers.[93]

This leads to a crucial point: whatever role structural concerns play with respect to due process limits on state law, there is no reason to think that structural concerns need to play that same role with respect to due process limits on federal law. This is because, when it comes to federal law, structural concerns are *already* being addressed—the way they always have been, without due process (or other external limits) being brought to bear, simply by considering, as in *Lopez* or *Bellaizac-Hurtado*, the internal limits on federal power set out in Article I.[94]

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88. *E.g.*, United States v. Comstock, 560 U.S. 126 (2010); Sabri v. United States, 541 U.S. 600 (2004); United States v. Morrison, 529 U.S. 598 (2000).

89. 46 U.S.C. §§ 70501–70508 (2012).

90. Kontorovich, *supra* note 9, at 1193.

91. 700 F.3d 1245 (11th Cir. 2012).

92. *Bellaizac-Hurtado*, 700 F.3d at 1249–58 (construing the Law of Nations Clause, U.S. CONST. art. I, § 8, cl. 10). The other circuit that sees frequent MDLEA prosecutions is the First, which includes Puerto Rico. The First Circuit seems poised to rein in the MDLEA on internal limits grounds. One influential First Circuit judge has pressed that position in a lengthy dissent. United States v. Cardales-Luna, 632 F.3d 731, 739–51 (1st Cir. 2011) (Torruella, J., dissenting). The "force[ ]" of this position has been acknowledged by the First Circuit. *Id.* at 737 (majority opinion). But a case that presents the issue in a de novo procedural posture has not yet come up. *See* United States v. Nueci-Peña, 711 F.3d 191, 198 (1st Cir. 2013); *Cardales-Luna*, 632 F.3d at 737.

93. *E.g.*, United States v. Campbell, 743 F.3d 802, 810 (11th Cir. 2014) (measuring reach of extraterritorial criminal statute against scope of Article I power under Piracies and Felonies Clause); United States v. Brehm, 691 F.3d 547, 551 n.4 (4th Cir. 2012) (same, Raise and Support Armies Clause); United States v. Pendleton, 658 F.3d 299, 307–08 (3d Cir. 2011) (same, Foreign Commerce Clause); United States v. Belfast, 611 F.3d 783, 804–09 (11th Cir. 2010) (same, Necessary and Proper Clause); United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006) (same, Foreign Commerce Clause); United States v. Bredimus, 352 F.3d 200, 204–08 (5th Cir. 2003); (same, Foreign Commerce Clause); *see also* United States v. Yunis, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988) (striking down various extraterritorial hijacking charges as beyond Congress's Article I powers).

94. Brilmayer and Norchi argue that there is no reason why state and federal law should be treated differently from the perspective of due process limits on legislative jurisdiction.

And the argument can be pressed further. Building on *Graham v. Connor*, the Supreme Court has held that when "a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' "[95] Under *Graham*, that an "explicit textual source" (say, the Law of Nations Clause of Article I) speaks directly to the structural concerns that impact the extraterritorial reach of federal power means that the "generalized notion" of due process cannot be invoked to deal with those same structural concerns. Because Article I does structural work, due process cannot be pressed into service to do that same work.[96]

Moreover, it is clear that the spirit of *Graham* very much applies here. Some have thought that the Supreme Court's jurisprudence is too permissive such that Article I, as currently interpreted, does not limit federal legislative jurisdiction tightly enough.[97] That concern certainly seems to have influenced the lower courts in imposing due process checks on extraterritorial prosecutions.[98] But it is one thing to argue that due process should be poured into a given area because, otherwise, that area might be left empty—

Brilmayer & Norchi, *supra* note 5, at 1224–40. But the argument in the text is one such reason. That external limits (like due process) are necessary to curb state law does not mean that they are needed for curbing federal law—where the bounds of legislative jurisdiction are *already* policed, by the internal limits of Article I.

95. Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)); *accord* County of Sacramento v. Lewis *ex rel.* Estate of Lewis 523 U.S. 833, 842 (1998).

96. Graham v. Connor, 490 U.S. 386, 395 (1989). As a doctrinal matter, this argument is not free from doubt. For example, the Supreme Court has not yet explained whether *Graham* applies when the "explicit textual source" is Article I, not a constitutional amendment—though it is hard to see why it should not. *See* United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) (describing *Graham* as applying to "specific constitutional *provision[s]*, such as the Fourth or Eighth Amendment[s]" (emphasis added)). Moreover, the Court has not said whether *Graham* applies only as a counterweight to the expansiveness of substantive due process—in which case it might not apply to due process checks on legislative jurisdiction. But *Graham* does not seem confined only to substantive due process. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 50–51 (1993) (declining to apply *Graham* in a procedural Due Process case—but not suggesting that the principle does not apply, as a categorical matter, in such cases). Rather, *Graham* appears to be an instantiation of the idea that the specific trumps the general, *see* Turner v. Rogers, 131 S. Ct. 2507, 2522 (2011) (Thomas, J., dissenting) (suggesting as much for four Justices), in which case it should apply in all Due Process contexts.

97. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (arguing that the Article I commerce power has been too permissively construed by the Supreme Court); *cf.* Bond v. United States, 134 S. Ct. 2077, 2098–3012 (2014) (Scalia, J., concurring) (arguing that Article I Necessary and Proper Clause powers have been construed too permissively by the Supreme Court).

98. For example, Judge Torruella's concerns about the permissiveness of Article I, *see, e.g.*, United States v. Cardales-Luna, 632 F.3d 731, 739–51 (1st Cir. 2011) (Torruella, J., dissenting); United States v. Angulo-Hernández, 565 F.3d 2, 20 (1st Cir. 2009) (Torruella, J., concurring in part and dissenting in part), appear to have led him toward embracing due process limits on federal legislative jurisdiction. *See Angulo-Hernández*, 632 F.3d at 19.

a law-free zone. It is another thing for the lower courts to import due process into an area because of a sense that the law that *already* occupies the space, that the Supreme Court has laid down, is insufficiently protective. The first motive seems permissible.[99] The second is surely not, and that motive is precisely the one that *Graham* nips in the bud.[100]

B. *Criminal Law and the Popular Branches*

As set out above, when it comes to federal law, Article I already addresses structural concerns, so there is no need to look to due process to address them—indeed, under *Graham*, it would be improper to do so.[101]

These arguments explain why structural concerns should not, in general, be understood to animate due process limits on federal law. In this Section, I develop more particularized arguments that point in the same direction—that explain why structural concerns should not be understood to undergird due process limits on federal *criminal* law, let alone due process limits on federal criminal law that is applied *extraterritorially*.

Domestic and international cases involve different structural concerns. In the domestic context (as in *Allstate*, when Minnesota law reached into Wisconsin), the structural concerns that due process addresses are purely of an interstate nature.[102] They are a matter of "horizontal federalism"—of keeping the states of the union in their proper lanes vis-à-vis each other.[103] In the international context (as in *Home Insurance Co. v. Dick*, when Texas

99. *Lewis*, 523 U.S. at 843–45 (suggesting it is).

100. The Supreme Court, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–18 (1936), made the "remarkable claim that the [federal] foreign affairs powers are inherent and not dependent on enumeration [in the Constitution]." David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1906 n.347 (1998). This might suggest that the idea of "internal limits" developed in the text has no traction here, because federal extraterritorial power is not limited by the enumerated powers of Article I. But whatever might generally be said about it, *Curtiss-Wright* has been rejected in this context across the board. The courts have rejected it—testing extraterritorial statutes against the bounds of particular Article I enumerated powers, not an "inherent" powers concept. *See supra* note 93. Congress, too: extraterritorial criminal statutes have been enacted based on enumerated Article I powers, not "inherent" powers. *See, e.g.*, United States v. Brehm, 691 F.3d 547, 551 n.4 (4th Cir. 2012) (explaining that the House cited several Article I justifications for the passage of the Military Extraterritorial Jurisdiction Act); United States v. Pendleton, 658 F.3d 299, 302 n.1 (3d Cir. 2011) (explaining that the House based its authority to enact the Sex Tourism Prohibition Improvement Act of 2002 on the Commerce Clause of Article I); Kent, *supra* note 9, at 861–64 (detailing a number of recent congressional invocations of the Law of Nations Clause of Article I to support the enactment of various pieces of legislation). And the executive has defended extraterritorial statutes based on the reach of specific Article I powers, not based on "inherent" power; that is clear from the reports of the cases collected above. *See supra* note 93 and accompanying text.

101. *See supra* notes 94–96 and accompanying text.

102. *See supra* notes 60–61 and accompanying text.

103. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008) (describing horizontal federalism).

law reached into Mexico),[104] the structural concerns that due process addresses have nothing to do with horizontal federalism. Rather, they relate to the relationship between a state (say Texas) and a foreign government (say Mexico).[105]

Controlling intergovernmental friction between states and foreign governments is not a relatively major concern of the Constitution; it is not on par with the Constitution's concern for controlling friction between the states. For example, New York must give full faith and credit to the judgments of Connecticut[106] but not to the judgments of Canada or China.[107] And this asymmetry is not particular to full faith and credit. Numerous constitutional provisions "are designed to foster national unity and to move interstate relations away from the international model," to "forbid[ ]" the states from merely "treat[ing] each other like foreign countries."[108] But the Constitution generally says very little about "the international model" *itself*, about how states are to "treat[ ] . . . foreign countries."

But if the Constitution has relatively less to say about state-foreign relations, it is closely focused on state-federal relations. The federal government—not the states—is in charge of the nation's foreign relations.[109] The Constitution restrains the states internationally to protect this federal primacy, to leave ample room for the federal government to control the country's external affairs.[110]

And this dynamic is in play with respect to due process. Due process limits on state assertions of jurisdiction in the international realm are based in substantial measure on the potential impact that such assertions of jurisdiction may have on the federal government's ability to control the nation's external relations.[111]

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104. 281 U.S. 397, 407–08 (1930).

105. *See Dick*, 281 U.S. at 407–08.

106. U.S. Const. art. IV, §1; Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) ("Regarding judgments . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

107. Donald Earl Childress III, *When* Erie *Goes International*, 105 Nw. U. L. Rev. 1531, 1552 n.161 (2011).

108. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 259–60 (1992).

109. United States v. Belmont, 301 U.S. 324, 330 (1937); Anthony J. Bellia Jr. & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 Notre Dame L. Rev. 1795, 1801–02 (2010); *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 383–86 (2000).

110. *Garamendi*, 539 U.S. at 413; *Crosby*, 530 U.S. at 371–74; *see also, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 450–51 (1979) (curbing international reach of state law to permit the nation to "speak with one voice" abroad).

111. *E.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (noting that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements" by the federal government) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 2, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-865), 2013 WL 3377321); Asahi Metal Indus. Co. v.

In sum, when state law is applied internationally, constitutional law—including due process—is animated by structural concerns. But those structural concerns are less a general vision of the states' proper relationship to foreign countries, and more a matter of ensuring that state actions internationally do not impinge on the federal government's control of the nation's external affairs.

But this structural concern with overinvolvement in foreign affairs bears no weight when we move from state to federal law. While constitutional law constrains state interference with the nation's external relations, there is no concomitant concern for federal "interference" with external relations. After all, the federal government is *supposed* to be in charge of external relations.[112] When state law reaches into the international arena, there is no reason to think that it reflects the preferences of the government in charge of such matters, the federal government. But when *federal* law reaches internationally, we can be sure that at least one of the federal popular branches considered such a possibility. Congress necessarily wrote and approved the substance of the federal law. And Congress must have intended the federal law to be applied abroad—otherwise the law cannot apply.[113] From the perspective of structural concerns, due process limits on state law in the international realm are principally designed to ensure that the federal government controls the nation's external relations. But that goal cannot be transposed to a rationale for due process limits on federal law.

