Article

Core Criminal Procedure

Steven Arrigg Koh†

† Marianne D. Short and Ray Skowyra Sesquicentennial Assistant Professor of Law, Boston College Law School. The author is grateful to Darryl Brown, Sherry Xin Chen, Tom Dannenbaum, Laurel Davis, Brandon Garrett, Jeff Gordon, Rebecca Hamilton, Robert Howse, Sun Kim, Harold Hongju Koh, Kay Levine, Yael Lifshitz, Cortney Lollar, Travis Pantin, Daniel Richman, Diane Ring, David Sloss, and Katharine Young for their invaluable insights and contributions to this piece, as well as to Ellie Dupler, Daniel Fahrenthold, Rory Skowron, and Rachel Weiss for their excellent research assistance. The author is also grateful to the *Minnesota Law Review* staff for its incisive editorial contributions.

INTRODUCTION

To what criminal procedural standard do we hold another country?[1] At first blush, one answer is intuitive: hold other countries to the same fundamental rights[2] enumerated here in the United States. This procedure is enshrined in the U.S. Constitution, codified in statute, and articulated in case law. Formally, criminal defendants are entitled to individual rights such as freedom from unreasonable search and seizure; guarantees to a speedy and public trial by an impartial jury; and freedom from cruel and unusual punishment. In our era of mass incarceration, such formal rights are under attack given legislative overreach, executive discretion, and judicial retrenchment.[3]

1. For purposes of this Article, this is a question focused on the United States as a jurisdiction evaluating foreign sovereigns and international criminal systems. Another way of phrasing this question could be "to what criminal procedural standard should the U.S. criminal justice system hold itself when engaging with foreign criminal justice systems?" This question is thus related to, but distinct from, the matter of a global criminal procedural standard, such as that of the international criminal courts establishing their rules of procedure and evidence, *see generally* KARIM A.A. KHAN, CAROLINE BUISMAN & CHRISTOPHER GOSNELL, PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE (2010) (discussing the evolution of rules of procedure and evidence which have developed in international criminal tribunals).

2. While to some degree, "rights" may be broadly construed to encompass any criminal legal procedure (for example, the right to have an initial appearance within the first 24 hours is a procedural right provided under the Federal Rules of Criminal Procedure), the emphasis of this Article is the rights enumerated in the U.S. Constitution. Future research could explore more granular procedural details, such as charging procedure, to show the differential in procedures between two or more legal systems.

3. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (analyzing legislative and judicial aspects of the politicization of the criminal justice system and why they are barriers to addressing the structural problems of criminal law); Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthey Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R.A. Duff, Albert W. Dzur, Thomas F. Geraghty, Adriaan Lanni, Marah Stith McLeod, Janice Nadler, Anthony O'Rourke, Paul H. Robinson, Jonathan Simon, Jocelyn Simonson, Tom R. Tyler & Ekow N. Yankah, *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017) (laying out "thirty proposals for the democratic criminal justice reform"); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 274 (2013) (showing how the DOJ administers corrections, forensics, and clemency); *see also* Nicholas Fandos & Maggie Haberman, *Trump Embraces a Path to Revise U.S. Sentencing and Prison Laws*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/politics/prison-sentencing

Often overlooked in this discussion is an emerging front in which U.S. criminal justice may diverge substantially from its centuries-old procedural framework. Today, all three branches now engage in a criminal procedural line drawing in which fundamental rights are no longer so fundamental. Instead, the U.S. government increasingly distinguishes between a mandatory inner set of truly inviolable rights and others that it deems marginal and expendable. This arises both when foreign countries assist in criminal cases and when the United States facilitates foreign criminal prosecutions. Consider the following examples:

The United States indicts and arrests a U.S. citizen on drug trafficking charges. Before her trial, she moves to suppress evidence that Canadian law enforcement obtained in Montreal without a warrant and subsequently turned over to U.S. law enforcement.[4] The court denies her motion to suppress on the ground that Canadian law enforcement's actions did not "shock the judicial conscience"[5] and thus did not violate her Fourth Amendment right.[6]

Switzerland convicts *in absentia* a U.S. citizen for committing securities fraud in Zurich and then requests that the United States extradite him to Switzerland to serve his sentence. The fugitive challenges the extradition before a U.S. magistrate judge, arguing that the Swiss conviction without his physical presence violated his rights to confront witnesses and to speedy trial.[7] The judge rejects his challenge on the ground that Swiss criminal procedure is a foreign affairs matter.[8] Shortly thereafter, he is extradited to Switzerland to serve his sentence there.

-trump.html [https://perma.cc/2NLK-F7RU] (describing executive support for bipartisan legislative criminal justice reform).

4. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .").

5. United States v. Mitro, 800 F.2d 1480, 1483 (1st Cir. 1989).

6. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment does not apply to search and seizure of property "owned by a nonresident alien and located in a foreign country").

7. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him . . . .").

8. *In re* Ernst, No. 97 CRIM.MISC.1 PG.22, 1998 WL 395267, at *14 (S.D.N.Y. Jul. 14, 1998) ("Ernst claims that his conviction *in absentia* was 'fundamentally unfair' because (1) Ernst was not permitted to call witnesses to testify in his own behalf and (2) the long delay in the commencement of the trial violated Ernst's right to a speedy trial. The rule of non-inquiry precludes the assertion of these claims.").

A U.S. national is convicted of possessing cocaine with intent to distribute. At sentencing, the government moves for an upward departure of his sentence given a prior conviction in Mexico for importing narcotic drugs. The defendant objects on the ground that he was denied both the right to trial by jury and the right to counsel in the Mexican proceeding.[9] The judge splits the difference, finding first that it would be "cultural imperialism" to insist on a Sixth Amendment right to trial by jury abroad.[10] However, the judge also finds that denial of right to counsel in Mexican proceedings constitutes a basis for not relying on the foreign conviction, given that "a central dimension of American criminal procedure is the presence of counsel at all significant stages of the criminal proceeding."[11]

These examples illustrate the central problem of this Article: what happens when the United States compromises on rights in order to facilitate law enforcement cooperation with other nations? This question arises with increasing frequency due to the accelerating rate of interaction between national criminal justice systems.[12] Today, the United States has a law enforcement relationship with virtually every country and is often obligated—either pursuant to treaty or informal working practices—to assist other countries in their criminal law enforcement mandates.[13] Inversely, these relationships also give rise to "foreign affairs prosecutions,"[14] or U.S. criminal cases with some foreign nexus. As I have argued previously, such cases—such as the El Chapo and FIFA prosecutions—are proliferating in an age of cross-border, cyber, and international crime.[15] A relevant question in this

9. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense.").

10. *E.g.*, United States v. Moskovits, 784 F. Supp. 183, 190 (E.D. Pa. 1991) ("It would, however, be a form of cultural imperialism for the United States to insist that it would not countenance, for U.S. purposes, recognition of a foreign criminal judgment which came from a legal culture which did not employ the jury . . . .").

11. *Id.* at 191 ("My understanding is that the Supreme Court calls for the presence of counsel at all significant stages in the American criminal proceeding, and what analysis we can make of the Mexican procedures, as they affected Mr. Moskovits, would show the Careo hearings to have been crucial.").

12. Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 354 (2019) (noting a significant rise in cases involving foreign activity).

13. *Id.* at 358 (highlighting "dense network of bilateral treaties regulating law enforcement cooperation around extradition and mutual legal aid assistance").

14. *Id.* at 340.

15. *See, e.g.*, Steven Arrigg Koh, *The Huawei Arrest: How It Likely Happened and What Comes Next*, JUST SEC. (Dec. 10, 2018), https://www.justsecurity.org/61799/huawei-arrest-happened [https://perma.cc/8TY9-HPBR]. International criminal tribunals are also recognizing the need to foster cross-border law enforcement

context is what criminal process should govern and protect individual defendants.

Up until now, scholarship has not comprehensively considered the nature of such criminal procedural rights and duties in the transnational context.[16] Most of the literature that has addressed this question—including extradition and the rule of non-inquiry,[17] recognition of foreign criminal judgments,[18] constitutional extraterritoriality,[19] personal and legislative jurisdiction,[20] cross-

cooperation to provide accountability for crime. *See* Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112 AM. J. INT'L L. 433, 441–42 (2018) (discussing steps that state actors and agencies may take to facilitate prevention and prosecution of atrocity crimes); *see also* Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689 (2017) (suggesting that ICC prosecutions may promote domestic human rights prosecutions).

16. One earlier attempt did so before 9/11 and focused on the doctrinal developments of Fourth, Fifth, and Sixth Amendment protections. Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along*, 39 HOUS. L. REV. 307, 308, 327, 335, 351 (2002). This Article builds upon this foundation in our contemporary era and does so by situating cross-border law enforcement developments alongside broader contexts of constitutional legal history, human rights, and political theory.

17. John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973 (2010) (examining the rule of non-inquiry and proposing more judicial involvement in extradition cases); Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 732 (1998) (analyzing the lack of judicial involvement in extraditions and the effect it has on "procedural protections").

18. Little has been written on the recognition of foreign criminal judgments at U.S. sentencing, and what has been written has generally argued that courts should be more circumspect in their consideration of foreign criminal judgments but has not considered the broader question of cross-sovereign criminal procedural rights. *See, e.g.*, Nora V. Demleitner, *Thwarting a New Start? Foreign Convictions, Sentencing, and Collateral Sanctions*, 36 U. TOL. L. REV. 505 (2005) (arguing for more limited use of foreign conviction by U.S. courts at sentencing, with concern for whether a foreign conviction demonstrates a risk of recidivism). *See generally* A. Kenneth Pye, *The Effect of Foreign Criminal Judgments within the United States*, 32 UMKC L. REV. 114 (1964) (discussing the ambiguity surrounding the effect foreign criminal judgments have within the United States).

19. Work on constitutional extraterritoriality has often proceeded from the perspective of the history of American empire and thus constitutional application to U.S. proceedings. *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009) (discussing the evolution of constitutional extraterritoriality and its interrelationship with U.S. history). This Article, by contrast, focuses on the related but distinct question of U.S. evaluation of criminal procedural rights in *foreign* legal systems.

20. Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial*

border transfer of evidence,[21] and judicial engagement with authoritarian legal systems[22]—have all considered aspects of core criminal procedure and/or judicial engagement with foreign legal systems without recognizing the same overarching phenomenon at play descriptively or considering its normative implications. Meanwhile, legal scholarship on procedural rights has done so outside of the transnational criminal context. Incorporation of the Bill of Rights—a classic dispute in both Supreme Court jurisprudence and in legal scholarship—rooted itself in questions of the plain language of the Fourteenth Amendment Due Process Clause, Framers' intent, and policy reasoning,[23] but more recent critiques of the selective incorporation approach to "constitutionalization" of criminal procedure[24] have not been considered in contemporary transnational criminal debates. The limited international human rights scholarship on criminal procedural rights focuses primarily on national constitutional protections[25] and, more often, human rights before

Due Process, 116 COLUM. L. REV. 625, 626 (2016) (arguing for due process curbs on personal jurisdiction in criminal cases); Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 516–17 (2016) (describing how due process limits extraterritorial legislative jurisdiction).

21. *See generally* L. Song Richardson, *Due Process for the Global Crime Age: A Proposal*, 41 CORNELL INT'L L.J. 347 (2008) (proposing a transnational due process model that minimizes foreign policy concerns in the mutual legal assistance context).

22. *See, e.g.*, Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. (forthcoming 2020) (manuscript at 26–27) (on file with author) ("[C]ourts must sometimes *evaluate* foreign law or institutions . . . . Judges may have to assess foreign laws while managing discovery or while considering forum selection clauses, stays, and antisuit injunctions. Perhaps the most common 'evaluative' doctrines in the authoritarian law setting are those concerning forum non conveniens and foreign judgments recognition . . . .").

23. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Louis Henkin, "*Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000).

24. *See, e.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) ("The constitutional proceduralism of the 1960s and after helped to *create* the harsh justice of the 1970s and after."); Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 113 (2005) ("Codes specify rules, not norms.").

25. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National*

international criminal tribunals.[26] And the vast majority of the scholarship on recognition of foreign judgments is on the civil or arbitral side.[27] This Article builds on this scholarship.

My central argument is that core criminal procedure—a standard that enumerates certain fundamental procedural rights but allows for flexibility in evaluating foreign criminal process—should be applied to all criminal law enforcement cooperation with other nations. To build this case, Part I will describe how all three government branches have evaluated other sovereigns using this core criminal procedure approach, which first emerged in Bill of Rights incorporation and international human rights engagement but now appears in novel cross-border electronic evidence cooperation. It will also describe how, at other times, courts have applied a vaguer outlier approach to foreign evidence material to conviction, foreign judgments material to sentencing, and extradition. This Part will also provide an explanatory account for how these two distinct approaches developed historically. Part II, drawing on global justice political theory, normatively grounds core criminal procedure in domestic procedural rights, international human rights standards, and comparative functionalism. Finally, Part

Constitutions, 3 DUKE J. COMPAR. & INT'L L. 235 (1993) (establishing certain general principles of human rights protection for individuals in national criminal justice processes); Chrisje Brants & Stijn Franken, *The Protection of Fundamental Human Rights in Criminal Process: General Report*, 5 UTRECHT L. REV. 7 (2009) (considering the ways in which national jurisdictions' legal systems promote or hinder implementation of fundamental rights in criminal process). More fruitful work has, however, been done on the economic and social rights side. *See, e.g.*, Sital Kalantry, Jocelyn E. Getgen & Steven Arrigg Koh, *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, 32 HUM. RTS. Q. 253 (2010); Katherine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

26. *See, e.g.*, Sonja Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008) (showing how problematic remedial rules in human rights law may be in the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda); David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983 (2008) (considering the constitutionality of the Rome Statute provisions in the event of U.S. ratification of the Rome Statute of the International Criminal Court).

27. *See* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 179 (2013) (noting that countries must acknowledge arbitral awards as binding and carry them out in compliance with local procedural requirements); David Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 LAW & POL'Y INT'L BUS. 325, 340 (1987) (stating that foreign judgments in the United States are enforceable unless they are fundamentally in conflict with basic notions of fairness or key elements of the U.S. legal system).

III will consider the broader implications of core criminal procedure for engagement with the International Criminal Court and newer international investigative mechanisms.

Ultimately, this Article makes four contributions. First, it enriches historical and contemporary understandings of criminal procedure, using the cross-border law enforcement context as a launching point to explore how the U.S. government has negotiated criminal procedural questions over the last century. Second, this Article contributes to international law scholarship by showing how the United States creates and implements bilateral and multilateral treaty obligations concerning criminal procedural rights. In doing so, it also provides some guidance for future government actors engaging in criminal procedural line drawing when negotiating treaties or other cross-border law enforcement agreements. Third, it adds to the literature on comparative law, showing how functionalism "touches down" when legal systems with conflicting criminal procedural norms interact in cross-border cases.[28] And finally, it uses a legal methodology to inform political philosophy—specifically, global justice theory—by affirming what specific criminal procedural rights may constitute a "core" amongst a Rawlsian law of peoples.[29]

I. CROSS-SOVEREIGN CRIMINAL PROCEDURAL LINE DRAWING: TWO APPROACHES

This Part describes how the U.S. government engages in what I call cross-sovereign *criminal procedural line drawing*, or the process of evaluating which criminal procedural rights to require when criminal cases involve another sovereign. As a descriptive taxonomy, this Part will describe two approaches that the political and judicial branches have taken in such line drawing. First is the *core criminal procedure* or fundamental rights approach, in which the United States guarantees certain—but not all—enumerated criminal procedural rights vis-à-vis another sovereign. Second is the minimalist *outlier approach*, an *ad hoc* analysis that ignores criminal procedural guarantees in all but the most flagrant cases wherein the other sovereign's procedure "shocks the conscience."

The doctrinal contexts in which these issues arise vary greatly. For example, the United States may send fugitives outward to other

28. Markus D. Dubber, *Comparative Criminal Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1277, 1277 (Mathias Reimann & Reinhard Zimmermann eds., 2012) ("[C]omparative criminal law has attracted little attention, at least compared to other types of law.").

29. *See infra* Part II.A.2.

countries, whereas other examples involve foreign evidence coming inward to U.S. criminal cases. Furthermore, they arise at various stages of the criminal process, such as investigations, pre-trial litigation regarding admission of evidence, and at sentencing. And yet all ultimately resolve to the same fundamental issue—holding foreign sovereigns to a certain criminal procedural standard—and, ultimately, to the central criminal justice concerns, namely, the carceral deprivation of liberty or, at the extreme, execution.

The formal, applicable sources of law may also vary. Core criminal procedure arises when the Supreme Court interprets the Bill of Rights, or when the political branches negotiate and ratify treaties related to international human rights or electronic evidence. Similarly, the "outlier" approach may turn on interpretation of the Fifth Amendment due process clause, federal courts' general supervisory powers, or various judicially-created rules such as that of non-inquiry. The ambiguity in this space owes to the fact that these cases lie between two clear poles of constitutional concern. On one extreme, the Constitution clearly regulates domestic prosecutions;[30] on the other extreme, it has nothing to say about a foreign country prosecuting its own national abroad. These cases unfold in between, wherein, at times, the Constitution regulates law enforcement conduct based on territory or nationality, but at other times it does not.[31]

To be clear at the outset: U.S. criminal procedure is not the paragon of criminal procedural perfection, and cross-border law enforcement cooperation is not the sole context wherein criminal procedural rights are worryingly parsed. Recent federal jurisprudence has eroded many axiomatic criminal procedural rights such as the warrant requirement,[32] *Miranda*,[33] and the right to counsel

30. *E.g.*, U.S. CONST. amend. XI (describing certain rights and procedural elements of criminal prosecutions).

31. As Kal Raustiala has noted, "the United States still lacks a firm answer to the question of whether the Constitution follows the flag, the government, the individual, or the directive of the president." RAUSTIALA, *supra* note 19, at 224. Rising U.S. power has coincided with a relaxation of traditional Westphalian territorial doctrines; American courts have frequently accepted executive assertions that constitutional protections are territorial. *Id.* at 188–89. This Article focuses on the implications of this tension, just at the edges of these constitutional protections.

32. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (describing the warrant requirement as "basically unrecognizable" due to its many exceptions).

33. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657 (1984) (recognizing an exception to the Miranda rule in situations "posing a threat to the public safety").

at lineups.[34] More specifically, even these eroded rights may not apply in various domestic criminal procedural circumstances. For example, *Boykin* rights—applicable in the plea colloquy context—encompass only the right against compulsory self-incrimination, the right to a jury trial, and the right to confront witnesses;[35] more generally, guilty pleas short circuit many rights individual defendants may assert in our criminal justice system.[36] Additionally, defendants may not assert Fourth Amendment claims on collateral review of state criminal convictions in federal habeas corpus proceedings, given that the Supreme Court has ruled that the exclusionary rule is a prophylactic remedy.[37] Relatedly, the same applies to judicial restrictions on *Bivens* remedies and qualified immunity.[38] These contexts differ from the focus of this Article because they are either not concerned with *cross-sovereign* criminal procedural rights, or arise in the civil context.

34. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 691 (1972) (holding that defendants have no Sixth Amendment right to counsel at a pre-indictment identification because no adversary judicial proceeding triggering the right has begun); *see also, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) ("The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. . . . Warrants are not required—unless they are.").

35. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

36. See FREDERICK T. DAVIS, AMERICAN CRIMINAL JUSTICE: AN INTRODUCTION 80 (2019) (noting that U.S. criminal procedural rights are premised on the assumption that a trial will take place, despite the fact that this is an increasingly uncommon occurrence).

37. *See* Stone v. Powell, 428 U.S. 465, 493 (1976) ("There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions."). *But cf.* Martinez v. Ryan, 566 U.S. 1, 17 (2012) ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.").

38. Ordinarily, a plaintiff may maintain suit against a government officer under two circumstances: (1) where the officer allegedly acted outside of delegated statutory power, or (2) where the officer acted within the conferred statutory limits of the office but allegedly offended a provision of the Constitution. Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 689–91 (1949). Nonetheless, Congress retains the authority to adopt alternative remedies for resolving legal complaints. *See* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 456–57 (2005).

A. THE CORE CRIMINAL PROCEDURE APPROACH

Pursuant to the core criminal procedure approach, the United States guarantees certain—but not all—enumerated criminal procedural rights vis-à-vis another sovereign. This approach has emerged in the history of incorporation of the Bill of Rights, negotiation and ratification of international human rights treaties, and in the Clarifying Lawful Overseas Use of Data (CLOUD) Act of 2018.