The point is sharper yet when the federal law in question is federal *criminal* law. When federal criminal law is applied abroad, it is not at the behest of a private plaintiff pursuing her own litigation interests, whatever the results on U.S. foreign relations might be. Rather, federal criminal law is applied at the behest of the federal executive branch—and that makes all the difference. It is one thing for courts to worry about impacts on international relations when private plaintiffs bring suit. In such private suits, someone needs to guard the foreign policy interests of the United States.[114] And as between a private plaintiff and a court, the court is clearly better suited and due process is a tool at hand. But there is no reason to think that courts are better positioned than the federal executive branch, acting through its prosecutors, to make decisions about structural concerns, about what might upset

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Superior Court, 480 U.S. 102, 115 (1987) (reversing state assertion of jurisdiction and noting that a "careful inquiry" is necessary, one that assesses, among other things, "the Federal Government's interest in its foreign relations policies").

112. *E.g.*, *Garamendi*, 539 U.S. at 413 (describing "the Constitution's allocation of the foreign relations power to the National Government").

113. *E.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) ("It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

114. *Cf.* Doe VII v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (describing recent objections by seven countries to extraterritorial application of a particular federal statute at the behest of private plaintiffs).

the fine balances of give and take that mark the international system or what might constitute an overreach in the context of it.[115]

Consider, for example, the Supreme Court's 2005 decision in *Pasquantino v. United States*,[116] which upheld a federal fraud prosecution that was based on the allegation that the defendants had deprived a foreign government (Canada) of tax revenue by engaging in liquor smuggling. The *Pasquantino* Court emphasized that private suits are distinct from "a criminal prosecution brought by the United States in its sovereign capacity."[117] And it rejected the defendants' argument that the prosecution would cause "international friction":

> This action was brought by the Executive to enforce a statute passed by Congress. In our system of government, the Executive is the "sole organ of the federal government in the field of international relations," and has ample authority and competence to manage "the relations between the foreign state and its own citizens" and to avoid "embarass[ing] its neighbor[s]" . . . . . [W]e may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. . . . The greater danger, in fact, would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, concerns that we have "neither aptitude, facilities nor responsibility" to evaluate.[118]

This leaves very little room, if any, for courts to disapprove of extraterritorial prosecutions because of a sense that they might cause intergovernmental frictions between the United States and a foreign country.

And *Pasquantino* applies with greater force yet to the sorts of extraterritorial prosecutions we have been considering in this Article. It is tautological that the federal prosecutors who handled the *Pasquantino* liquor-smuggling prosecution were acting for the federal executive branch.[119] But it is little more than that. There was no suggestion in *Pasquantino*, save in a formal

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115. It is telling that when a private plaintiff's suit might raise foreign policy concerns, the Supreme Court has strongly suggested that the courts should look to whatever views about the litigation that the federal executive might be willing to express. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004); *cf.* Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004) (describing State Department's filing of "statements of interest"). In a similar vein, the Court has spoken of the need for "judicial caution" when it comes to creating a private right of action under a federal statute—in part because creating such a right of action is tantamount "to permit[ing] enforcement [by a private plaintiff] without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 725–27.

116. 544 U.S. 349 (2005).

117. *Pasquantino*, 544 U.S. at 362.

118. *Id.* at 369 (citations omitted) (first quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); then quoting Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring); and then quoting Chi. & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948)).

119. Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 123 (2d Cir. 2001) ("When the United States prosecutes a criminal action, the United States Attorney acts in the interest of the United States . . . .").

sense, that the prosecutors' work affirmatively reflected the nation's foreign policy preferences. Indeed, if the *Pasquantino* prosecutors *had* been in touch with senior political figures about foreign policy matters, that would have been deeply unusual given the strict separation that is supposed to exist between the Department of Justice and other parts of the federal government.[120]

But these norms of deep separation do not apply with full force in major extraterritorial prosecutions.[121] With respect to one African terror leader, for example, there were dozens of meetings to decide whether to mount an extraterritorial prosecution.[122] The meetings involved the Department of Justice.[123] But the meetings were held at the White House, and some of the most active participants seem to have been Pentagon and State Department officials, and two of the President's most senior staffers.[124]

As the Supreme Court suggested in *Pasquantino*, a liquor-smuggling prosecution merits deference as the executive's foreign policy choice.[125] It follows that more deference should be accorded when the United States mounts a major extraterritorial prosecution, and the actual federal foreign policy apparatus (including the President's staff) is involved—and not just career Department of Justice prosecutors who have been, for good reason, intentionally hived off from the rest of the federal government. Major extraterritorial prosecutions are not like state law reaching abroad: potential impediments to the federal executive making foreign policy. They *are* the federal executive making foreign policy. That the former are curbed by due process does not suggest that the latter should be.[126]

And the argument goes further. U.S. foreign relations law routinely seeks to address structural concerns in the international context by limiting

120. *See, e.g.*, Memorandum from the Att'y General to Heads of Dep't Components and United States Att'ys [hereinafter Communications Memo] (Dec. 19, 2007), http://www.justice.gov/sites/default/files/ag/legacy/2008/04/15/ag-121907.pdf [http://perma.cc/D7LV-JEXH] (setting out Department of Justice-wide policies). It was, in part, contacts between prosecutors and senior executive branch figures that caused many observers to excoriate then-Attorney General Alberto Gonzales, and that led to his forced resignation. Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2190 & n.21 (2009). Gonzales's successor immediately restored traditional (tight) restrictions on communications between prosecutors and others in the executive branch. *See* Communications Memo, *supra*.

121. For example, then-Attorney General Mukasey's December 2007 memo explicitly specified that its strict limits on prosecutors' communication with the White House did not apply to national security matters. *See* Communications Memo, *supra* note 120, at 2.

122. DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 237–63 (2012).

123. *Id.*

124. *Id.*

125. Pasquantino v. United States, 544 U.S. 349, 369 (2005).

126. This conclusion is, again, directly at odds with *Extraterritoriality*'s claim that there is no basis for not transposing due process checks on state law into due process limits on federal law, including federal criminal law applied abroad. *See* Brilmayer & Norchi, *supra* note 5, at 1224–39.

the reach of federal law. But it generally does so only as a second-best option—because the popular branches, charged with running U.S. foreign relations, have not yet spoken.[127] Thus, for example, structural concerns are the basis for restraining federal law from reaching foreign sovereigns, under the sovereign immunity doctrine.[128] But the executive branch can eliminate a sovereign's immunity.[129] Structural concerns undergird the judicial presumption against extraterritoriality, but that presumption gives way when the popular branches say so.[130] Structural concerns prevent federal law from reaching the actions of other governments, under the act of state doctrine.[131] But Congress and the executive branch can together curb the act of state doctrine, as they have.[132] And structural concerns, grounded in international law, are a basis for curtailing the extraterritorial reach of federal law, especially in commercial contexts.[133] But the popular branches can override international law.[134] In sum, courts have long invoked structural concerns to limit the reach of federal law—but as a general matter only if the popular branches have not yet addressed those concerns. Once the popular branches *have* addressed these concerns, the courts' ideas about international friction are, at that point, no longer thought to be in play. This is because, as Justice Jackson explained, judgments about foreign policy are "political, not judicial"; they are not backward looking (like most legal decisions), but rather

127. *See generally* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395 (1999).

128. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) (describing the "comity" basis of *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 134, 136 (1812), as "the source of our foreign sovereign immunity jurisprudence").

129. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (collecting cases); *see also* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) ("The Executive Branch has not merely refrained from taking a position on this matter; to the contrary, by pursuing [the defendant's] capture and this prosecution, the Executive Branch has manifested its clear sentiment that [the defendant] should be denied head-of-state immunity.").

130. Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1664, 1668–69 (2013) ("The presumption against extraterritoriality guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.").

131. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity . . . .").

132. 22 U.S.C. § 2370(e)(2) (2012) (cutting back on the act of state doctrine by overruling the specific holding of a then-recent Supreme Court act of state doctrine decision, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)); S. Rep. No. 1188, at 24 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3829, 3852 (describing intent to do so).

133. *E.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979) (citing Timberlane Lumber Co. v. Bank of Am. Nat'l Trust, 549 F.2d 597, 614–15 (9th Cir. 1976)); *cf.* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798–99 (1993).

134. McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 21–22 (1963); The Paquete Habana, 175 U.S. 677, 700 (1900); The Nereide, 13 U.S. (9 Cranch) 388 (1815). It bears noting that international law obligations may continue to apply as a matter of international law even after being superseded by U.S. domestic law.

"involve large elements of prophecy."[135] "They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[136]

But due process limits on the international reach of federal law, if they are understood as predicated on structural concerns, would go a long way to undermining this architecture. As sketched out above, the settled understanding has generally been that constraints on federal law, to the extent that they are based on structural concerns, can be undone by the popular branches. But that would no longer be the case if those structural concerns were somehow thought to be constitutionalized, to be instantiated in due process itself.

To see the point, think of the United States' 1989 invasion of Panama. That invasion cost hundreds of lives and ended with Panamanian leader Manuel Noriega in custody in Florida, facing federal narcotics charges for conduct in Central America.[137] Now imagine that Noriega had invoked due process limits on federal legislative jurisdiction as a defense to the criminal charges against him. And imagine further that due process limits on the international reach of federal law were understood to be animated by structural concerns—by an understanding of what the United States' proper relationship is with other countries in the international system, by a sense of how much intergovernmental friction between the United States and other countries is too much. If that were the case, there would be prosecutions, if not Noriega's then others, in which the popular branches of the federal government would say "this is fine from a foreign relations/international friction perspective"; where the court would say the opposite—and the court's view would prevail, as an expression of constitutional law that trumps the contrary views of the popular branches.

Such a result would contradict centuries of long-established understandings reflected in the main lines of foreign relations law.[138] And it would require judges to enforce as law against the popular branches a particular theory of how international relations are supposed to work, whatever that theory might be—just as *Lochner* once required the courts to enforce a particular theory of economic and social justice.[139] Due process does not enshrine judges' ideas about the proper functioning of the international system any more than it "enact[ed] Mr. Herbert Spencer's Social Statics."[140] To

135. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

136. *Id.*

137. United States v. Noriega, 117 F.3d 1206, 1210–11 (11th Cir. 1997); *see also* JOHN LINDSAY-POLAND, EMPERORS IN THE JUNGLE: THE HIDDEN HISTORY OF THE U.S. IN PANAMA 118 (2003).

138. *See supra* text accompanying notes 127–136.

139. Lochner v. New York, 198 U.S. 45, 58–65 (1905).

140. *Id.* at 75 (Holmes, J., dissenting); *cf.* United States v. Angulo-Hernández, 565 F.3d 2, 20 (1st Cir. 2009) (Torruella, J., concurring in part and dissenting in part) (expressing concern about an extraterritorial federal prosecution because "[t]he United States cannot be the

again cite Justice Jackson, the "struggle" against "judicial supremacy"[141] will have been lost on an important front if due process is construed to give courts—and not the President and the Congress—the final say over what is or is not consistent with how the international system is supposed to work. That would be to cede control over important portions of our national life to unelected judges. And that would be an implication of deploying due process to limit federal law on the basis of international structural concerns—not the common-law constraints of foreign relations law that can be undone by the political branches; but the definitive constraints of constitutional law, that, in the end, trump them.

III. Fairness in Its Proper Place

Part II advanced the argument that structural concerns cannot form the basis for due process limits on extraterritorial application of federal criminal law. This is not the end of the matter, though, because a concern for fairness is the other pillar of due process checks on legislative jurisdiction.[142] But if due process is to limit prosecutions *solely* to protect against unfairness, then it of course follows that due process should be brought to bear only when, in fact, some unfairness is present. There would be no reason to apply the extraterritorial due process doctrine when the problem that it exists to solve (unfairness) is, simply, not there.[143]

But what is unfairness in this context? And how much unfairness is minimally sufficient to bring to bear the "nexus" test of the extraterritorial due process doctrine? Section III.A below answers the first question, and Section III.B answers the second one. The arguments developed in this Part suggest that the extraterritorial due process doctrine should be very substantially reformulated—Section III.C explains how.