1. Incorporation of the Bill of Rights

Core criminal procedure originates in the U.S. Supreme Court and, more specifically, the beginnings of the "constitutionalization" of criminal procedure. Of course, the history of incorporation of the Bill of Rights' criminal procedural protections through the Fourteenth Amendment is as canonical as it is familiar. Adopted in the wake of the U.S. Civil War, the Fourteenth Amendment prohibits individual states from "depriv[ing] any person of life, liberty, or property, without due process of law."[39] From the early 1930s to early 1960s,[40] the Supreme Court interpreted this clause not as requiring that states uphold the criminal procedural protections in the Bill of Rights, but as protecting "fundamental fairness."[41] For example, in *Powell v. Alabama*, the Court found that a state's denial of counsel deprived due process in the infamous Scottsboro trial, a capital case involving two African Americans convicted of rape without, *inter alia*, the assistance of an attorney at trial.[42] In holding that the Fourteenth Amendment protects fundamental rights, the Court emphasized that such protection was "not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the 'conception of due process of law.'"[43] In weighing whether the Fourteenth Amendment protected from state action rights enumerated in the Fifth and Sixth Amendments, the Court asked whether such a right constituted one of the "fundamental principles of

39. U.S. CONST. amend. XIV.

40. *See* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 256, 304 (1982) (noting that an initial period of "fundamental fairness" application began in the wake of the adoption of the Fourteenth Amendment and lasted until the early 1960s).

41. *Id.* at 273.

42. 287 U.S. 45, 71 (1932).

43. *Id.* at 67–68 (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)); ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION 21 (3d ed. 2018).

liberty and justice which lie at the base of all our civil and political institutions."[44]

But starting in 1961, the Warren Court moved toward a right-by-right "selective incorporation" approach to criminal procedural protections,[45] ultimately incorporating through the Fourteenth Amendment due process clause virtually all of the Bill of Rights' criminal procedural guarantees, a process continuing to the present day.[46] Such abandonment of the fundamental fairness approach is widely recognized as "one of the most important legacies of the Warren Court. . . ."[47] In opting for selective incorporation, the Supreme Court articulated a test wherein it would first look at the entirety of the right (as opposed to a fact-specific analysis) and then ask whether the provision is "fundamental to our scheme of ordered liberty"[48] or "deeply rooted in this Nation's history and tradition."[49] Drawing on this analysis, the Court has by now incorporated virtually all rights,[50] including: the warrant requirement,[51] exclusionary rule,[52] and freedom from unreasonable searches and seizures[53] under the Fourth Amendment; the Double Jeopardy Clause,[54] privilege against

44. *Powell*, 287 U.S. at 67 (citing Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

45. *See* George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 172 (2005) ("Of the criminal procedure rights in the Bill of Rights, the first incorporation was not until 1961 when the Court [in Mapp v. Ohio, 367 U.S. 643 (1961)] required states to follow the Fourth Amendment exclusionary rule and suppress evidence that had been unconstitutionally seized."); Israel, *supra* note 40, at 253 ("In June 1960 Justice Brennan's separate opinion in *Ohio ex rel. Eaton v. Price* set forth what came to be the doctrinal foundation of the Warren Court's criminal procedure revolution . . . [and] what is now commonly described as the 'selective incorporation' theory of the [F]ourteenth [A]mendment." (footnote omitted)).

46. *See generally, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (incorporating the Eighth Amendment's Excessive Fines Clause against the states).

47. *See* Meares, *supra* note 24.

48. *See, e.g.*, *Timbs*, 139 S. Ct. at 686–88 (applying this test to the Excessive Fines Clause of the Eighth Amendment); McDonald v. City of Chicago, 561 U.S. 742, 758–59 (2010) (applying this test to the Second Amendment).

49. *See McDonald*, 561 U.S. at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

50. *See generally* RUSSELL L. WEAVER, JOHN M. BURKOFF & CATHERINE HANCOCK, CRIMINAL PROCEDURE: A CONTEMPORARY APPROACH 25–26 (2d ed. 2018).

51. Aguilar v. Texas, 378 U.S. 108 (1964).

52. Mapp v. Ohio, 367 U.S. 643, 659–60 (1961).

53. Wolf v. Colorado, 338 U.S. 25, 25–26 (1949).

54. Benton v. Maryland, 395 U.S. 784, 787 (1969).

self-incrimination,[55] and Just Compensation Clause[56] under the Fifth Amendment; the rights to trial by jury,[57] compulsory process,[58] speedy trial,[59] confrontation of adverse witnesses,[60] and assistance of counsel[61] under the Sixth Amendment; and the prohibitions against cruel and unusual punishment,[62] excessive bail,[63] and excessive fines[64] under the Eighth Amendment. At time of writing, the only criminal procedural rights not to be incorporated are the Fifth Amendment right to indictment by a grand jury and Sixth Amendment right to a jury selected from residents of the state and district where the crime occurred.[65] Once a protection is incorporated, "there is no daylight between the federal and state conduct it prohibits or requires."[66]

This history is relevant to core criminal procedure in three ways. As an initial matter, incorporation exposes the inherent challenges in criminal procedural line drawing. The Fourteenth Amendment incorporation debates among the members of the U.S. Supreme Court illustrate the slippery nature of this inquiry. For example, in *Duncan v. Louisiana*, Justices White and Harlan, purporting to apply the same standard, disagreed as to whether it was "fundamentally unfair" for the state of Louisiana to withhold from Gary Duncan the right to a jury trial for the charge of simple battery.[67] Meanwhile, in a concurring opinion, Justice Black altogether rejected the doctrine of fundamental fairness, stating that such inquiry "depends entirely on the particular

55. Malloy v. Hogan, 378 U.S. 1, 2–3 (1964).

56. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 233–34 (1897).

57. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

58. Washington v. Texas, 388 U.S. 14, 17–19 (1967).

59. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

60. Pointer v. Texas, 380 U.S. 400, 403 (1965).

61. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

62. Robinson v. California, 370 U.S. 660, 666 (1962).

63. Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

64. Timbs v. Indiana, 139 S. Ct. 682, 691 (2019).

65. F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 168, 175 n.78 (2019).

66. *Timbs*, 139 S. Ct. at 685 (noting that the only exception is the Sixth Amendment requirement of jury unanimity).

67. Duncan v. Louisiana, 391 U.S. 145, 149, 193 (1968). Justice White, writing for the majority, held that "trial by jury in criminal cases is fundamental to the American scheme of justice," *id.* at 149, while Justice Harlan, in dissent, stated that trial by jury is "a good means [of trying criminal cases], but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise," *id.* at 193 (Harlan, J., dissenting).

judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution."[68]

Second, incorporation reveals the three options available to courts when evaluating the criminal procedures of other sovereigns. One is a "hands off" approach, permitting the other sovereign discretion to guarantee whichever criminal procedural rights it deems to be fundamental. The opposite extreme is a total incorporation, or "normalization" approach, calling for criminal procedure to be co-extensive with that of the U.S. Bill of Rights and related rights flowing from them. The middle option—between rigorous insistence on identical procedural guarantees and laissez-faire permissibility of all foreign procedure—consists of two other possibilities. Courts can selectively incorporate a core criminal procedure by guaranteeing only certain rights, rooted in notions of fundamental guarantees in Anglo-American jurisprudence. Or, courts may apply a more nebulous fundamental fairness or "outlier test" in which much state investigative and/or adjudicative action is permitted unless the other sovereign grossly violates some core criminal procedural norm.

Finally, the long history of incorporation has given room to understand the positives and negatives of a fundamental rights approach to criminal procedure. For example, William Stuntz has famously critiqued the Warren Court's procedural revolution as spawning aggressive law enforcement in the latter part of the 20th century.[69] Additionally, Tracey Meares has argued that codes such as the Bill of Rights are advantageous in promoting reform, given that they specify rules over norms and provide "sharp-edged prophylactic prohibitions" that guard against suspicion of judicial actors otherwise prepared to justify law enforcement practices using open-ended fundamental fairness norms.[70] The flip side, though, is that such rules may be crudely inflexible and may create costs relating to under- and over-inclusiveness.[71]

68. *Id.* at 168–69 (Black, J., concurring); *see also* Fed. Power Comm'n v. Nat. Gas Pipeline Co., 315 U.S. 575, 600–01 (1942) (Black, Douglas, and Murphy, JJ., concurring) (discussing how the fundamental fairness doctrine is an elastic approach allowing judges to substitute for legislatures).

69. Stuntz, *supra* note 24 ("The constitutional proceduralism of the 1960s and after helped to *create* the harsh justice of the 1970s and after." (footnote omitted)).

70. *See* Meares, *supra* note 24 ("Codes specify rules, not norms.").

71. *Id.*

2. International Human Rights with Criminal Procedural Guarantees

Core criminal procedure also animates U.S. engagement with international human rights law. During the mid-20th century, countries had to agree on certain core criminal procedural rights in the drafting of the Universal Declaration of Human Rights (UDHR), as well as in the ratification of the International Covenant on Civil and Political Rights (ICCPR).[72] In contrast to judicial right-by-right incorporation, here the political branches could comprehensively assess a system of rights to establish as core.

The early UDHR negotiation history shows that the United States did not expect to parse the definition and scope of human rights.[73] The U.S. government initially favored including an international bill of rights into the U.N. Charter, focusing specifically on civil and political rights similar to those in the U.S. Bill of Rights—instead of economic rights and enforcement measures.[74] The U.S. delegation assumed that human rights were clearly defined concepts, with a focus on civil and political rights as opposed to economic security rights;[75] so while there was some discussion of certain freedoms relevant to Franklin D. Roosevelt's "four freedoms" speech from 1941,[76] the delegation did little preparatory work to define human rights in a broader, cross-cultural sense.[77]

72. Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. L. REV. 61, 65–66 (2013) (noting the process of countries agreeing on certain rights, in particular criminal procedural rights, when drafting the UDHR).

73. *See generally* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 62–72 (2010) (reviewing the history of the UDHR negotiation and highlighting the cross-cultural complexities in doing so).

74. *See* M. GLEN JOHNSON & JANUSZ SYMONIDES, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION 1948–1998, at 28–29 (1998).

75. *See id.* at 40–42 (describing the clash of values and particularly the assumptions of the American Law Institute on foundational rights).

76. *See generally* Franklin D. Roosevelt, President of the U.S., Eighth Annual Message to Congress (Four Freedoms Speech) (Jan. 6, 1941) (listing four key human freedoms including (1) freedom of speech and expression; (2) freedom of every person to worship God in their own way; (3) freedom from want; and (4) freedom from fear).