A. *Actual-Conflict Cases and No-Conflict Cases*

In the context of due process limits on legislative jurisdiction in civil cases, fairness is a matter of protecting the defendant's expectations.[144] And expectations' domains are well-established—due process checks on legislative jurisdiction protect the defendant's expectations about the body of substantive law that is ultimately to control her conduct.[145]

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world's policeman," and "[i]f we continue to extend the natural borders of our national jurisdiction, we can expect others to do the same against us").

141. Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of Crisis in American Power Politics (1941).

142. *See supra* text accompanying note 71.

143. The extraterritorial due process doctrine, exemplified in *Davis*, requires a "nexus" to the United States. *See supra* text accompanying notes 45–48.

144. *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 317–18 (1981) (plurality opinion); *see also id.* at 331 (Stevens, J., concurring); *id.* at 337–38 (Powell, J., dissenting).

145. *E.g.*, Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 822 (1985) (reversing application of state substantive law because, "[w]hen considering fairness in this context, an important element is the expectation of the parties" and "[t]here is no indication that when the leases . . .

To begin analyzing how this particular concept of fairness translates here, imagine a U.S. prosecution of a Spanish citizen for actions she took in Spain—and two possible variants on that hypothetical prosecution.

First, the actions the defendant took in Spain might have been *lawful* under Spanish criminal law. In such a scenario, on the fundamental question whether certain conduct subjects the defendant to criminal liability, the potentially relevant bodies of criminal law directly conflict with each other. The defendant's actions were legal under Spanish law. But they were illegal under U.S. criminal law—which is how there can be a U.S. prosecution. This is an "actual-conflict case."[146]

Second, the actions the defendant took in Spain might have been *unlawful* under Spanish criminal law. In such a scenario, the potentially relevant bodies of criminal law are in harmony; they do not conflict. The defendant's actions were illegal under Spanish law, and they were also illegal under U.S. criminal law. I call this a "no-conflict case."

In the actual-conflict case, a U.S. prosecution profoundly upsets the defendant's expectations. The defendant expected that she was conforming her conduct to the law—Spanish law.[147] But, it turned out, she was breaking the law—U.S. criminal law. In the no-conflict case, a U.S. prosecution does not upset the defendant's expectations in this particular way. The defendant could not have expected that she was conforming her conduct to the law. Her conduct violated Spanish criminal law, regardless of whether it also violated U.S. criminal law.

In actual-conflict cases, the application of U.S. law very deeply upsets expectations. The defendant is surprised to know that her conduct is illegal, and is *also* surprised to learn that she is subject to U.S. law. In no-conflict cases, the defendant is not surprised that her conduct is illegal, *only* that she is subject to U.S. law. Actual-conflict cases involve relatively more unfairness; no-conflict cases involve relatively less.[148]

This actual conflict/no conflict typology is familiar. Indeed, assessments of whether there is a conflict between two potentially applicable bodies of

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were executed, the parties had any idea that Kansas law would control"); *Allstate*, 449 U.S. at 312–13 (noting that due process measures the constitutionality of applying "a State's substantive law").

146. As to the term "actual conflict," see *infra* note 149.

147. The background assumption is of course that people generally believe that their conduct is governed, at least, by the law of the place where they act.

148. The most pointed kind of actual conflict is one in which the defendant is prosecuted in the United States for actions that were not only lawful where she acted—but that local law required her to take. So far as I know, though, nothing like this has come up in an extraterritorial federal prosecution—though an analogous situation sometimes comes up in civil cases. *E.g.*, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958) (reversing dismissal of civil action for noncompliance with discovery order when complying with order would have required the plaintiff to violate Swiss criminal law).

substantive law are at the heart of the modern jurisprudence of civil legislative jurisdiction.[149]

B. *The Constitutional Necessity of a Threshold Conflict*

As we saw above, unfairness in the context of due process limits on legislative jurisdiction means the upending of a defendant's expectations about the substantive law that she thought would control her conduct.[150] This upending of expectations is especially pointed in an actual-conflict case. The defendant thought she was following the law and turns out to have been breaking it—and is now being prosecuted for that surprising law-breaking. There is little doubt that the extraterritorial due process doctrine should apply in a prosecution that involves an actual conflict—and that such a prosecution should therefore have to satisfy the doctrine's requirement of a "nexus" to the United States. The problem that the extraterritorial due process doctrine exists to solve (unfairness, in terms of upset expectations) is emphatically present in an actual-conflict case.

But no-conflict cases are different. The defendant knew that she was violating the criminal law, but did not know that, in addition to violating local criminal law, she was also violating U.S. criminal law. This is a less dramatic upending of expectations. The question, then, is this: If it is to be understood as based solely on fairness concerns, is there enough unfairness in the no-conflict scenario to justify application of the extraterritorial due process doctrine? This Section argues that the answer is largely "no." Section III.B.1 begins with due process limits on legislative jurisdiction in civil cases. Such limits, I show, are triggered only when there is an actual conflict—between one body of substantive law that might apply and another. Section III.B.2 argues that, before applying due process limits, it makes as much sense to require a threshold actual conflict in criminal cases as it does in civil cases.[151] Section III.B.3 goes further, explaining that there are stronger reasons to require an actual conflict in criminal cases than in civil ones. Section III.B.4 shows that requiring a threshold actual conflict would bring the extraterritorial due process doctrine into line with fair-warning law—a closely related due process doctrine that also requires an actual conflict, though not in so many words. Section III.B.5 broadens the argument, showing that due process protections should *also* be triggered when there is a "sentencing conflict"—a discrepancy between how a defendant is to be sentenced under U.S. law and how she might otherwise have been sentenced.

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149. In civil cases, a conflict between two bodies of substantive law has long been called an "actual conflict." Because I use a similar concept, to similar effect, with respect to criminal cases, I use that same term: actual conflict. Note that I am not the first person to analyze criminal cases with respect to actual conflicts: Professor Colangelo's important work has been trailblazing. Colangelo, *supra* note 12, at 1103–1109; Colangelo, *supra* note 13, at 165–74.

150. *See supra* Section III.A.

151. This civil-to-criminal analogy is not perfect. *See supra* Section I.B. But reasoning from civil cases to criminal ones makes sense in part because, as we saw above, the extraterritorial due process doctrine is *itself* apparently based on that analogy. *See supra* Section I.D.

1. Civil Cases: The Necessity of a Threshold Actual Conflict

The Supreme Court has principally developed its jurisprudence of due process limits on legislative jurisdiction in the choice-of-law context.[152] These are civil cases, in which the plaintiff seeks application of one body of substantive law and the defendant seeks application of another. These cases typically follow the same three-step analytic progression.

In the first step, the court determines whether the potentially applicable bodies of substantive law do, in fact, actually conflict with one another.[153] After determining that there is an actual conflict, the court tentatively selects which of the potentially applicable bodies of substantive law to apply.[154] The court then moves to the third and final stage of the analysis—determining whether it is permissible under due process for the body of substantive law that the court has tentatively selected to govern the dispute.[155]

It makes sense that due process should come last. Like any constitutional question, the issue of whether due process prohibits the application of a given body of law should be avoided if possible.[156] A litigant may erroneously imagine (or hope for) a difference between bodies of relevant law

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152. *See* Florey, *supra* note 12, at 1068–82.

153. Allstate Ins. Co. v. Stolarz, 613 N.E.2d 936, 937 (N.Y. 1993) ("The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved."); *accord, e.g.*, Teleglobe USA, Inc. v. BCE Inc. (*In re* Teleglobe Commc'ns Corp.), 493 F.3d 345, 358 (3d Cir. 2007) ("[T]he practice of the federal system and most states [is to] decide a choice-of-law dispute only when the proffered legal regimes actually conflict on a relevant point."); On Air Entm't Corp. v. Nat'l Indem. Co., 210 F.3d 146, 149 (3d Cir. 2000) ("[B]efore a choice of law question arises, there must actually be a conflict between the potentially applicable bodies of law."); *In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594, 605 n.2 (7th Cir. 1981) ("All laws must be carefully examined to determine that a conflict actually exists, under any choice-of-law theory, before application of the theory."); Pa. Emp., Benefit Tr. Fund v. Zeneca, Inc., 710 F. Supp. 2d 458, 466 (D. Del. 2010) ("Delaware's choice of law approach entails a two-pronged inquiry. First, it is necessary to compare the laws of the competing jurisdictions to determine whether the laws actually conflict on a relevant point."); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1847 (2006) ("By definition, conflicts jurisprudence emerges only where the substantive law of more than one state is potentially implicated by the events in controversy and . . . the underlying substantive laws of the competing states vary in some significant aspect."); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 821 (1993) (Scalia, J., dissenting) ("Where applicable foreign and domestic law provide *different* substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary." (emphasis added)).

154. *E.g.*, Booking v. Gen. Star Mgmt. Co., 254 F.3d 414, 419–23 (2d Cir. 2001) (determining that there is an "actual conflict," and then proceeding to a choice-of-law analysis); *Air Crash Disaster*, 644 F.2d at 605–08, 610–33 (same). This selection of substantive law is done based on the controlling choice-of-law rules. *See id.* at 610–33. These rules may be based on "territorial" considerations, for example, or they may derive from "interest analysis." *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1277–85 (1989).

155. Allstate Ins. Co. v. Hague, 449 U.S. 302, 307–13 (1981) (plurality opinion).

156. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) ("[W]e ought not to pass on questions of constitutionality . . . unless such [questions are] unavoidable."); Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass

when none exists. Comparison of the potentially applicable bodies of substantive law, right from the outset, may allow a court to dispose of the choice-of-law issue before having to reach the constitutional question that awaits at the end of the road. Resolving the first question (is there an actual conflict?) before the last question (is there a due process violation?) is thus a matter of prudence. But proceeding in that order is also legally required—because in the absence of an actual conflict, there can be no due process claim. Indeed, the Supreme Court has all but explicitly stated that rule. In *Phillips Petroleum*, one of the leading modern choice-of-law cases, Chief Justice Rehnquist framed the issue for eight Justices this way:

> Petitioner contends that total application of Kansas substantive law violated the constitutional limits on choice of law . . . . We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.[157]

As Justice Stevens put it, writing for himself: "[A]bsent any *conflict* of laws, in terms of the results they produce, the Due Process Clause simply has not been violated. . . . In this case it is perfectly clear that there has been no due process violation because this is a classic 'false conflicts' case."[158]

In short, all nine Justices in *Phillips Petroleum* agreed that simply being subjected to a certain body of substantive law cannot, standing alone, be the basis of a due process claim. Rather, there must be a "material," "results"-impacting difference between the body of law that was imposed and "any other law which could apply." This is an actual conflict, and it is not surprising that the Supreme Court required such a conflict as a threshold matter before a due process claim could be pressed.

To see why, consider *Allstate*. In that case, Ralph Hague had three car insurance policies, each with Allstate; each policy provided for a recovery up to $15,000.[159] Ralph Hague was killed in an accident, and his wife Lavinia Hague sued Allstate.[160] Lavinia Hague argued that Minnesota tort law was controlling, and that under Minnesota law the three $15,000 insurance policies could be "stacked," such that she could recover $45,000.[161] Allstate countered that Wisconsin tort law was controlling, that Wisconsin law prohibited stacking, and that, accordingly, the maximum recovery was $15,000.[162] For Allstate, the difference between application of Minnesota law and Wisconsin law was worth something: $30,000, the difference between

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upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

157. Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 816 (1985).

158. *Id.* at 837–38 (1985) (Stevens, J., concurring). In this context, a "false conflict" is the opposite of an "actual conflict." *See id.*

159. *Allstate*, 449 U.S. at 305.