77. Even the American Law Institute, which in 1942 appointed a committee of lawyers and political scientists from several different countries including Germany, Poland, India, and Lebanon, was unable to reach complete consensus regarding the definition of human rights. JOHNSON, *supra* note 74, at 40–41; *see also* Statement of Essential Human Rights Presented by the Delegation of Panama, U.N. Doc. A/148 (Oct. 24, 1946) (defining essential freedoms).

However, disagreements with foreign nations as to the substance and language of such rights led the United States and other participating nations to conclude that a separate bill of rights should be drafted and negotiated in order to ensure that the U.N. Charter itself was adopted, leaving the Charter with only a brief reference to human rights.[78] When the time came to negotiate the Declaration itself, the various parties aimed to articulate "a common conception of human rights that would command acceptance despite huge differences in culture, political systems, geographic location and economic circumstance."[79] Negotiations ultimately turned on a variety of tensions, including natural law versus positivism, liberalism versus Marxism, and western perspectives versus non-western perspectives.[80]

With regard to criminal procedure, an initial question of the UDHR drafting process was which rights to even include.[81] Designed precisely to strengthen the independence of the judiciary, Articles 6–12 are the UDHR's central provisions concerning the rights of defendants in criminal proceedings.[82] In the end, the UDHR's final text protects only a few criminal procedural rights, lacking the specificity of the U.S. Bill of Rights but affirming general principles that are immanent in the U.S. Constitution. In particular, Articles 6–12 guarantee universal recognition as a person and equality before the law,[83] effective judicial remedy for violation of fundamental rights,[84] freedom from arbitrary arrest or detention,[85] "full equality to a fair and public hearing by an independent and impartial tribunal,"[86] presumption of innocence,[87] protection against retroactivity,[88] and protection against "arbitrary interference" with a person's "privacy,

78. JOHNSON, *supra* note 74, at 27–29. *See also* Delegation of Panama, Statement of Essential Human Rights Presented by the Delegation of Panama, U.N. Doc. A/148 (Oct. 24, 1946).

79. JOHNSON, *supra* note 74, at 39.

80. *Id.* at 42–48; SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 57–61 (2018) (reviewing the history of UDHR negotiation).

81. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 51 (1999).

82. *See id.* at 49–58.

83. G.A. Res. 217 (III) A, UDHR, arts. 6–7 (Dec. 10, 1948) [hereinafter UDHR].

84. *Id*. art. 8.

85. *Id.* art. 9.

86. *Id.* art. 10.

87. *Id.* art. 11(1).

88. *Id.* art. 11(2).

family, home or correspondence."[89] In other words, such rights constitute a core criminal procedure narrower than that guaranteed in the U.S. Constitution: rights to assistance of counsel, freedom from cruel and unusual punishment, and unreasonable search and seizure are all absent.[90]

History reveals that the U.S. delegation initially favored a more robust conception of rights in the UDHR. Specifically, the United States made proposals to expand the protections guaranteed by these articles. For example, the United States proposed that the UDHR include the right of arrestees to "be promptly informed of the charges against [them], and to trial within a reasonable time or to be released,"[91] but the provision's final form guarantees protection against merely "arbitrary arrest, detention, or exile."[92] Additionally, the United States proposed adding the rights of confrontation and counsel,[93] but the final language of the provision only guarantees "a fair and public hearing by an independent and impartial tribunal."[94]

Criminal procedural line drawing was not only evident in the *negotiation* of the UDHR; it was also apparent in the *ratification* of international human rights treaties.[95] In particular, this arose in U.S. action regarding Article 14 of the ICCPR, which requires rights such as equality before courts and tribunals, presumption of innocence, presence at criminal trial without undue delay, appeal, and double jeopardy.[96] Here, the United States for the first time curtailed rights

89. *Id.* art. 12.

90. *See generally id.*

91. 1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES 1023 (William A. Schabas ed., 2013) [hereinafter U.S. SUGGESTIONS FOR UDHR].

92. UDHR, *supra* note 83, art. 9.

93. U.S. SUGGESTIONS FOR UDHR, *supra* note 91, at 712.

94. UHDR, *supra* note 83, art. 10. Although Article 11 provides to the accused "all the guarantees necessary for his defence [sic]," it does not expressly provide for the right to the assistance of counsel. *Id.* art. 11.

95. Given its status as a declaration, the UDHR is not a human rights treaty, though many of the UDHR's provisions have been incorporated into customary international law, incorporated into domestic law via other human rights treaties, or otherwise incorporated into domestic law. Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH & HUM. RTS. 144, 145–46 (1998).

96. *See* International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR]; Hum. Rts. Comm., General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶¶ 3–4, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) (noting the complexities of the various Article 14 guarantees with different scopes of application, though noting that a general reservation to the right to a fair trial would defeat the object and purpose of the treaty).

located *beyond* its core conception.[97] Specifically, it did so by attaching certain reservations, understandings, and declarations (RUDs) to its ratification of the ICCPR.[98]

For example, with regard to the right to counsel, the United States stated its understanding that the guarantee of "legal assistance of [one's] choosing"[99] does not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on ground of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed.[100] Additionally, with regard to the right to "obtain the attendance and examination of witnesses on his behalf," the United States expressed understanding that such right does not prohibit the requirement that a defendant seeking to compel a witness must show that such witness is necessary for her defense.[101] Further, the United States reserved its acceptance of a separate criminal procedural standard for juveniles as compared with adults, maintaining that, in exceptional circumstances, juveniles may be treated as adults in criminal proceedings.[102] Finally, the United States attached RUDs to its acceptance of the ICCPR guarantees regarding compensatory damages[103] and rights against double jeopardy.[104]

97. *See* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1186 (1993).

98. "RUDs" are the "reservations, understandings, and declarations" upon which U.S. ratification of the ICCPR was conditioned, proposed by the Carter Administration after extensive inter-agency review and consultation. *See id.* 1199–1200.

99. ICCPR, *supra* note 96.

100. Stewart, *supra* note 97, at 1199–1200.

101. *Id.* at 1200.

102. *Id.* at 1195.

103. While the ICCPR guarantees compensatory damages for unlawful arrests, the United States does not generally accord a right to compensation for an arrest or detention made in good faith but ultimately determined to have been unlawful. *See id.* at 1197–98.

104. Again, the United States stated its understanding that the ICCPR prohibition against double jeopardy is not absolute; it applies only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the federal government or a constituent unit. *See id.* at 1200. Finally, of the seven major international human rights treaties, the only other to touch on criminal procedural guarantees is the U.N. Convention against Torture, which includes provisions that bear on criminal procedural rights. *See* UNFPA, *Core International Human Rights Instruments*, UNITED NATIONS POPULATION FUND (2004), https://www.unfpa.org/resources/core-international-human-rights-instruments [https://perma.cc/SV4H-VZMS]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Feb. 4, 1985, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

3. Electronic Evidence

The final example of core criminal procedure is the most cutting edge. The U.S. government has recently articulated core criminal procedure in statutory rules governing the transmission of in-country electronic data abroad for use in foreign criminal cases. The Clarifying Lawful Overseas Use of Data (CLOUD) Act, enacted in 2018, is best known for amending the Stored Communications Act to allow U.S. law enforcement to compel internet service providers (ISPs) to provide data stored on servers abroad.[105] However, it also empowers the executive branch to enter bilateral agreements with foreign governments, which may then directly request electronic data from U.S. ISPs and use that data as evidence in a foreign prosecution.[106] In many cases, this obviates the need for mutual legal assistance, increasing efficiency in law enforcement cooperation.[107]

Notably, the Act mandates that the Attorney General, with the concurrence of the Secretary of State, certify to Congress its determination, *inter alia*, that every foreign legal system "afford[] robust substantive and procedural protections for privacy and civil liberties."[108] The Act provides both procedural and substantive guidance as to how the executive branch should make that determination, mandating that it consider factors such as "adequate substantive and procedural laws on cybercrime and electronic evidence,"[109] respect for the rule of law and nondiscrimination principles, and applicable human rights standards.[110] Regarding the latter, the Act specifies rights such as "protection from arbitrary and unlawful interference with privacy;" "fair trial rights;" "freedom of expression, association, and peaceful assembly;" "prohibitions on arbitrary arrest and detention;" and "prohibitions against torture and

105. *See* 18 U.S.C. § 2713 ("A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication . . . regardless of whether [it] is located within or outside of the United States.").

106. *See id.* § 2523(b).

107. *See generally* U.S. DEP'T OF JUST., PROMOTING PUBLIC SAFETY, PRIVACY, AND THE RULE OF LAW AROUND THE WORLD: THE PURPOSE AND IMPACT OF THE CLOUD ACT (2019), https://www.justice.gov/opa/press-release/file/1153446/download [https://perma.cc/Y2DP-8JTC] (noting the purpose and potential benefits of the CLOUD Act).

108. *See* 18 U.S.C. § 2523(b).

109. *See id.* § 2523(b)(1)(B)(i) (specifying that states may demonstrate this by being a party to the Convention on Cybercrime, which entered into force January 7, 2004, or through domestic laws that are consistent with the Convention).

110. *See id.* § 2523(b)(1)(B)(i)–(iii).

cruel, inhuman, or degrading treatment or punishment."[111] It also categorically exempts such certifications and determinations from judicial review.[112]

In summary, the core criminal procedure approach explicitly guarantees certain fundamental rights. In the incorporation context, core criminal procedure encompasses virtually all U.S. Bill of Rights guarantees, save for the Fifth Amendment right to indictment by grand jury and the Sixth Amendment right to a jury selected from residents of the state and district where the crime occurred. The ICCPR provides rights of intermediate specificity—including rights to presence at trial without undue delay, presumption of innocence, and protection against double jeopardy.[113] And the UDHR and CLOUD Act provide the most basic minimum guarantees to fair trial rights and prohibitions on arbitrary arrest and detention.[114]

B. THE OUTLIER APPROACH

While core criminal procedure, in the contexts above, is enumerated, prospective, and relatively coherent in its approach to fundamental rights, the outlier approach described in this Part is imprecise, retrospective, and *ad hoc*. Pursuant to this approach, in all but the most flagrant cases of foreign criminal justice system abuse, U.S. courts will problematically draw criminal procedural lines to admit foreign evidence, consider foreign convictions, or extradite to foreign countries.

111. *Id.* § 2523(b)(1)(B)(iii). The Act also specifies certain requirements for the agreements themselves, such as a prohibition on targeting U.S. persons. *See id.* § 2523(b)(4).