160. *Id.*

161. *Id.*

162. *See id.* at 305–06.

what Allstate would pay out if Wisconsin tort law applied versus what Allstate would pay out if Minnesota tort law applied.[163]

But what if there was no actual conflict? If Minnesota and Wisconsin law *both* allowed for a $15,000 recovery, it would make no practical difference for Allstate which body of tort law applied to the case. The case would come out the same under either body of law. In the absence of an actual conflict, nothing would turn on whether Minnesota law or Wisconsin law applied. And in that circumstance, Allstate could hardly claim that application of one of those bodies of law was so unfair that its due process rights were violated.

The point can be transposed into doctrinal terms. Due process claims can go forward only if there is a threshold deprivation of property (or, in an appropriate case, of life or liberty).[164] In turn, due process property is, (1) an "entitlement" that (2) has "monetary value."[165] And this definition is dispositive. In the absence of an actual conflict, even if Allstate had an entitlement to application of Wisconsin law, that entitlement would have had no monetary value. Allstate would have been required to pay out the same $15,000 whether it received its entitlement (and Wisconsin law applied) or whether it was deprived of its entitlement (because Wisconsin law was displaced and Minnesota law applied). In the absence of an actual conflict, the entitlement would be worthless. An entitlement that lacks all "monetary value" is not property, and if property is not at stake in a lawsuit there can be no due process claim.[166]

Nor is the logic of requiring a threshold actual conflict even particular to due process. Constitutional claims generally require some sort of real-world injury before they can go forward.[167] But the court's application of the wrong body of substantive law does not typically injure anyone unless something practical turns on which body of law applies.[168]

Take ex post facto law as an example. In that context, the defendant is very much arguing that the court applied the wrong body of law—the court applied the new law in force at the time of trial, not the old law in force at

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163. *See id.*

164. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) (noting that this requirement applies in "every" case); *see also* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972).

165. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 766 (2005); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 431 (1982); Paul v. Davis, 424 U.S. 693, 709 (1976).

166. *See* sources cited *supra* note 165.

167. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

168. *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 126 (1989) (plurality opinion) (noting, in the context of a due process claim, that "[i]t is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration."); City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the [police] departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." (emphasis omitted)).

the time she acted. But in the ex post facto context, it is not generally enough that there be some sort of purely formal difference between these two bodies of law, old and new.[169] Rather, there must be a practical, bottom-line difference for the defendant,[170] and that is only logically possible if the old and new bodies of law are meaningfully different from each other—if there is between them what amounts to an actual conflict.

2. From Civil to Criminal

As we saw above, the extraterritorial due process doctrine must be grounded solely on a concern for fairness, generally understood as protecting against the upsetting of relevant expectations.[171] But expectations can only be upset when there is a discrepancy between baseline (what one expected would happen) and reality (what actually did happen)—in the case of legislative jurisdiction, a discrepancy between the substantive law that one expected would apply and the substantive law that did, in reality, apply.[172] If there is no actual conflict, then the only discrepancy between the expected body of substantive law and the applied body of substantive law is its source—in the example above, that one is Spanish substantive law and the other is U.S. substantive law.[173] But that formalistic distinction cannot amount to a constitutionally sufficient upsetting of expectations. *Phillips Petroleum* makes that clear.[174]

And there is no reason that the logic of *Phillips Petroleum* does not apply in criminal cases. In "every" case, due process has a role to play only after a threshold deprivation of life, liberty, or property.[175] But there can be no such deprivation unless we imagine that, but for the application of a particular body of substantive law, the defendant would have had more—more property, in a civil case like *Phillips Petroleum*, or more life or liberty, in a criminal case.

In short, just as a threshold actual conflict is required before a due process test is brought to bear with respect to civil legislative jurisdiction, so too a threshold actual conflict should generally be required before the due process nexus test applies to criminal legislative jurisdiction.

This point is underscored by the Supreme Court's reasoning in a now-obscure case, *Nielsen v. Oregon*.[176] In *Nielsen*, Washington and Oregon

169. Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

170. *See* Dobbert v. Florida, 432 U.S. 282, 294 (1977); *see also* Weaver v. Graham, 450 U.S. 24, 29 (1981); Malloy v. South Carolina, 237 U.S. 180, 183–84 (1915).

171. *See supra* Part II, Section III.A.

172. *See supra* Section III.B.1.

173. *See supra* Section III.A.

174. *See supra* Section III.B.1.

175. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999).

176. *See* 212 U.S. 315, 319–21 (1909).

shared jurisdiction over a river.[177] Oregon's laws criminalized certain conduct, Washington's did not.[178] This amounted to an actual conflict and the Supreme Court ultimately vacated the Oregon conviction.[179] The Court framed the question as follows:

> Where an act is . . . prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense . . . . [B]ut where as here the act is prohibited by one State and in terms authorized by the other, can the one state which prohibits, prosecute and punish for the act done within the territorial limits of the other?[180]

In the no-conflict scenario—"[w]here an act is . . . prohibited and punishable by the laws of both States"—it does not much matter which body of criminal law is applied ("the one first acquiring jurisdiction of the person may prosecute the offense"). But if there is an actual conflict—if "the act is prohibited by one State and in terms authorized by the other"—harder questions about extraterritoriality begin to crop up. Why is it immaterial, in the absence of an actual conflict, which body of law is applied? Another court explained, in a case involving shared criminal jurisdiction over a bridge, that if the defendant's "conduct was in violation of the laws of both states," he "is hardly in a position to charge any basic unfairness."[181] In short, in criminal cases, no less than in civil ones like *Phillips Petroleum*, it is the existence of an actual conflict that triggers searching inquiry into the scope of legislative jurisdiction.

This conclusion gathers added force when we consider the alternative. If a threshold actual conflict were required before due process could be brought to bear in civil cases under *Phillips Petroleum*, but not in criminal cases, the result would be that U.S. civil legislative jurisdiction would be broader than U.S. criminal legislative jurisdiction. This is because there would be a class of cases—no-conflict cases—in which due process limits the reach of criminal legislative jurisdiction, but does not limit the reach of civil legislative jurisdiction.

An example helps to show how this would happen. Imagine that a company in France intentionally spews toxins; the toxins are inhaled by a Mexican national who then comes to the United States for a business trip—at which point he gets sick and is hospitalized. And imagine further that the tort law and the criminal law of all relevant entities are in perfect harmony—with no actual conflicts between France, Mexico, or the United States.[182] Because, under *Phillips Petroleum*, due process checks U.S. civil legislative jurisdiction only when there are actual conflicts, U.S. tort law could

177. *Nielsen*, 212 U.S. at 316.

178. *Id.* at 316–17.

179. *Id.* at 321.

180. *Id.* at 320.

181. State v. Holden, 217 A.2d 132, 134 (N.J. 1966).

182. For these purposes, imagine that there is an applicable body of U.S. tort and criminal law.

be applied to the French company's actions—regardless of whether there is a nexus to the United States that would be sufficiently strong to satisfy due process. But if, by contrast, due process checked U.S. criminal legislative jurisdiction whether there is an actual conflict or not, U.S. criminal law could be applied to the French company's actions only if there were a nexus to the United States strong enough to satisfy due process.

This would amount to a deep divergence between the reach of legislative jurisdiction in criminal cases versus civil ones. But the reach of a sovereign's extraterritorial power to prescribe should not substantially vary depending on whether the sovereign is prescribing standards of conduct backed by civil remedies or by criminal sanctions. The underlying jurisdictional bases are the same.[183] "The principles governing [extraterritorial] jurisdiction to prescribe . . . apply to criminal as well as to civil regulation."[184] That is why the Supreme Court has directly analogized from the extent of Congress's extraterritorial criminal power to the extent of Congress's extraterritorial civil power.[185] That is why no one suggests that civil and criminal cases should be treated differently on a core question of extraterritorial legislative jurisdiction—whether Congress can reach into a foreign country and require a U.S. citizen living there to come back to the United States to testify.[186] And that is why one of the Supreme Court's major twentieth century precedents on the extraterritorial reach of criminal legislative jurisdiction, *Skiriotes v. Florida*,[187] was based principally on civil legislative jurisdiction decisions,[188] and

183. *Compare, e.g.*, United States v. Vasquez-Velasco, 15 F.3d 833, 840 (9th Cir. 1994) (criminal) *with* Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 76 (3d Cir. 1994) (civil).

184. Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. f (Am. Law Inst. 1987).

185. *See, e.g.*, Vermilya-Brown Co., Inc. v. Connell, 335 U.S. 377, 381 (1948).

186. In 1932, the Supreme Court upheld the issuance of a subpoena to compel the return of an American citizen to the United States for testimony in a criminal trial. Blackmer v. United States, 284 U.S. 421 (1932). The subpoena, issued under the Walsh Act, was held not to exceed the reach of federal legislative jurisdiction. In 1964, the Act was amended to allow the issuance of extraterritorial subpoenas to U.S. citizens in civil cases—and since then courts have closely examined whether Walsh Act subpoenas should issue in civil cases on numerous occasions. *E.g.*, Balk v. N.Y. Inst. of Tech., 974 F. Supp. 2d 147, 155 (E.D.N.Y. 2013); SEC v. Sabhlok, No. C 08-4238 CRB (JL), 2009 WL 3561523, at *4–5 (N.D. Cal. Oct. 30, 2009); Estate of Ungar v. Palestinian Auth., 412 F. Supp. 2d 328, 332 (S.D.N.Y. 2006); Klesch & Co. v. Liberty Media Corp., 217 F.R.D. 517, 523 (D. Colo. 2003). But none of these cases have even entertained the possibility that although Walsh Act subpoenas do not exceed legislative jurisdiction in criminal cases, as *Blackmer* held—such subpoenas might nonetheless exceed legislative jurisdiction in civil cases. Rather, the unyielding assumption is that the reach of criminal and civil legislative jurisdiction are co-terminus. This makes sense, because "in assessing whether an assertion of extraterritorial subpoena power violates the due process clause, the distinction between criminal and civil actions is not constitutionally significant." Rhonda Wasserman, *The Subpoena Power:* Pennoyer*'s Last Vestige*, 74 Minn. L. Rev. 37, 104 (1989).

187. 313 U.S. 69 (1941).

188. *Skiriotes*, 313 U.S. at 73, 77, 79 (first citing Cook v. Tait, 265 U.S. 47 (1924); then citing Old Dominion S.S. Co. v. Gilmore (*The Hamilton*), 207 U.S. 398 (1907); then citing Del Castillo v. McConnico, 168 U.S. 674 (1898); and then citing United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123 (1938)).

why *Skiriotes*, the criminal legislative jurisdiction case, has principally influenced civil legislative jurisdiction decisions.[189]

3. The Added Impetus for Actual Conflicts in Criminal Cases

Section III.B.1 argued that there must generally be a threshold actual conflict before due process is brought into play to check the reach of civil legislative jurisdiction, and Section III.B.2 showed that an actual conflict is required in criminal cases as well. This Section argues that the constitutional necessity of an actual conflict looms even larger in criminal cases than civil ones.

To see the argument, start with a puzzle. The constitutional necessity of a threshold actual conflict is a foundational point. But so far as I can tell, this point has never been mentioned. Why? Until very recently, all of the cases regarding due process limits on legislative jurisdiction have been civil, not criminal. And in civil cases, the point that the Constitution requires an actual conflict has no substantial practical impact—and is therefore very hard to see. This lack of a practical impact in civil cases flows from two sources.

The first is litigation incentives. Civil legislative jurisdiction cases are typically choice-of-law cases, and choice of law is a famously complicated area, with a bad reputation: "[A] dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."[190] Lawyers who want to raise a choice-of-law argument must initiate themselves into the field's considerable mysteries. That is costly[191] and a strong financial disincentive to raising pointless arguments. There is little reason to argue about whether Minnesota or Wisconsin tort law applies if, because there is no actual conflict, the case will turn out the same either way. This means that even if there were *not* a threshold constitutional requirement of an actual conflict, civil litigants would, in any event, be incentivized to raise choice-of-law arguments only if there were, indeed, an actual conflict.

Then there is doctrinal structure. Recall that in the first step of a choice-of-law analysis, state choice-of-law rules generally require the court to determine if there is an actual conflict. If there is no actual conflict, the analysis ends; the third stage of the analysis, the due process stage, is never reached. If there is an actual conflict in the first stage, the analysis can then proceed—eventually reaching the due process stage.[192] This means that a court undertakes a due process analysis (in the third stage) only because it already found

189. *E.g.*, Askew v. Am. Waterways Operators, Inc., 411 U.S. 325, 333 (1973); Alaska v. Arctic Maid, 366 U.S. 199, 203 (1961).

190. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

191. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 11–12 (1991) (describing choice-of-law litigation as "expensive and time-consuming").

192. *See supra* text accompanying notes 154–155.

an actual conflict (in the first stage); the threshold of actual conflict must necessarily have been crossed before there is any consideration of due process. This is why, in the choice-of-law context, it does not generally matter whether due process is self-consciously understood to require an actual conflict. An actual conflict is already required—independently, at the first stage of the analysis. If only by misdirection, the due process obligation of a threshold actual conflict is virtually always satisfied.

But these two factors, doctrinal structure and litigation incentives, do not do the same work in criminal cases. As to doctrinal structure, in criminal cases, no preliminary legal inquiry requires the existence of an actual conflict. Accordingly, in criminal cases the constitutional actual conflict cannot be satisfied indirectly, by virtue of an actual conflict being required by some other part of the law. Rather, in criminal cases, if due process is not itself understood as requiring an actual conflict, then no actual conflict will be required at any point.

Nor do litigation incentives function in criminal cases as they do in civil ones. As noted above, in civil cases litigation incentives help to ensure that, whatever the law's formal dictates might be, there is always an actual conflict. If Minnesota and Wisconsin tort law do not actually conflict, there is no practical upside in convincing a Minnesota judge that due process prevents application of Minnesota law. Because if the judge is convinced, she will then just apply Wisconsin law—which, by hypothesis, is in harmony with Minnesota law anyway. But things are different in a criminal case. Convincing the Minnesota judge that due process prevents application of Minnesota criminal law will not cause the judge to apply Wisconsin criminal law. Indeed, the Minnesota judge *cannot* apply Wisconsin criminal law.[193] If the Minnesota judge is convinced that due process prevents application of Minnesota criminal law, the case will not simply toggle from one body of substantive law to another, as a civil action might. Rather, the criminal prosecution will be dismissed.[194] This is, again, a deep contrast. In a civil action, in the absence of an actual conflict there is generally no upside for the defendant in showing that due process prevents application of a certain body of law. In a criminal case, there is an enormous upside for the defendant in showing that due process prevents application of a certain body of law. That upside is dismissal of the prosecution, the greatest prize of all—and the defendant's incentive to pursue it has nothing to do with whether there is an actual conflict.

In short, the constitutional necessity of a threshold actual conflict need not be a self-conscious part of civil legislative jurisdiction law. Because of litigation incentives and doctrinal structure, legislative jurisdiction issues will generally be raised in civil cases only if there is an actual conflict. But that is not how things work in criminal cases. In criminal cases, if an actual

193. *See supra* text accompanying note 37.

194. *See, e.g.*, United States v. Perlaza, 439 F.3d 1149, 1168–69 (9th Cir. 2006).

conflict is not explicitly understood as a legally necessary threshold requirement, due process claims will be pressed by defendants even when there is no such conflict.

4. Fair Warning and Actual Conflict

Requiring a threshold actual conflict makes sense in criminal cases for another reason as well: it would bring the extraterritorial due process doctrine in line with its closest constitutional relation, fair-warning law. Fair warning is a due process doctrine with three canonical "manifestations": void-for-vagueness, the rule of lenity, and the rule against judicial interpretations of criminal statutes that retrospectively expand their scope.[195] In extraterritorial prosecutions, defendants have begun to press a novel kind of fair-warning claim. The most prominent case in this emerging area is *United States v. Al Kassar*.[196] As noted above, the lead defendant in *Al Kassar* was a Spanish citizen who worked, principally from Spain, to ship missiles to purported narco-terrorists in Colombia; the traffickers said they wanted the missiles to shoot down U.S. military personnel.[197] The *Al Kassar* defendants sought to vacate their convictions on fair-warning grounds, and the Second Circuit rejected their claim:

> Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere. The defendants were not ensnared by a trap laid for the unwary. Supplying weapons illegally . . . to a known terrorist organization with the understanding that those weapons would be used to kill U.S. citizens and destroy U.S. property is self-evidently criminal . . . .[198]

So too in *United States v. Bin Laden*,[199] the other leading case. That was a U.S. prosecution based on bombings of American embassies in Kenya and Tanzania. There, the court also rejected a fair-warning claim, because even if the defendant did not know the "breadth of the statutory framework that would serve as the basis for the [U.S.] charges against him—few defendants do—there is no room for him to suggest that he has suddenly learned that mass murder was illegal in the United States or anywhere else."[200]

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195. United States v. Lanier, 520 U.S. 259, 265–66 (1997).

196. 660 F.3d 108 (2d Cir. 2011).

197. *Al Kassar*, 660 F.3d at 115–16. The narco-traffickers identified themselves as members of the FARC, a left-wing Colombian organization. *Id.* at 115. That organization has been designated as a terror group by the United States. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, http://www.state.gov/j/ct/rls/other/des/123085.htm [http://perma.cc/8WCE-TXCV].

198. *Al Kassar*, 606 F.3d at 119; *accord* United States v. Brehm, 691 F.3d 547, 553–54 (4th Cir. 2012) (following *Al Kassar* on this point).

199. 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

200. *Bin Laden*, 92 F. Supp. 2d at 218–19 (quoting Gov't Memo at 34, United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (No. 1:98-CR-01023)); *accord* United States v. Reumayr, 530 F. Supp. 2d 1210, 1223–24 (D.N.M. 2008) (following *Bin Laden* on this point).

All of this makes sense from a fairness perspective. "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law."[201] It is unfair that a person who expects that he is conforming his conduct to the criminal law turns out, to his surprise, not to be. That can happen in the domestic context when, for example, a statute is vaguely worded. And it can happen in the extraterritorial context, when the crux of a defendant's claim is that he was not made aware (not fairly warned) of a switch—a switch from regulation of his conduct by one body of criminal law (the local criminal law of Spain, Kenya, or Tanzania) to regulation of that same conduct by another body of criminal law (U.S. criminal law, under which he is now being prosecuted).

But flipping between legal regimes does not threaten to undo the defendant's expectation that he has conformed his conduct to the law when there is no actual conflict between local law and U.S. law. Shipping missiles to narco-terrorists is "self-evidently criminal," a crime under the laws of any possibly relevant country. Accordingly, the Spanish defendant in *Al Kassar* could have conformed his conduct to U.S. law without being warned of its terms or applicability—effortlessly, simply by conforming his conduct to Spanish law. In *Bin Laden*, too. The Kenyan and Tanzanian bombers could have stayed on the right side of U.S. criminal law (which forbids murder) just by following Kenyan and Tanzanian criminal law (which also does). Murder is illegal everywhere; as in *Al Kassar*, it did not matter which bodies of criminal law applied because they all proscribed the same thing.

The fair-warning law that has begun to develop functions in the same way that, this Article argues, the extraterritorial due process doctrine should function. In each context, the mere application of U.S. criminal law to defendants' conduct abroad does not, standing alone, trigger a due process issue. Rather, due process enters the picture only when there is an actual conflict. This confluence is no coincidence. Properly understood, each due process doctrine flows from the same basic concern for upsetting the defendant's expectations with respect to the substantive criminal law he thought would govern his behavior. And these expectations cannot be upset if there is no deep disjunction, no actual conflict, between the body of criminal law (Spanish, Tanzanian, or Kenyan) that would have applied to the defendant and the body of criminal law (U.S. criminal law) that either was applied to the defendant, in the case of the extraterritorial due process doctrine, or that was applied to the defendant without sufficient warning, in the case of fair-warning law.

5. Sentencing Conflicts

To this point, this Article has considered only actual conflicts—in which a defendant's conduct was lawful under the substantive law of the place where she acted but unlawful under the law of the United States, where she

201. City of Chicago v. Morales, 527 U.S. 41, 58 (1999).

was prosecuted. I have argued that an actual-conflict scenario should be understood to trigger application of due process checks on criminal legislative jurisdiction—but a no-conflict scenario should not.

But there should be no doubt that, even in no-conflict cases, deep discrepancies between U.S. sentencing law and the sentencing law that would otherwise have applied to the defendant should trigger application of due process protections. Sentencing in criminal cases is closely analogous to damages in civil cases; each is the follow-on consequence of a finding of liability. And in civil cases, large differences in how damages are to be calculated can emphatically trigger application of due process limits. Indeed, both *Phillips Petroleum* and *Allstate* involved differences between two bodies of law with respect to the permissible measure of damages.[202] The fact that deep conflicts in damages law in civil cases can trigger application of due process suggests that deep conflicts in sentencing law in criminal cases should also trigger application of due process.

This makes sense. Imagine if our hypothetical Spanish defendant had faced a five-year maximum sentence if she had been prosecuted in Spain, but, prosecuted in the United States, she now faces a fifty-year mandatory minimum sentence. This is closely analogous to an actual conflict—the law of the place where the defendant acted (Spanish sentencing law) permitted an outcome (freedom after five years in prison) that is essentially forbidden by the corresponding body of U.S. law.

If discrepancies in sentencing law regimes—I will call them "sentencing conflicts"—can trigger application of the extraterritorial due process doctrine, this raises a number of questions. For example, how different must two sets of sentencing laws be before the discrepancy between them triggers application of the due process "nexus" test? The Supreme Court has considered related questions in other areas of constitutional criminal law,[203] and they are hard.

But those questions are not especially important from a practical perspective. This is because sentencing is dynamic. For example, to facilitate extraditions from countries that want to cap their citizens' sentencing exposure, federal prosecutors routinely represent that if a certain extraterritorial prosecution is permitted to go forward, the United States will not seek a sentence above a given ceiling.[204] Against this backdrop, it would seem readily possible for U.S. prosecutors to wholly eliminate sentencing conflicts—and the due process-triggering unfairness that comes with them—simply by making binding representations that they will not seek certain penalties. For example, if a sentencing conflict results because the death penalty is available in the United States but not Spain, prosecutors can wholly eliminate that conflict by agreeing in advance not to seek the death penalty.

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202. Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 816–17 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 307, 320 (1981) (plurality opinion).

203. *E.g.*, Peugh v. United States, 133 S. Ct. 2072, 2085–86 (2013) (discussing ex post facto laws).

204. *See, e.g.*, United States v. Baez, 349 F.3d 90, 92–93 (2d Cir. 2003).

Accordingly, prosecutors can unilaterally transform scenarios that involve sentencing conflicts into no-conflict scenarios. In this sense, prosecutors could opt out of the extraterritorial due process doctrine, and its "nexus" requirement, by committing not to seek certain sentences. Sentencing conflicts would not lead, in practice, to the dismissal of any prosecutions. Rather, they would lead to something potentially important, but something much different—to some lower sentences.[205]

C. *A Reformulated Doctrine*

The extraterritorial due process doctrine, animated solely by concerns for fairness,[206] and reformulated in light of the arguments developed above,[207] would function as follows. In actual-conflict cases, the doctrine would apply as it does today—U.S. prosecutions could go forward only if they had a sufficient nexus to the United States.

In some no-conflict cases, in which there are sentencing conflicts, the extraterritorial due process doctrine would also apply. But such cases would, as a practical matter, melt away. This is because if the extraterritorial due process doctrine's strictures could not be satisfied in a given sentencing-conflicts case, prosecutors could, themselves, eliminate the conflict, by agreeing to cap the defendant's sentencing exposure. This would eliminate the unfairness of the sentencing conflict—and, with it, the need to apply the extraterritorial due process doctrine.