112. *See id.* § 2523(c). The CLOUD Act also notes that "[i]nternational agreements provide a mechanism for resolving these potential conflicting legal obligations where the United States and the relevant foreign government share a common commitment to the rule of law and the protection of privacy and civil liberties." Clarifying Lawful Overseas Use of Data (CLOUD) Act, Pub. L. No. 115-141, div. V, § 102, 132 Stat. 1213, 1213 (2018). Given the CLOUD Act was recently passed into law, it has not yet been tested in the courts nor discussed in depth in academic literature. This will surely change soon, however. In October 2019, the United States and United Kingdom concluded the first bilateral agreement under the Act, paving the way for each country to obtain electronic evidence directly from ISPs in the territory of the other. *See* Agreement on Access to Electronic Data for the Purpose of Countering Serious Crime, U.K.-U.S., Oct. 3, 2019, CS USA No. 6/2019.

113. *See* ICCPR, *supra* note 96.

114. *See* UDHR, *supra* note 83, arts. 6–12; CAT, *supra* note 104; 18 U.S.C. § 2523(b)(1)(B)(ii)–(iii).

1. Evidence Material to Conviction

The outlier approach manifests itself, first, when foreign law enforcement investigators produce evidence that U.S. prosecutors move to admit in U.S. criminal proceedings.

This issue presents itself with increasing frequency today, but its roots are of old vintage.[115] While the U.S. Constitution is silent regarding its territorial reach, the Insular Cases of 1901 distinguished between incorporated and unincorporated territories as respective zones in which "fundamental" and "nonfundamental" constitutional limitations applied, respectively.[116] From this point until the 1950s, constitutional rights "follow[ed] the flag"—i.e., to newly-acquired territories—but nowhere else.[117] And while the plurality opinion in the 1957 case *Reid v. Covert* reasoned that Bill of Rights protections should apply to U.S. citizens everywhere,[118] Justice Kennedy's approach, first articulated in his concurrence in *United States v. Verdugo-Urquidez* (1990) and later in his majority opinion in *Boumediene v. Bush* (2008), held that the Constitution does not apply abroad—at least with regard to foreign nationals—when it would be "impracticable and anomalous."[119] The issue in many of these cases differed slightly from the question at hand in this Article, however, because they largely concerned application of the U.S. Bill of Rights to the American empire, i.e., to the *United States acting as sovereign*, albeit outside of core U.S. territory. In other words, the central question in such cases was whether the Constitution protected Americans that the U.S. government tried overseas.[120] A related but

115. *See generally* RAUSTIALA, *supra* note 19 (discussing the evolution of constitutional extraterritoriality and its interrelationship with U.S. history).

116. *See* Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 366 (2009).

117. RAUSTIALA, *supra* note 19, at 25–26.

118. *See* Reid v. Covert, 354 U.S. 1, 17 (1957).

119. Boumediene v. Bush, 553 U.S. 723, 759 (2008) (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring)); *see also* Neuman, *supra* note 116, at 375 ("We may assume, however, that U.S. citizens retain their belief in U.S. privacy values even when present in countries with different customs, and we might regard as legitimate the citizens' expectation that their own government . . . would behave consistently toward them.").

120. *See* RAUSTIALA, *supra* note 19, at 140 ("[B]oth cases posed a familiar question: did the Constitution protect Americans tried overseas by the U.S. government?"); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (examining the historical origins of the doctrine of "inherent powers" over foreign affairs and the Supreme Court's ultimate ratification of that doctrine in its late-nineteenth-century decisions concerning Indians, aliens, and territories).

distinct line of cases concerns U.S. courts evaluating foreign sovereigns applying the outlier approach to the fruits of extraterritorial searches, statements obtained during foreign custodial interrogation, and other areas wherein foreign evidence is introduced in domestic criminal proceedings.[121]

This foreign sovereign evaluation plays out in two different doctrinal scenarios. First, there are the cases on the applicability of the U.S. Constitution abroad, wherein courts engage in complex line drawing to determine when constitutional rights apply to foreign evidence and legal procedures. For instance, the Supreme Court has created a test wherein constitutional and statutory protections do not apply extraterritorially if such protection would be "impracticable and anomalous."[122] Under this aforementioned test, constitutional protections will turn on an analysis of the "practical concerns" involved in applying the rights,[123] rather than on straightforward application of constitutional principles and precedent, as would be the case in ordinary domestic prosecutions.[124] The courts have similarly created tests to determine *who* benefits from constitutional protections. Under the prevailing view articulated in *Boumediene*, the extraterritorial rights of both citizens and noncitizens vary from location to location, and from circumstance to circumstance.[125] For non-citizens, the courts have sometimes determined that whether they benefit from constitutional protections in U.S. courts depends on the extent of their "voluntary connection[s]" to the United States.[126]

121. *See, e.g.*, United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009) ("The general rule is that evidence obtained from searches carried out by foreign officials in their own countries is admissible in United States courts, even if the search would not otherwise comply with United States law or the law of the foreign country. . . . But this Circuit has recognized . . . that evidence from foreign searches is inadmissible if the conduct of the foreign officials during the search 'shocks the judicial conscience.'").

122. *See Boumediene*, 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)) (citing *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring)).

123. *Id.*

124. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20–30 (1968) (applying constitutional principles and precedent to determine the reasonableness of search and seizure).

125. *Boumediene*, 553 U.S. at 766 ("[A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.").

126. *See Verdugo-Urquidez*, 494 U.S. at 271; Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1036–37 (D. Ariz. 2015), *vacated*, 140 S. Ct. 1258 (2020).

Even in cases where the Constitution does not apply abroad, courts may still exclude evidence using the outlier approach. The Fourth Amendment is the prime example here. Generally, U.S. courts will admit evidence that foreign officials obtain from a search in their own country, even when such search would not comply with U.S. law.[127] But when foreign law enforcement is operating entirely independently in its criminal investigations, and thus the Fourth Amendment does not apply, evidence gathered will still be excluded when the foreign law enforcement methods "shock the conscience" of the U.S. court.[128] This discretion is rooted in federal courts' inherent "supervisory powers over the administration of federal justice,"[129] and protects against foreign government conduct that "violates fundamental international norms of decency."[130] This constitutes a "high bar."[131] For instance, the Second Circuit has affirmed the admission of evidence that may have been obtained by Israeli law enforcement without a warrant under Israeli law.[132] Or as another

127. United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009); *see also Verdugo-Urquidez*, 494 U.S. at 274 (adding the requirement that the Fourth Amendment does not apply to searches/seizures of nonresident aliens located in a foreign country). Is (non)compliance with foreign law considered when determining reasonableness of foreign searches? The Ninth Circuit says yes; the Fifth, Seventh, and Eleventh Circuits say no. *Compare* United States v. Peterson, 812 F.2d 486, 490 (5th Cir. 1987) (holding that courts should address law of foreign country when assessing reasonableness of foreign search), *with Emmanuel*, 565 F.3d at 1330 (holding that evidence obtained from searches by foreign officials is generally admissible, even if the search violated foreign law), United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976) (refusing to hold that the Government must demonstrate that a search was legal under the laws of a foreign country when it enters evidence gleaned from such a search), *and* United States v. Stokes, 726 F.3d 880, 890 (7th Cir. 2013) (adopting the language of *Emmanuel*, though also including *Peterson* in a string cite). An exception to this rule is that the Fourth Amendment applies when the United States is in a "joint venture" or when foreign authorities are acting as U.S. agents. *See, e.g.*, United States v. Abu Ali, 528 F.3d 210, 228 (4th Cir. 2008), *cert. denied* Ali v. United States, 555 U.S. 1170 (2009).

128. *E.g.*, United States v. Maturo, 982 F.2d 57, 60–61 (2d Cir. 1992); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970).

129. *Emmanuel*, 565 F.3d at 1330 (quoting Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir. 1965)) (citing United States v. Barona, 56 F.3d 1087, 1096 (9th Cir. 1995)).

130. United States v. Mitro, 880 F.2d 1480, 1483–84 (1st Cir. 1989) (quoting Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the* Terra Firma *of the United States*, 20 VA. J. INT'L L. 741, 775 (1980)).

131. United States v. Knowles, No. CR 12-266, 2015 WL 10890271, at *4 (D.D.C. Dec. 30, 2015) ("Though neither the Supreme Court nor the D.C. Circuit has articulated a clear test to use to evaluate whether government conduct shocks the conscience, the Supreme Court and other circuits emphasize the high bar such conduct must satisfy.").

132. United States v. Getto, 729 F.3d 221, 229 (2d Cir. 2013).

example, the Eleventh Circuit has found that lack of Bahamian judicial review by a neutral magistrate over wiretaps did not shock the conscience, given that fundamental international norms of decency do not require in all jurisdictions such review over applications to intercept wire communications.[133]

Fifth Amendment interrogation jurisprudence similarly exemplifies the outlier approach. Interrogation abroad by foreign authorities does not require *Miranda* warnings, given that the Constitution cannot compel such foreign law enforcement conduct and, furthermore, U.S. court exclusion has little deterrent effect on foreign police practices.[134] But if the U.S. government subsequently moves to admit such statements into evidence in a domestic criminal case, it must demonstrate that such statements were voluntary and that the methods for obtaining such statements did not "shock the conscience."[135] This "shocks the conscience" test derives from the Due Process Clauses of the Fifth and Fourteenth Amendments,[136] and courts use it as a backstop to ensure that "decencies of civilized conduct" are met even where the Constitution would not ordinarily apply.[137] For example, the Eleventh Circuit has found voluntary a statement that Cambodian law enforcement elicited when the defendant was interrogated for less than two hours, was offered food and water, was not beaten or threatened, and was "treated with

133. *Emmanuel*, 565 F.3d at 1331 ("But it is clear enough that the conduct of the Bahamian officials does not shock our conscience. Sergeant Woodside's request for a wiretap on Emmanuel's telephones went through four levels of review and the request had to be renewed every 14 days."); *see also* United States v. Castrillon, No. S2 05 Cr. 156(CM), 2007 WL 2398810, at *3 (S.D.N.Y. Aug. 15, 2007) (holding that "the conduct identified by the defendants as conscience-shocking-that [sic] Colombian law does not require a neutral and detached magistrate to review wiretap applications [or] a showing of probable cause . . . falls far short of that standard").

134. *See, e.g.*, United States v. Frank, 599 F.3d 1221, 1228 (11th Cir. 2010); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980).

135. *E.g.*, United States v. Allen, 864 F.3d 63, 82 (2d Cir. 2017) (noting that while the Fourth Amendment prohibits unreasonable searches and seizures regardless of whether the evidence is sought to be used in a criminal trial, a Fifth Amendment violation may occur only if a statement is introduced at trial); Casey v. Dep't of State, 980 F.2d 1472, 1477 (D.C. Cir. 1992) (showing "great deference" to Costa Rica's determination of extraditability in ruling against defendant who alleged that the State Department misrepresented RICO charges as being drug charges, thereby subjecting him to a Costa Rican treaty's dual criminality provision, whereas RICO charges would not have the same effect because Costa Rica did not have a RICO equivalent).

136. *See* Harbury v. Deutch, 233 F.3d 596, 602 (D.C. Cir. 2000); Rochin v. California, 342 U.S. 165, 172–73 (1952).

137. United States v. Abu Ali, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005).

respect."[138] Similarly, the Southern District of New York has found that a statement given to Colombian law enforcement did not shock the conscience when the defendant was first advised of his rights under Colombian law—which included the right to remain silent and the right to counsel—even though he did not appear to have waived such rights and was neither informed that anything he said could be used against him in a court of law, nor that an attorney would be appointed for him if he could not afford one.[139]

These tests are *ad hoc*, fact-specific, and at times criticized. As some scholars have noted, the meaning of "impracticable and anomalous" is unclear.[140] The U.S. District Court for the District of Columbia has noted that "neither the Supreme Court nor the D.C. Circuit has articulated a clear test . . . to evaluate whether [foreign] government conduct shocks the conscience" in the Fourth Amendment context.[141] And some judges have criticized this approach on the ground that it opens U.S. nationals up to the "vagaries" of foreign criminal justice systems.[142]

2. Judgments Material to Sentencing

U.S. courts also use an outlier approach at sentencing, asking whether a defendant's prior conviction in a foreign country may be used as a basis for upward departure of the U.S. sentence.[143]

At the federal level, although the U.S. Sentencing Guidelines specify that foreign convictions may not be taken into account when

138. *Frank*, 599 F.3d at 1229.

139. United States v. Lopez-Imitola, No. 03 CR.294, 2004 WL 2534153, at *3 (S.D.N.Y. Nov. 9, 2004).

140. *See* Neuman, *supra* note 116, at 391–92.

141. United States v. Knowles, No. 12-266, 2015 WL 10890271, at *4 (D.D.C. Dec. 30, 2015).

142. *See, e.g.*, United States v. Barona, 56 F.3d 1087, 1100 (9th Cir. 1995) (Reinhardt, J., dissenting) ("[W]hat the majority holds is that the only Fourth Amendment protections United States citizens who travel abroad enjoy vis-a-vis the United States government are those safeguards, if any, afforded by the laws of the foreign nations they visit."). In *Barona*, the majority affirmed the admission of evidence obtained in Denmark through a joint venture between Danish and U.S. authorities as reasonable on the basis that all authorities fully complied with Danish law in their investigation. *Id.* at 1096.

143. A departure allows sentencing courts to impose sentences outside or otherwise different from the Commission's guideline range, or—if the departure is based on inadequate criminal history—to assign a different criminal history category, allowing the court to impose a sentence outside the guideline range. OFF. OF GEN. COUNS., U.S. SENT'G COMM'N, DEPARTURE AND VARIANCE PRIMER 1, 5 (2014), https://www.ussc.gov/sites/default/files/pdf/training/primers/2014_Primer_Departure_Variance.pdf [https://perma.cc/3C5P-ABL8].

computing a defendant's criminal history, they expressly provide that such convictions may be considered at sentencing "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[144] Among the states, considerable differences exist regarding the extent to which foreign criminal judgments may be recognized, particularly in the context of repeat offender statutes.[145] Some state courts have insisted that prosecutors demonstrate that the foreign legal system in which a defendant was previously convicted is "fundamentally fair,"[146] but most have been willing to consider foreign convictions when determining sentences without any such requirement on the part of prosecutors.[147]

When the government moves for upward departure based on a foreign conviction, courts virtually always reject defendant challenges to such upward departure. The variation in the case law is how specifically courts consider criminal procedural guarantees when doing so. Some courts, in addressing the use of foreign criminal convictions at sentencing, have rejected challenges to upward departure without addressing any specific procedural rights.[148] In

144. *See* U.S. SENT'G GUIDELINES MANUAL § 4A1.3 (U.S. SENT'G COMM'N 2018). Such "information" includes "[p]rior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions)." *Id.* § 4A1.3(a)(2)(A); *see also id.* § 4A1.2(h) ("Sentences resulting from foreign convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).").

145. As of 1994, eight states expressly allowed for the consideration of foreign judgments, twenty states disallowed it, and the remaining states had not clearly decided the issue. *See* Alex Glashausser, Note, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134, 139 (1994).

146. *See, e.g.*, People v. Wallach, 312 N.W.2d 387, 404 (Mich. Ct. App. 1981) (holding that, before it could introduce evidence of a Canadian conviction for impeachment purposes, the prosecution had the burden of showing that the Canadian legal system was fundamentally fair), *vacated on other grounds*, 331 N.W.2d 730 (Mich. 1983).

147. *See, e.g.*, United States v. Small, 183 F. Supp. 2d 755, 769 (W.D. Pa. 2002) (noting that, regardless of their fairness, the procedures used by a foreign prosecutor did not "cast any serious doubt on the accuracy of the fact-finding process"), *aff'd*, 333 F.3d 425 (3d Cir. 2003), *rev'd on other grounds*, 544 U.S. 385 (2005).

148. *See, e.g.*, United States v. Fordham, 187 F.3d 344, 348 (3d Cir. 1999) (affirming lower court's determination that Mexican conviction was "fair" for purposes of upward departure despite uncertainty regarding whether "Mexican authorities adhered to due process in sentencing the defendant"); United States v. Soliman, 889 F.2d 441, 445 (2d Cir. 1989) (affirming upward departure based on defendant's previous Italian conviction because trial judge was fully apprised of the "possible constitutional

such cases, courts have even affirmed sentence enhancements based on foreign convictions obtained through criminal proceedings starkly different from those in the United States. In *United States v. Ngombwa*, for example, the Eighth Circuit affirmed the U.S. District Court for the Northern District of Iowa's use of Rwandan "*gacaca* court" *in absentia* convictions in its upward departure at sentencing, sidestepping the defendant's claims that such courts lack due process and procedural rights.[149] The district court found that, although such proceedings "lacked certain rights" guaranteed domestically, expert testimony regarding the various procedural protections that were in place assured the court that such proceedings were "procedurally fair to accused individuals," using as indicia "a healthy ratio of acquittals to convictions."[150] This is quite astounding, given the community-based *gacaca* courts lack any right to counsel, the presumption of innocence is pressured, and in many cases defendants learn of the nature of the allegations against them only on the day of their trial.[151] Indeed, the United States lacks a formal extradition treaty with Rwanda.[152] As will be seen below, this suggests a lack of confidence in the country's criminal justice system.

Other courts may reference the "fundamental fairness" standard derived from the Fourteenth Amendment's due process clause.[153] As noted above, the "fundamental fairness" inquiry—by which courts

infirmities" of the foreign judgment); *see also* Brice v. Pickett, 515 F.2d 153, 154 (9th Cir. 1975) ("Even if . . . [defendant] could prove that the foreign conviction was obtained in proceedings which if conducted in this country would be violative of United States constitutional guarantees, we find no requirement that a foreign court's proceedings or conviction must conform to United States constitutional standards.").

149. 893 F.3d 546, 556 (8th Cir. 2018); *see also* United States v. Ngombwa, No. 14-CR-123-LRR, 2017 U.S. Dist. LEXIS 17373, at *66 n.8 (N.D. Iowa Feb. 7, 2017).

150. *Ngombwa*, 2017 U.S. Dist. LEXIS 17373, at *66 n.8.; *see also* Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 381 (noting *gacaca* courts' lack of competent judges, prosecutors, and defense counsel).

151. *See* HUM. RTS. WATCH, JUSTICE COMPROMISED: THE LEGACY OF RWANDA'S COMMUNITY-BASED GACACA COURTS 27–65 (2011) (reviewing *gacaca* procedure and arguable violations of the right to counsel, presumption of innocence, right to be informed of the case and to have time to prepare a defense, right to present a defense, right to testify in one's defense and the right against self-incrimination, protection from double jeopardy, the right to be present at one's own trial, and the right not to be arbitrarily detained).

152. *See* 18 U.S.C. § 3181 (listing U.S. extradition treaty partners).

153. *See, e.g.*, United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir. 1977) (per curiam) ("The only question here is whether the German legal system is so fundamentally unfair that a conviction obtained under it is inadmissible. The defendant has not shown that the German legal system lacks the procedural protections necessary for fundamental fairness.").

evaluate whether a given criminal procedural rule is consistent with due process—typically proceeds by considering whether the given right is contrary to "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such a government."[154] For example, in *United States v. Kole*, the Third Circuit held that a prior Philippine conviction in which the defendant was denied the right to a jury trial was nonetheless consistent with fundamental fairness, as the Philippine court's judgment reflected "the kind of careful, searching analysis of evidence that one would expect . . . in the United States."[155] Applying the "fundamental fairness" standard derived from the Fourteenth Amendment's Due Process Clause, courts have typically found upward departure appropriate in such cases.[156] In general, courts are most likely to affirm upward departure based on a foreign conviction when presented with reliable information concerning the defendant's conduct that formed the basis of the foreign conviction.[157] In terms of specific procedural rights, courts have considered foreign

154. *See* Twining v. New Jersey, 211 U.S. 78, 106 (1908), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

155. 164 F.3d 164, 175 (3d Cir. 1998).

156. *See also* United States v. McKeeve, 131 F.3d 1, 10 (1st Cir. 1997) (admitting foreign-administered deposition that "did not comport in all respects with American practice" under the former testimony hearsay exception of Federal Rules of Evidence 804(b)(1) on the basis that "the manner of examination required by the law of the host nation . . . [was compatible] with our fundamental principles of fairness"). *But see* United States v. Moskovits, 784 F. Supp. 183, 190 (E.D. Pa. 1991) ("[W]e cannot countenance reliance on a foreign criminal conviction where it can be said, on the basis of the record made, that there was a failure to provide for counsel at crucial stages of the process.").