Finally, in some no-conflict cases, those that do not involve a sentencing conflict, the extraterritorial due process doctrine would not apply. Assuming no other impediments—Article I limits, for example—the federal government would be constitutionally permitted to prosecute a defendant without regard for the nexus that her conduct has or does not have to the United States. This would not be unfair to defendants—by hypothesis, there would be no actual conflict, and no sentencing conflict. And while some other nations might object to such prosecutions, protecting against international frictions is a matter for Congress and for the President, not for the courts and the Constitution.[208]

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205. In some cases, something akin to a sentencing conflict might be created (or deepened) by the existence of relatively harsher prison conditions in the United States, or the relatively greater distance between a defendant imprisoned in the United States and her family that will need to visit from abroad. But these sorts of concerns can very much be reflected in the sentence imposed by the Court. *See, e.g.*, United States v. Carty, 264 F.3d 191, 196–97 (2d Cir. 2001) (per curiam) (discussing the conditions of confinement that created a sentencing conflict); United States v. Johnson, 964 F.2d 124 (2d Cir. 1992) (discussing how family ties are a valid reason for downward departures from the sentencing guidelines); *cf.* United States v. Lipman, 133 F.3d 726 (9th Cir. 1998) (holding that a non-U.S. citizen's sentence can be reduced based on extent of cultural connection to the United States).

206. *See supra* Part II.

207. *See supra* Sections III.A–B.

208. Note that there may sometimes be scenarios in which there is no actual conflict and no sentencing conflict—but it nonetheless may make sense to apply the extraterritorial due

IV. Judicial Jurisdiction

To this point, I have argued that the extraterritorial due process doctrine can potentially have traction in actual-conflict cases and in cases in which there is a sentencing conflict—but not otherwise. But how can this be? Spanish and U.S. law may both proscribe murder, and may both punish it in precisely the same way; there is no conflict of any kind. But application of U.S. criminal law to our hypothetical Spanish defendant means that she will be subject to prosecution in America, halfway around the world, a trial conducted before a foreign jury, in a foreign legal system, and in what is likely a foreign language. She will be away from the support of family and the comforts of home, in an American prison during a potentially long pretrial period and, in the event of a conviction, for a period afterward. These are serious concerns, and they certainly sound in unfairness and upsetting of expectations.

But none of these concerns is a reason to bring to bear due process limits on legislative jurisdiction. That is because these are all matters of judicial jurisdiction, of the burdens of being tried in a court that, to the defendant, seems terribly inconvenient—perhaps to the point of constitutional unfairness. But judicial jurisdiction is controlled by its own body of constitutional law. This is the difference in civil cases between *Allstate*[209] (legislative jurisdiction) and *Pennoyer v. Neff*[210] or *International Shoe*[211] (judicial jurisdiction); in criminal cases, this is the difference between *Davis*[212] or *Yousef*[213] (legislative jurisdiction) and *Ker*, *Frisbie*, or *Alvarez-Machain* (judicial jurisdiction).[214] And the Supreme Court has emphasized—over and over again, literally for generations—that judicial jurisdiction and legislative jurisdiction are separate, each controlled by its own body of law.[215]

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process doctrine. For example, the outcome of a particular prosecution may turn on an affirmative defense, like intoxication or duress, and these defenses may be different in a material way under the relevant bodies of law. Such scenarios seem quite obscure. They are worth noting, but should not detain us here. In a similar vein, differences between procedural laws—differing lengths of statutes of limitations, for example—do not seem to fall within the domains of due process limits on civil legislative jurisdiction, Sun Oil Co. v. Wortman, 486 U.S. 717, 729–30 (1988), and, accordingly, should not be taken to fall within the analogous domains of due process limits on criminal legislative jurisdiction.

209. Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (plurality opinion) (legislative jurisdiction).

210. 95 U.S. 714 (1878) (judicial jurisdiction).

211. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (judicial jurisdiction).

212. United States v. Davis, 905 F.2d 245, 247–50 (9th Cir. 1990) (legislative jurisdiction).

213. United States v. Yousef, 327 F.3d 56, 85–114 (2d Cir. 2003) (judicial jurisdiction).

214. Under the *Ker-Frisbie* rule, the Supreme Court has rejected the argument that the "power of a court to try a person for crime" is affected by the manner in which the defendant came before the court. Frisbie v. Collins, 342 U.S. 519, 521 (1952). The major cases are the ones referenced in the text: United States v. Alvarez-Machain, 504 U.S. 655 (1992); *Frisbie*, 342 U.S. 519; and Ker v. Illinois, 119 U.S. 436 (1886).

215. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011) (plurality opinion); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 821 (1985); Keeton v. Hustler Magazine,

In criminal cases, it has long been conventionally thought that U.S. courts may exercise judicial jurisdiction over any defendant physically before the court,[216] without regard to how the defendant got there.[217] To some observers, this can seem unfair.[218] But if judicial jurisdiction's purported unfairness is placed into starker relief by a lack of due process checks on legislative jurisdiction, then that may be a strong reason to work a change in judicial jurisdiction. But it is not a reason to expand due process checks on legislative jurisdiction, to apply such checks because of concerns that would otherwise be outside of its domains.[219] If it seems unfair to try our hypothetical Spanish defendant in the United States, few would suggest that the proper response is to do some tinkering and compensating in *other* areas of constitutional criminal law—by giving the defendant a right to an even speedier trial; by raising the burden of proof for her higher than "beyond a reasonable doubt"; by expanding her rights to challenge searches and seizures under the Fourth Amendment beyond everyone else's. Constitutional rights are not generally thought of as a system of free-form adjustments, where every action (this looks unfair) merits an equal and opposite—and ad hoc—reaction (so make that more fair over there). If there is unfairness in judicial jurisdiction law, it should not lead to a trimming of legislative jurisdiction's sails.

Perhaps, though, it might be argued that in the criminal context there is no meaningful difference between legislative and judicial jurisdiction—such that it makes sense to treat them as a single system. In civil cases, it might be said, a sovereign's courts can have jurisdiction, but the sovereign's substantive laws might not apply; judicial jurisdiction and legislative jurisdiction are thus separate. By contrast, it might be argued, in criminal cases this cannot happen—the sovereign's courts always apply the sovereign's substantive criminal laws,[220] so judicial jurisdiction and legislative jurisdiction collapse into one another.

But this is not persuasive. It is true that, in criminal cases, when a sovereign's courts have judicial jurisdiction (because the defendant is physically present before the court), the sovereign's courts never apply the substantive

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Inc., 465 U.S. 770, 778 (1984); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Hanson v. Denckla, 357 U.S. 235, 254 (1958).

216. *E.g.*, Albert Levitt, *Jurisdiction over Crimes*, 16 J. Am. Inst. Crim. L. & Criminology 316, 321 (1926) ("The principle is absolute in Anglo-American law that the accused must be present in court at the time he is being tried. . . . Nor does it matter how such control was secured."); *accord, e.g.*, United States v. Burke, 425 F.3d 400, 408 (7th Cir. 2005); United States v. Rendon, 354 F.3d 1320, 1326 (11th Cir. 2003); Stamphill v. Johnston, 136 F.2d 291, 292 (9th Cir. 1943); *cf.* Fed. R. Crim. P. 43(a) ("[T]he defendant must be present at . . . every trial stage . . . .").

217. *See supra* note 214.

218. *E.g.*, *Alvarez-Machain*, 504 U.S. at 687–88 (Stevens, J., dissenting) (suggesting that *Ker-Frisbie* rule is "deeply disturb[ing]" to "most courts throughout the civilized world").

219. *See supra* text accompanying notes 144–145.

220. *See supra* note 37 .

law of *another* sovereign. But that does not mean that the court always applies its own substantive criminal law. That is, indeed, what the extraterritorial due process doctrine is all about. In extraterritorial due process cases, the court has judicial jurisdiction—the defendant is physically present, there before the court. But then the court nonetheless considers whether it has legislative jurisdiction. Legislative jurisdiction does not follow inevitably from judicial jurisdiction in criminal cases. If it did, there would have been nothing to say in *Davis*, for example, other than "the defendant is here, so we apply U.S. criminal law." The reverse is also true. There have been criminal cases in which courts very clearly have legislative jurisdiction but then consider, separately, whether they have judicial jurisdiction. These are cases like *United States v. Toscanino*[221] and *United States v. Anderson*,[222] and, whatever else might be said about them,[223] those cases demonstrate that judicial jurisdiction is not understood to follow automatically from legislative jurisdiction in criminal cases.

Legislative jurisdiction and judicial jurisdiction are, in short, separate in civil cases—and in criminal ones, too. It does not make sense to solve a felt problem in one area of law by tinkering with what is another, separate body of law—by responding to perceived looseness in the law of judicial jurisdiction by tightening up the law of legislative jurisdiction beyond what is otherwise warranted.[224]

V. Actual Conflicts

As argued above, a reformulated extraterritorial due process doctrine and its nexus test should be applied only in actual-conflict cases and in sentencing-conflict cases.[225] If it did apply only in those cases, the doctrine would, in practice, potentially lead to the quashing of prosecutions only in actual-conflict scenarios.[226] Under current law, however, the extraterritorial due process doctrine applies across the board—in actual-conflict cases, sentencing-conflict cases, and no-conflict cases.[227]

This Part shows that there is a large practical gulf between these two approaches. Because of certain major structural aspects of international law enforcement, extraterritorial prosecutions are overwhelmingly—perhaps exclusively—no-conflict cases. Concomitantly, when it comes to extraterritorial prosecutions, actual-conflict cases are exceedingly rare, if they exist at

221. 500 F.2d 267, 274 (2d Cir. 1974) (considering whether to decline judicial jurisdiction over the defendant even though he is physically present before the court).

222. 472 F.3d 662, 666 (9th Cir. 2006) (same).

223. *See, e.g.*, United States v. Mitchell, 957 F.2d 465, 470 (7th Cir. 1992) (questioning *Toscanino*'s "continuing constitutional vitality" given the Supreme Court's post-*Toscanino* reaffirmation of the *Ker–Frisbie* doctrine).

224. In a forthcoming article, I explain how due process limits on judicial jurisdiction should be understood to function in extraterritorial criminal cases.

225. *See supra* Section III.C.

226. *See supra* Sections III.B.5 and III.C.

227. *See supra* text accompanying notes 41–48.

all. It bears noting at the outset that there is no ready way empirically to determine the relative prevalence of actual-conflict prosecutions and no-conflict prosecutions. But in the absence of empirical information, we can proceed by inference from the major structural forces that shape international-criminal-law enforcement: extradition, mens rea requirements, and international law.

First, the nature of extradition makes actual-conflict cases very rare. If two countries are parties to an extradition treaty, one country may request that a second country arrest an individual and send him to the first country for prosecution there.[228] The United States is a party to more than a hundred extradition treaties.[229] Each year the United States requests hundreds of extraditions from other countries,[230] and extradition is the standard means by which foreign defendants arrive in the United States after U.S. prosecutors charge them for conduct that took place abroad.[231] Every (or virtually every) U.S. extradition treaty includes a "dual criminality" requirement.[232] Under dual criminality, "an accused person can be extradited only if the conduct complained of is considered criminal . . . under the laws of both the requesting and requested nations."[233] Accordingly, where dual criminality applies, a

228. Restatement (Third) of the Foreign Relations Law of the United States § 475 (Am. Law Inst. 1987) ("A state party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state . . . .").

229. 18 U.S.C. § 3181 (2012) (listing current extradition treaties).

230. *See, e.g.*, U.S. Dep't of Justice, Review of the Office of International Affairs' Role in the International Extradition of Fugitives 8–10 (2002), https://oig.justice.gov/reports/OBD/e0208/extradition.pdf [https://perma.cc/P67Y-NK3J] (providing statistics).