157. In *United States v. Delmarle*, for instance, motivating the Second Circuit's affirmation of the use of an Italian *in absentia* conviction was a reliable record of the conduct underlying the judgment. 99 F.3d 80, 85–86 (2d Cir. 1996) ("The events . . . had been investigated by both an Italian agency and the United States Military Police. The court considered the investigative report of the United States Military Police, which was accompanied by extensive documentation . . . ." (internal quotations omitted)); *see also* United States v. Ngombwa, No. 14-CR-123-LRR, 2017 U.S. Dist. LEXIS 17373, at *66 (N.D. Iowa Feb. 7, 2017) ("[T]he court finds that the eyewitness reports of Defendant's acts of violence—bolstered by his convictions in two separate [Rwandan] courts—constitute 'reliable information' indicating that Defendant's classification in Criminal History Category I under-represents the severity of his criminal history."); United States v. Small, 183 F. Supp. 2d 755, 769 (W.D. Pa. 2002), *aff'd*, 333 F.3d 425 (2003), *rev'd*, 544 U.S. 385 (2005) ("Although [violating defendant's right to remain silent] would be highly improper in a criminal prosecution in the United States, we cannot say that the prosecutor's actions cast any serious doubt on the *accuracy* of the fact-finding process . . . ." (emphasis added)).

convictions obtained without assistance of counsel,[158] convictions obtained without the right to a jury trial,[159] and perhaps more dramatically, convictions obtained *in absentia*.[160]

3. Extradition

Extradition is where the U.S. facilitation of foreign prosecutions is at its apex. In this context, courts advance an outlier test when evaluating foreign criminal justice systems, due in part to antecedent political branch action.

The political branches are the first to engage in criminal procedural line drawing when they negotiate bilateral extradition treaties. Under Title 18 of the U.S. Code, such a treaty is necessary to extradite a person out of the United States.[161] The U.S. political branches have thus concluded such bilateral extradition treaties with dozens of other countries.[162] In so doing, they act as criminal procedural gatekeepers, assessing other countries' criminal justice systems before entering mutually binding international legal obligations to extradite to and from that country. So, for example, the United States has ratified extradition treaties with France and Japan, but not with Russia or China.[163]

What exactly do the political branches assess in a potential extradition treaty partner? Unfortunately, public statements in this regard are quite sparse. To be sure, the branches do not require the identical, finely-tuned constellation of U.S. rights. The majority of treaty partners are civil law countries, meaning they are non-adversarial and thus procedurally distinct from common law jurisdictions.[164] Indeed, pursuant to these treaties, U.S. nationals may

158. United States v. Concha, 294 F.3d 1248, 1254–55 (10th Cir. 2002); Houle v. United States, 493 F.2d 915, 915–16 (5th Cir. 1974) (per curiam).

159. *Kole*, 164 F.3d 164, 165–66 (3d Cir. 1998); *Small*, 183 F. Supp. 2d at 768.

160. *Delmarle*, 99 F.3d at 85–86; United States v. Fleishman, 684 F.2d 1329, 1345 (9th Cir. 1982), *rev'd*, United States v. Ibarra-Alcarez, 830 F.2d 968 (9th Cir. 1987).

161. *See* 18 U.S.C. § 3181(a) ("The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government."). *But see id.* § 3184 (permitting the United States to extradite, without regard to the existence of a treaty, non-U.S. persons who commit crimes of violence against United States nationals in foreign countries).

162. *Id.* § 3181 (listing the countries with which the United States has extradition agreements).

163. *Id*.

164. *Compare id.* (listing the countries with which the United States has extradition agreements), *with Field Listing: Legal Systems*, CIA, https://www.cia.gov/library/

be extradited to countries lacking a right to trial by jury,[165] in which defendants lack the same robust ability to confront witnesses,[166] evidence may be admitted even though the underlying warrant was issued on less than probable cause,[167] or where hearsay evidence is generally admitted in the investigating judge's pre-trial dossier at the outset of criminal proceedings.[168] Even after conclusion of the extradition treaty, executive branch extradition practice also demonstrates some critical evaluation of foreign criminal procedure. For example, many civil law countries convict *in absentia*, i.e., in instances where a criminal defendant is at large and thus not physically present at trial.[169] For the U.S. executive branch, such a conviction is a step too far: if a foreign country convicts a defendant *in absentia* and such defendant is located in U.S. territory, the executive will request—as a condition precedent to extradition—that the individual be given a new trial upon return to that country.[170]

We might expect the judiciary to police the boundaries of such executive action.[171] But the U.S. judiciary has crafted a "rule of non-

publications/the-world-factbook/fields/308.html [https://perma.cc/U2TM-TZYS] (listing all countries by legal systems).

165. *See generally* Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. L. SOC. SCI. 275 (2008) (surveying the various forms of jury trial worldwide).

166. *See* Lorena Bachmaier, *Rights and Methods to Challenge Evidence and Witnesses in Civil Law Jurisdictions*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 841, 853 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds., 2019); *see also* Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 242 n.7 (1977) ("Some have suggested that the judge's role in questioning the defendant and witnesses at trial is the most distinctive feature of the [inquisitorial] system.").

167. *See* Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT'L L. 423, 426 (2001) (noting that England, France, and Germany issue warrants without requiring probable cause and that European countries do not use exclusion as often to counteract illegal searches and seizures).

168. *See* Goldstein, *supra* note 166 ("[T]he judge is expected to carry the factfinding initiative at trial, using the file (dossier) prepared during the pretrial investigation by an examining judge (or magistrate) or public prosecutor."). *See generally* JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977) (surveying the German system of criminal procedure).

169. *See* Anne L. Quintal, *Rule 61: The "Voice of the Victims" Screams out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723, 739 (1998).

170. *See, e.g.*, Leslie Anderson, *Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception*, 4 MICH. J. INT'L L. 153, 155–56 (1983) (describing an instance where the United States requested a new trial upon granting extradition).

171. *See* John Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 94–95 (2002) ("[A] citizen accused of crimes in another country might

inquiry," meaning courts will not look deeper into a foreign country's criminal process notwithstanding possible humanitarian concerns, deferring instead to the executive's evaluation pursuant to its Article II power and the requirement of an extradition treaty pursuant to 18 U.S.C. § 3181(a).[172] Courts also cite to the Secretary of State's ultimate discretion not to issue a surrender warrant in instances where the fugitive has shown that he or she would be tortured or otherwise denied the requisite process abroad.[173] Whether explicitly or not, courts assume that they are "bound by the existence of an extradition treaty to assume that the trial will be fair."[174] On occasion, the judiciary has recognized a limit to this deference. For example, the Second Circuit has expressed "disquiet" over this doctrine, recognizing possible "situations where [an extraditee] would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination. . . ."[175] However, courts rarely ever pierce this veil, typically opting to instead defer.[176]

seek comfort in the protections of due process . . . . [But the] extradition process does not live up to such expectations . . . .").

172. *See, e.g.*, Hoxha v. Levi, 465 F.3d 554, 563 (3d Cir. 2006) (denying habeas relief despite petitioner's claims that he would be tortured if extradited because "such humanitarian considerations are within the purview of the executive branch and generally should not be addressed by the courts").

173. *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997) ("[U]nder what is called the 'rule of non-inquiry' in extradition law, courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely."). As noted above, such deference also implicates foreign substantive criminal law. Individuals may also be extradited to other countries and prosecuted for crimes that would not constitute criminal conduct within the United States. *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 569 (N.D. Ohio 1985) ("If the extradition treaty so provides, the United States may surrender a person to be prosecuted for acts which are not crimes in the United States."); Factor v. Laubenheimer, 290 U.S. 276, 293 (1933) ("Considerations which should govern the diplomatic relations between nations . . . require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.").

174. Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

175. Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) ("We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above.").

176. Indeed, it appears that the few occasions where courts appeared to chip away at the rule of non-inquiry have since been overruled. *See, e.g.*, Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (9th Cir. 2000) (concluding that an individual facing extradition who claims he will be subjected to torture in the requesting country may, under habeas corpus, petition for review of the Secretary of State's decision to extradite), *overruled by* Trinidad y Garcia v. Thomas 683 F.3d 952, 957 (9th Cir. 2012) (en banc) ("The doctrine of separation of powers and the rule of non-inquiry block any

Judicial reticence in this area may stem from the fact that the United States' duties to its own nationals in extraditions are unclear, falling between the twin doctrinal pillars of domestic criminal procedural violations and extradition prohibitions in cases of torture.[177] On one hand, any such foreign criminal process would clearly violate constitutionally guaranteed procedural rights were it to apply in a domestic U.S. case.[178] On the other hand, the United States has an absolute obligation not to extradite individuals to countries where they will be tortured. The principle of *non-refoulement* prohibits the expulsion of a refugee to a country where she may be persecuted.[179]

Notably, several international instruments, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), explicitly obligate states to abide by

inquiry into the substance of the Secretary[] [of State's] declaration. To the extent that we have previously implied greater judicial review of the substance of the Secretary's extradition decision other than compliance with her obligations under domestic law, we overrule that precedent." (citations omitted)); *In re* Burt, 737 F.2d 1477, 1484 (7th Cir. 1984) ("[F]ederal courts undertaking habeas corpus review of extraditions have the authority to consider the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights."), *partially overruled by* Venckiene v. United States, 929 F.3d 843, 860 (7th Cir. 2019).

177. To be clear, the preceding discussion should not be misunderstood as suggesting that the executive branch enjoys unfettered discretion to extradite at will. The judiciary does exercise authority over the executive branch in *individual cases*: *inter alia*, it must certify that DOJ has probable cause that the fugitive has committed the alleged crime abroad. *See* RONALD J. HEDGES, INTERNATIONAL EXTRADITION: A GUIDE FOR JUDGES 10 (2014) ("[T]he central issue [is] whether there is competent evidence to establish probable cause that the fugitive committed the offenses underlying the request for extradition."). But before any such case reaches such judicial review, the political branches must have concluded a bilateral extradition treaty with the foreign country. *See* 18 U.S.C. § 3181(a) ("The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government."). And once the political branches reach such a conclusion, the judiciary construes questions regarding foreign criminal process to be a foreign affairs matter.

178. And, of course, a foreign country's arrest of a U.S. national present in a foreign country would not explicitly trigger any U.S. duties to its nationals. *See Arrest or Detention of a U.S. Citizen Abroad*, U.S. DEP'T STATE, https://travel.state.gov/content/travel/en/international-travel/emergencies/arrest-detention.html [https://perma.cc/S95L-VFZM] (explaining the limited services the U.S. government can provide to arrested citizens).