231. Aside from extradition, there are some other ways that the United States gains custody over foreign defendants. Rendition, for example, is defined as "the forcible movement of an individual from one country to another, without use of a formal legal process, such as an extradition mechanism." Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose* Any *Restrictions?*, 42 Loy. U. Chi. L.J. 523, 525 (2011). Renditions get headlines, but this in large part because they are exceptional. *E.g.*, Ernesto Londoño, *Capture of Bombing Suspect in Libya Represents Rare 'Rendition' by U.S. Military*, Wash. Post (Oct. 7, 2013), http://www.washingtonpost.com/world/national-security/libya-condemns-us-raid-and-capture-of-bombing-suspect/2013/10/06/aad8b7ec-2ea6-11e3-8906-3daa2bcde110_story.html [http://perma.cc/2PW2-QA5K] (describing forcible capture of al Qaeda leader by U.S. military on the streets of Tripoli, and his transfer to the United States). Extraditions, by contrast, are utterly commonplace, the background standard from which rendition departs. *See, e.g.*, Melanie M. Laflin, *Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options*, 26 J. Legis. 315, 319–20 (2000).

232. There is some dispute as to whether dual criminality is a requirement of every U.S. extradition treaty. *Compare* John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1459 (1988) (describing dual criminality as standard in "nearly every" treaty), *with* Michael John Garcia & Charles Doyle, Cong. Research Serv., 98-958, *Extradition to and from the United States: Overview of the Law and Recent Treaties* 10 (2010) (describing dual criminality as feature of "all" treaties).

233. Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir. 1986); *accord* Collins v. Loisel, 259 U.S. 309, 311 (1922) ("[A]n offense is extraditable only if the acts charged are criminal by the laws of both countries."); Extradition Treaty with Great Britain and Northern Ireland, U.S.-U.K., Mar. 31, 2003, S. Treaty Doc. No. 108-23, art. 2(1) ("An offense shall be an extraditable

defendant cannot be extradited to the United States unless the U.S. crime with which he is charged is *also*, in substance, a crime in the country from which the defendant was extradited.

The dual criminality requirement works to eliminate actual conflicts. Indeed, in a nutshell, that is its function. If the charged defendant is liable under U.S. criminal law but is not liable under the law of the place from which extradition is sought, the dual criminality requirement would flatly bar extradition. No U.S. prosecution would even get underway. When there is an actual conflict, there is no dual criminality; and when there is no dual criminality, there is no extradition.[234]

Aside from extradition, mens rea requirements in U.S. criminal statutes also help make actual-conflict cases rare. Many major extraterritorial prosecutions concern violations of the federal terrorism laws. But the terrorism laws that apply extraterritorially generally include some sort of mens rea requirement.[235] Accordingly, a person can usually be charged with violating these laws only if the government can prove that she knew she was acting with the requisite mental state. And such proof would of course be hard to come by if there were an actual conflict—that is, if the conduct that forms the basis of the U.S. criminal charge was lawful in the place where it was undertaken. A person in Lebanon who gives money to Hezbollah may be less likely to think that this is wrongful, given that Hezbollah is currently the second-largest political party in Lebanon's parliament. Mens rea requirements, in short, tend to further reduce the number of actual conflicts in extraterritorial criminal prosecutions. If a criminal defendant is charged in the United States for conduct that was not a crime where it was undertaken, it would often be hard for U.S. prosecutors to prove that the defendant acted with the requisite mental state—and prosecutors of course do not seek to bring cases that they have little chance of winning.

Finally, large swaths of international law also tend to reduce the number of actual conflicts. There are a series of multilateral treaties in which large numbers of nations (including the United States) have committed to passing their own domestic criminal laws to proscribe certain agreed-on conduct.[236] An example is the Hague Convention for the Suppression of Unlawful Seizure of Aircraft.[237] Signed in 1970, the Convention described the offense of air piracy (hijacking), and it required each of the Convention's signatories

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offense if the conduct on which the offense is based is punishable under the laws in both States . . . .").

234. As Professor Richman wisely pointed out to me, a country (say Spain) would be exceedingly unlikely to extradite a defendant to the United States for a crime that, while a violation of Spanish criminal law as a formal matter, had fallen into desuetude in Spain and was no longer being enforced there.

235. For the relevant terrorism statutes, see 18 U.S.C. §§ 2331–2339D (2012); for the narcotics statutes, see 21 U.S.C. §§ 846, 951–971 (2012).

236. Antonio Cassese, International Law 153–55 (2d ed. 2005).

237. Convention for the Suppression of Unlawful Seizure of Aircraft, Mar. 8, 1973, 860 U.N.T.S. 105.

to criminalize that offense under their domestic laws.[238] The Hague Convention now has 185 signatories; virtually every country in the world has signed on.[239] Such conventions greatly reduce the likelihood of an actual conflict. A defendant prosecuted in the United States for an extraterritorial hijacking is overwhelmingly likely to have acted in a country that, like the United States, has criminalized hijacking pursuant to the Hague Convention.

Aside from the Hague Convention, the United States has enacted a great many criminal statutes pursuant to obligations undertaken in multilateral international conventions. Some of these statutes are necessarily more obscure than others. But others are right in the mainstream of federal criminal law. The basic federal anti-narcotics statute is the Controlled Substances Act of 1970,[240] and that statute is used for vast numbers of prosecutions, including many important extraterritorial prosecutions.[241] Congress enacted the Controlled Substances Act in part to satisfy obligations that the United States had incurred in a multilateral treaty.[242] Similarly, terrorism cases are at the heart of contemporary extraterritorial prosecutions. And, by one count, Congress has passed more than twenty antiterrorism criminal statutes to satisfy multilateral treaty obligations.[243] Such statutes, by definition, criminalize conduct that is illegal not just in the United States, but also in many countries around the world.

In sum, in the context of extraterritorial prosecutions the number of actual conflicts is dramatically reduced by the combined effect of three major structural features of international-law enforcement: dual criminality obligations in extradition treaties, mens rea requirements, and modern multilateral treaties. These, together, make it exceedingly unlikely that when we speak of extraterritorial prosecutions we are speaking of actual-conflict cases—there may not even, in fact, be any.

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238. *Id.* at art. 2.

239. Int'l Civil Aviation Org., Signatories to Convention for the Suppression of Unlawful Seizure of Aircraft, http://www.icao.int/secretariat/legal/List%20of%20Parties/Hague_EN.pdf [http://perma.cc/6V7U-4UKQ]. In 1974, the United States discharged its own Hague Convention obligations by passing an antihijacking law. *See* 49 U.S.C. § 46502 (2012).

240. Gregory Kau, *Flashback to the Federal Analog Act of 1986: Mixing Rules and Standards in the Cauldron*, 156 U. Pa. L. Rev. 1077, 1082 (2008) (describing the statute's history).

241. *E.g.*, United States v. Manuel, 371 F. Supp. 2d 404, 408–11 (S.D.N.Y. 2005).

242. Brief of Former State Department Legal Advisers as Amici Curiae in Support of Respondent, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158), 2013 WL 4518602, at *6–7 (citing, *inter alia*, 21 U.S.C. § 801(7) (2012)).

243. John De Pue, *Fundamental Principles Governing Extraterritorial Prosecutions*, U.S. Atty's Bulletin 9–13 (2007), http://www.justice.gov/sites/default/files/usao/legacy/2007/04/20/usab5502.pdf [http://perma.cc/75V3-4QF4] (Department of Justice publication, enumerating more than twenty distinct federal crimes established to implement "international agreements, to which the United States is a party, [that] are designed to thwart acts of terrorism"); *see also* Auguste v. Ridge, 395 F.3d 123, 128 (3d Cir. 2005) (describing an additional related example); Kadic v. Karad_iæ, 70 F.3d 232, 241 (2d Cir. 1995) (same); Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 Am. J. Int'l L. 48, 52 (2007) (same).

This conclusion implies two important practical points. First, the reformulated extraterritorial due process doctrine that this Article proposes, which would do the large bulk of its work in actual-conflict cases, would lead to the short-circuiting of prosecutions only very rarely—because actual-conflict cases are themselves so rare. And second, the mirror-image point: current extraterritorial due process doctrine is not only jurisprudentially misguided,[244] but it is, in practice, vastly overbroad. Due process's major task, of precluding unfair prosecutions, should be accomplished in actual-conflict cases, I have argued. But because it is applied virtually across the board under current law, the extraterritorial due process doctrine is being applied to no-conflict cases. And this is not happening sometimes or even frequently. Rather, it is happening ubiquitously—perhaps every single time that the doctrine is applied.

VI. A Reformulated Doctrine and the Wages of the Current "Approach

I have argued that the extraterritorial due process doctrine should apply only when an extraterritorial prosecution is unfair to the defendant.[245] Protecting against such unfairness, a reformulated extraterritorial due process doctrine would be triggered in actual-conflict cases.[246] These cases are very rare,[247] but when they occur, prosecutors would be required to show a nexus to the United States. A reformulated extraterritorial due process doctrine would also apply to sentencing-conflict cases—but in those cases, the doctrine would likely melt away, leaving lower sentences for some defendants in its wake, but not to the dismissal of many cases.[248]

This is a much narrower extraterritorial due process doctrine than the one we have. I have explained from a jurisprudential perspective why, under current law, the extraterritorial due process doctrine is overbroad.

And none of this is abstract. There are important practical consequences of the gap between the broad, across-the-board due process doctrine that we currently have and the narrow due process doctrine that, I have argued, we should have. The most significant practical consequence may be the most obvious one: public safety is impacted. Under current law, major extraterritorial prosecutions are foregone because while it is clear that a given person is violating U.S. criminal law, it is not clear that the doctrine's "nexus" stricture can be satisfied. Abubakar Shekau, the leader of Boko Haram, the

244. *See supra* Parts II, III.

245. *See supra* Part III.

246. *See supra* Part III.

247. *See supra* Part V.

248. *See supra* Sections III.B.5, III.C. Note that the approach I have proposed, in which actual-conflict and no-conflict cases are treated differently for due process purposes, finds echoes in international law, where a sovereign's capacity to legislate extraterritorially depends in part on whether the conduct reached by the extraterritorial legislation was lawful or unlawful where it was undertaken. *See* Restatement (Third) of the Foreign Relations Law of the United States § 403(2)(d), (h) (Am. Law Inst. 1987).

Nigerian terror group, is responsible for the deaths of many thousands of Africans,[249] and it seems perfectly clear that he has violated U.S. criminal law.[250] But could a U.S. prosecution of Shekau pass due process muster?

Under a reformulated extraterritorial due process doctrine, the prosecution could plainly proceed. There is no actual conflict because Sheku's wholesale murder and kidnapping are, of course, illegal everywhere. And if there is a sentencing conflict—because Sheku might be punished more harshly in the United States than he would be in Nigeria—that sentencing conflict can be removed if prosecutors agree to cap the punishment that Sheku might receive. In the absence of these conflicts, there is no unfairness to Sheku and the prosecution could proceed—even without showing a nexus to the United States.[251]

But could a prosecution proceed under the extraterritorial due process doctrine as it is currently formulated? That is doubtful, at least from the public record. The nexus between Boko Haram and the United States is not terribly robust,[252] and it seems unlikely that Sheku could therefore be prosecuted in the United States. Even though there is no unfairness to him in such a prosecution. Even though the United States is deeply invested in fighting Boko Haram.[253] Even if the Nigerian government, under the strain of a war with Boko Haram, asks the United States to mount the prosecution.[254] Even

249. *E.g.*, *#BringBackOurGirls: Addressing the Threat of Boko Haram: Hearing Before the Subcomm. on African Affairs of the S. Comm. on Foreign Relations*, 113th Cong. 5–7 (2014) [hereinafter *#BringBackOurGirls Hearing*] (statement of Hon. Robert P. Jackson, Principal Deputy Assistant Secretary of State for African Affairs).

250. *Compare* 18 U.S.C. § 2442 (2012) (extraterritorial U.S. criminal statute proscribing conscripting children for fighting), *with* Jacob Zenn, *Boko Haram: Recruitment, Financing, and Arms Trafficking in the Lake Chad Region*, CTC Sentinel (Combating Terrorism Ctr., West Point, N.Y.), Oct. 2014, at 5, 6–8, https://www.ctc.usma.edu/posts/boko-haram-recruitment-financing-and-arms-trafficking-in-the-lake-chad-region [https://perma.cc/TL3Y-K6UD] (describing Boko Haram's program of forcibly abducting children for fighting).

251. This does not mean that any person in the world can be prosecuted in the United States provided that there is no actual conflict. Regardless of whether due process is satisfied, a federal criminal statute must of course nonetheless be within Congress's Article I reach. *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1109–17 (9th Cir. 2006). There is little doubt that the broad impact of Nigeria's Boko Haram on economic life in all of southern Africa allows Congress to reach the group's leader under Article I. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) (stating that as compared to the—very broad—scope of the interstate Commerce Clause, "the Founders intended the scope of the foreign commerce power to be the greater"). And it is just as clear that the actions of a Nigerian pickpocket acting in Nigeria cannot even begin to cross the Article I threshold—such that Congress cannot constitutionally proscribe such pickpocketing, even if there is no actual conflict.

252. *E.g.*, *Boko Haram: The Growing Threat to Schoolgirls, Nigeria, and Beyond: Hearing Before the H. Comm. on Foreign Affairs*, 113th Cong. 10, 12 (2014) (prepared statement of Hon. Sarah Sewall, Under Secretary for Civilian Security, Democracy, and Human Rights) ("Boko Haram is a Nigerian-based group that . . . has metastasized into a regional threat.").

253. *E.g.*, *#BringBackOurGirls Hearing*, *supra* note 249 at 6–7.

254. *Cf. supra* text accompanying notes 26–27 (describing U.S. prosecutions of Colombian narcotics traffickers as a strategy for taking pressure off the Colombian state).

if Sheku flies into London, and the British will not extradite him to Nigeria for prosecution, for fear that Sheku will be tortured there.[255]

This is no surprise. The extraterritorial due process doctrine, as it exists under current law, is much broader than the reformulated doctrine that this Article proposes—and all other things being equal, the broader the reach of the doctrine, the fewer extraterritorial prosecutions there will be. The dynamic is a familiar one. Constitutional criminal rights increase the cost of prosecutions; because of the Fourth Amendment, for example, police cannot usually search a house without getting a warrant. The more something costs, the less we generally buy it. Raising the costs of prosecutions means that we get fewer prosecutions—but, hopefully, fewer prosecutions means better prosecutions.[256]

But in the context of extraterritorial prosecutions, this standard picture is not the whole one. The United States has mounted hundreds of lethal drone strikes.[257] It seems possible that there are terrorists who were targeted in U.S. drone strikes in part because federal prosecutors advised they could not satisfy the extraterritorial due process doctrine with respect to these terrorists—such that U.S. criminal justice was not an alternative option.[258] There is now a "strong preference for . . . prosecution of terrorists."[259] But when that "approach is foreclosed" drone strikes may become an option[260]—and foreclosing the criminal "approach" is precisely what the extraterritorial due process doctrine sometimes does. Even in the absence of an actual conflict, due process, as it is conventionally understood under current law, limits an extraterritorial prosecution. But due process—again, as it is

255. Nongovernmental organizations have described "routine[ ]" use of torture by Nigerian police. AMNESTY INT'L, TORTURE IN 2014 at 18 (2014), http://www.amnestyusa.org/sites/default/files/act400042014en.pdf [http://perma.cc/P894-BWXT]. And the global antitorture treaty, acceded to by the United Kingdom in 1988, prohibits signatories from "extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture," and indicates that "a consistent pattern of . . . violations of human rights" is relevant to that determination. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

256. *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1274–77 (1999).

257. *E.g.*, Spencer Ackerman, *41 Men Targeted but 1,147 People Killed: US Drone Strikes—The Facts on the Ground*, THE GUARDIAN (Nov. 24, 2014), http://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147 [http://perma.cc/LA5N-6H5D] (describing information collected from various sources).

258. *See* Mark Mazzetti & Eric Schmitt, *Terrorism Case Renews Debate Over Drone Hits*, N.Y. TIMES (Apr. 12, 2015), http://www.nytimes.com/2015/04/13/us/terrorism-case-renews-debate-over-drone-hits.html?_r=1 [http://perma.cc/HZ4A-45CT] (describing Obama Administration debate about whether to kill an al Qaeda figure in a drone strike and the eventual decision to criminally charge him instead).

259. President Barack Obama, Remarks at National Defense University (May 23, 2013), https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [https://perma.cc/9NXS-VZGN].

260. *Id.*

conventionally understood under current law—does not limit an extraterritorial missile strike.[261] This is more than a little ironic—and more perverse, even, than that.

In a similar vein, one wonders how many alleged terrorists have been consigned to local prosecutions, off-loaded to terribly rough criminal justice in Afghanistan or Somalia[262]—not prosecuted in the incomparably freer and fairer U.S. courts out of fealty to, of all things, the terrorists' own rights. Does consideration of a potential defendant's fair process rights (as instantiated in the extraterritorial due process doctrine, as currently formulated) lead to dramatically *less* in the way of fair process rights for the very same person?

And the same sorts of questions may be asked of Guantánamo Bay. Civil libertarians generally argue that Guantánamo detainees should be brought into the United States for ordinary criminal trials. But it seems possible that quietly vindicating one of a detainee's rights (his rights under the extraterritorial due process doctrine, as currently formulated) may ultimately preclude him from being vested with a whole range of other rights. Think of a Guantánamo Bay detainee whose actions do not reflect any nexus to the United States. Under the extraterritorial due process doctrine, as it is currently formulated, he cannot be transferred to a federal court in the United States for a civilian prosecution. And so the detainee may continue to be held in Guantánamo Bay, where a broad range of constitutional rights do not apply.[263]

When it comes to incapacitating ordinary criminals operating inside the United States, there is essentially only one option, the U.S. criminal justice system. But when it comes to certain classes of criminals who act extraterritorially—terrorists are the preeminent example—there are other options. U.S. criminal justice is just one "tool," to be used (or not) depending on a

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261. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (describing as "emphatic" the view that the Fifth Amendment does not apply abroad to protect non-U.S. citizens). An emerging literature suggests that due process rights should be understood to check all U.S. action, even when undertaken abroad. J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. 463, 464 (2007). But whatever the merits of that view, it has not been embraced by the United States, even during the Obama administration. *E.g.*, Government's Memorandum of Law in Response to Defendant Ahmed Khalfan Ghailani's Motion to Dismiss the Indictment on the Grounds of Outrageous Government Conduct at 39–55, United States v. Ghailani, (LAK) (S.D.N.Y. Apr. 23, 2010) (No. S10 98 Cr. 1023), 2010 WL 3336021. Note that the extraterritorial due process doctrine seems to be based on the common-sense assumption that non-U.S. defendants' due process rights are not potentially violated abroad, where they acted criminally—but rather in the United States, where they are being held for trial and tried.

262. U.S. Dep't of State, Afghanistan 2013 Human Rights Report 3–15 (2013), http://www.state.gov/documents/organization/220598.pdf [http://perma.cc/66KC-S24K] (describing severe systemic problems with respect to defendants' trial rights); U.S. Dep't of State, Somalia 2013 Human Rights Report 2–11 (2013), http://www.state.gov/documents/organization/220370.pdf [http://perma.cc/4XF3-QM3P] (same).

263. *See generally* Maqaleh v. Hagel, 738 F.3d 312, 329 (D.C. Cir. 2013); Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) .

comparison with other "viable alternatives."[264] If the extraterritorial due process doctrine takes a U.S. criminal prosecution off the table, the remaining "viable alternatives" may be much less appealing from the perspective of the very person whose due process rights are being "vindicated."[265]

This is what makes the extraterritorial due process doctrine such an odd piece of constitutional criminal law. The doctrine does not work in the familiar way, protecting the defendant's rights, even at the cost (to society) of giving him a "windfall." Rather, the doctrine protects the defendant's rights, at the cost (to him) of taking away what, in the scheme of things, might be a better option—an American criminal trial. A criminal defendant whose rights are vindicated might ordinarily expect a benefit—suppression of evidence, for example. But in the context of the extraterritorial due process doctrine, criminal rights may well point in the opposite direction. Vindicating those rights can harm the hypothesized defendant. As currently formulated, the doctrine is overprotective, extending its protections to no-conflict cases when there is no basis for doing so—when there is no cognizable unfairness to protect against. In the end, the costs of an overprotective extraterritorial due process doctrine may be real-world underprotection, as people who might have become U.S. criminal defendants are subjected, by default, to different, harsher fates. Concerned about a kind of unfairness to defendants that does not much exist, the extraterritorial due process doctrine may, from the defendant's perspective, create its own unfairness.

And more than that. All would agree that if Congress and the President signed on, it would be lawful as a matter of domestic law to attack Syria—to fire missiles and drop bombs to punish Syria's chemical weapons use.[266] But imagine that U.S. policymakers wanted an additional option—the filing of criminal charges against Syrian officials who gassed Syrian civilians,[267] charges that would effectively prevent such officials from ever showing up in London or Lebanon or New York, for vacations or weddings or business opportunities or retirement, even decades from now, after memories of today's atrocities may have, tragically, faded. Could such criminal charges be filed? Probably not. There does not appear to be a tight "nexus" between the

264. Kris, *supra* note 19, at 12–13.

265. *See generally* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2392 (1997) (discussing specific and general equilibria in the criminal justice context); Stuntz, *supra* note 256, at 1274–77 (describing substitution effects in the criminal justice context).

266. *See* President Barack Obama, Address to the Nation on Syria (Sept. 10, 2013), https://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria [https://perma.cc/8DT8-22VN] (stating that, in response to Syrian use of chemical weapons during August of 2013, "it is in the national security interests of the United States to respond . . . through a targeted military strike"). *See generally* Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1635–36 (2014) (noting that the congressional power to declare war "includes the power to authorize limited uses of force short of full-blown war").

267. *See* President Barack Obama, *supra* note 266 (stating that on August 21, 2013 "Asad's Government gassed to death over a thousand people, including hundreds of children," describing this as a "crime against humanity," and cataloguing evidence that shows that "the Asad regime was responsible," including evidence of involvement of "senior figures in Asad's military machine").

United States and Syria's use of chemical weapons within Syrian borders. And so under the extraterritorial due process doctrine as it is currently formulated, it would be difficult for the United States to prosecute Syrians who used chemical weapons in Syria. Even though the criminal prosecution, like the hypothesized U.S. attack on Syria, would have the goal of punishing chemical weapons use. Even though the criminal prosecution would harm many fewer innocent people than an attack. Even though the hypothesized criminal prosecution, like the hypothesized attack, would have the support of the two popular branches, the Congress that passed the relevant criminal statute and the executive branch that is seeking to enforce it. Even though the prosecution would not be unfair.

This does not make sense. With the backing of the Congress and the President, the Constitution allows the United States to act as the world's army, enforcing the global norm against chemical weapons use. But even with the backing of the Congress and the President, the Constitution, as currently interpreted in the extraterritorial due process doctrine, does not allow the United States to act as the world's police force. Distant horrors can be a *casus belli*. But under the extraterritorial due process doctrine as it is currently formulated, distant horrors cannot justify returning an indictment precisely because of their distance—their lack of connection and "nexus" to America. The law, I have shown, does not require this result. Truly horrible actions, like gassing civilians, are universally proscribed. They do not raise actual conflicts. With respect to legislative jurisdiction, prosecutions of such actions are limited by policymakers' decency and humility and good sense. But not by due process.