179. The United States has, at times, nonetheless done so, depending upon diplomatic assurances before transferring individuals to countries where they were likely to be tortured. Jonathan Horowitz, *Fatally Flawed Anti-Torture Assurances*, JUST SEC. (June 13, 2017), https://www.justsecurity.org/42009/fatally-flawed-anti-torture-assurances [https://perma.cc/FL83-MXVF].

this principle.[180] Therefore, as party to the ICCPR and CAT, the United States will not deport someone to a country where she will be tortured, even giving that person asylum in certain cases.[181] These cases lie in the middle: state action clearly exists because the U.S. government is physically taking custody of individuals and moving them across borders, and yet the alleged violations of individual rights abroad clearly do not implicate affirmative negative obligations on the state, such as those mandated in the CAT.[182]

Finally, U.S. courts differ regarding the weight to be given to foreign convictions *in absentia* when determining whether a foreign state has demonstrated probable cause to arrest an individual within the United States.[183] Many U.S. courts have historically considered such convictions merely as charges and therefore have required some independent showing of probable cause.[184] Other courts, particularly in recent years, have held that convictions *in absentia* can conclusively

180. CAT, *supra* note 104, at 114; *see The Principle of Non-Refoulment Under International Human Rights Law*, OFF. HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf [https://perma.cc/X8N3-992S].

181. *See* ICCPR, *supra* note 96, at 175; CAT, *supra* note 103, at 114; *see also* Jeffrey G. Johnston, *The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect Against Torture After 9/11*, 11 INT'L CRIM. L. REV. 1, 5–6 (2011) (noting that both the ICCPR and the CAT would be violated if a requested country extradited a defendant to a country wherein they would be tortured). These duties also stem from international legal obligations and the 1967 Protocol Relating to the Status of Refugees. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶ 18, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018) (listing preventive measures to guarantee the principle of *non-refoulement*).

182. As will be discussed in Part II, *infra*, this ambiguity underscores a broader lack of theory regarding U.S. obligations—in criminal justice and more broadly—beyond those encompassed in a social contract, citizenship-based conception of legal duties. *See* Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1050–52 (2007).

183. *See generally* Roberto Iraola, *Foreign Extradition and* in Absentia *Convictions*, 39 SETON HALL L. REV. 843 (2009).

184. *See, e.g.*, Arambasic v. Ashcroft, 403 F. Supp. 2d 951, 962 (D.S.D. 2005); Germany v. United States, No. 06-CV-01201, 2007 WL 2581894, at *7 (E.D.N.Y. Sept. 5, 2007); *In re* Extradition of Ernst, No. 97 CRIM.MISC.1 PG.22, 1998 WL 395267, at *7–10 (S.D.N.Y. July 14, 1998) (finding probable cause to extradite lacking when prosecution presented only the decision of a Swiss court, which failed to describe the basis for its decision); *see also* Note, *Foreign Trials* in Absentia*: Due Process Objections to Unconditional Extradition*, 13 STAN. L. REV. 370, 377 (1961) ("The established practice in the United States and most other countries . . . is that a person convicted *in absentia* is not treated as a person convicted, but as a person charged.").

establish probable cause.[185] In any case, that a defendant was convicted by a foreign country *in absentia* does not warrant a denial of extradition, even when the defendant may not be afforded a new trial by the requesting state, as is typically the case.[186] In *Gallina v. Fraser*, the defendant was found extraditable to Italy on the basis of two *in absentia* convictions.[187] In rejecting the defendant's contention that a finding of extraditability violated his due process rights because he would be returned directly to prison without a trial, the Second Circuit noted that it could find "no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the [defendant] upon extradition."[188] The court further observed that the case law holding that convictions *in absentia* should be treated as a charge was "not to be construed as a statement that [a] federal court may, as a condition for discharging the writ, require retrial in the foreign country."[189]

To sum up, pursuant to the outlier approach, courts deploy an *ad hoc*, retrospective, generalized assessment of foreign criminal justice systems. The courts have used a number of flexible tests when evaluating criminal procedural rights both in the course of conviction and in sentencing.[190] On the one hand, every defendant is guaranteed minimum standards of "civilized conduct," regardless of whether other constitutional provisions apply.[191] On the other hand, the courts

185. *See, e.g.*, United States v. Avdic, No. CR. 07-M06, 2007 WL 1875778, at *8 (D.S.D. June 28, 2007) (finding probable cause to extradite based on Bosnian conviction *in absentia* when "an independent judicial officer in the requesting country heard the evidence and found it sufficient to convict"); United States v. Bogue, No. CRIM.A. 98-572-M, 1998 WL 966070, at *2 (E.D. Pa. Oct. 13, 1998) ("A determination of the French government's procedural fairness in undertaking the petitioner's trial in his absence . . . is beyond the scope of this Court's review.").

186. Iraola, *supra* note 183, at 857–58.

187. Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir. 1960).

188. *Id.*

189. *Id.* at 78–79. What the case law stood for, according to the court, was merely that an *in absentia* conviction does not preclude a district court from making an independent probable cause determination as to whether the evidence presented justifies a reasonable belief that the fugitive committed the crime for which extradition is sought. *See id.* At the time *Gallina* was decided, in two of the seven reported cases concerning extradition for defendants convicted *in absentia*, the courts discharged the defendant, finding the evidence insufficient to support even an indictment. *See* Note, *supra* note 184, at 377 n.31.

190. *See supra* Parts I.B.1–2.

191. *See* United States v. Abu Ali, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)); *supra* notes 18–19 and accompanying text.

exclude rights that are sufficiently "impracticable" and deny protection to defendants lacking sufficient "connection" to the United States.[192] Each of these tests is highly fact-specific, and the Supreme Court has not established a particular structure for courts to take in their approach to these questions. Regarding foreign evidence—including fruits of extraterritorial searches and foreign interrogations[193]—evidence is admitted unless it falls under an outlier test such as "shocking the judicial conscience." When considering foreign criminal judgments as a basis for upward departure at sentencing, there are few, if any, procedural rights on which U.S. courts insist a foreign conviction must safeguard.[194] U.S. courts have affirmed the use of foreign judgments that were obtained without the right to counsel,[195] the right against self-incrimination,[196] and, most frequently, the right to a jury trial.[197] Similarly, concerning extradition, U.S. courts have found probable cause to extradite based on foreign convictions obtained *in absentia*, even when no guarantees exist that the convicted party will receive a new trial upon arrival to the requesting country.[198]

192. *See supra* notes 122–29 and accompanying text.

193. *See supra* notes 135–40 and accompanying text.

194. On occasion, courts have refused to consider foreign convictions obtained without the assistance of counsel. *See, e.g.*, United States v. Moskovits, 784 F. Supp. 193 (E.D. Pa. 1992). However, such practice undoubtedly represents the exception, not the rule. *See* United States v. Concha, 294 F.3d 1248, 1254 (10th Cir. 2002) ("[E]ven assuming [the foreign convictions] are subject to challenge on Sixth Amendment grounds, . . . it is proper to consider the underlying conduct in assessing the propriety of an upward departure."); Houle v. United States, 493 F.2d 915, 916 n.2 (5th Cir. 1974) ("We decline to assume that [a conviction obtained without the assistance of counsel] may be the basis for a judgment that a foreign system, utilizing procedures with which we are unfamiliar, has failed to provide a fair trial if it does not conform with our right-to-counsel concepts."); *cf.* United States v. Shavanaux, 647 F.3d 993, 997 (10th Cir. 2011) (affirming, for purposes of upward departure, sentencing judge's consideration of prior tribal convictions obtained without the assistance of counsel).

195. *See Concha*, 294 F.3d at 1254; United States v. Fleishman, 684 F.2d 1329, 1346 (9th Cir. 1982); *Houle*, 493 F.2d at 916 n.2.

196. *See* United States v. Small, 183 F. Supp. 2d 755, 769 (W.D. Pa. 2002) ("Although [violating defendant's right to remain silent] would be highly improper in a criminal prosecution in the United States, we cannot say that the prosecutor's actions . . . rendered [the defendant's] conviction unfair.").

197. United States v. Kole, 164 F.3d 164, 175 (3d Cir. 1998); United States v. Delmarle, 99 F.3d 80, 85–86 (2d Cir. 1996); United States v. Ngombwa, No. 14-CR-123-LRR, 2017 U.S. Dist. LEXIS 17373, at *66 n.8 (N.D. Iowa Feb. 7, 2017); *Small*, 183 F. Supp. 2d at 768.

198. Iraola, *supra* note 183, at 857–58; *see, e.g.*, United States v. Avdic, No. CR. 07-M06, 2007 WL 1875778, at *8 (D.S.D. June 28, 2007) (finding probable cause to extradite based on Bosnian conviction *in absentia* when "an independent judicial

C. ASSESSING AND EXPLAINING THE TWO APPROACHES

How may we explain and assess the two approaches described above? On its own terms, the core criminal procedure approach coheres. The U.S. Supreme Court has the greatest interest in preserving process domestically; the Court both decides which Bill of Rights guarantees apply to the states and what form they should take in such prosecutions.[199] The political branches then have the next highest concern in the negotiation and ratification of human rights treaties that apply both abroad and at home.[200] And finally, the United States has established the most narrow minimum core in instances where a mutuality of agreement exists but the normative concerns are at their lowest, either because the instrument is not legally binding (in the case of the UDHR)[201] or because the guarantees concern foreign jurisdictions prosecuting foreign nationals (in the case of the CLOUD Act).

Similarly, the outlier approach makes some intuitive sense on its own terms. Foreign jurisdictions are permitted a robust set of criminal procedures—even those procedures that will influence domestic criminal prosecutions—as long as there is no flagrant activity on the part of U.S. law enforcement and/or in the structure of that foreign legal system.[202] And extradition is driven by political branch treaty making, in particular executive branch foreign affairs expertise; the judiciary then defers because the political branches have "cleared the space" with formal law enforcement agreements.[203]

But combined, these two approaches are nonsensical. The clearest example of such doctrinal incoherence is that of the CLOUD Act, which draws procedural lines to include *greater* explicit protections for foreign nationals prosecuted in foreign countries than

officer in the requesting country heard the evidence and found it sufficient to convict"); United States v. Bogue, No. CRIM.A. 98-572-M, 1998 WL 966070, at *2 (E.D. Pa. Oct. 13, 1998) ("A determination of the French government's procedural fairness in undertaking the petitioner's trial in his absence . . . is beyond the scope of this Court's review."). *But see In re* Extradition of Ernst, No. 97 CRIM.MISC.1 PG.22, 1998 WL 395267, at *7–10 (S.D.N.Y. July 14, 1998) (finding probable cause to extradite lacking when prosecution presented only decision of a Swiss court, which failed to describe the basis for its decision).

199. *See supra* Part I.A. As discussed in Part II.A, *infra*, this differentiation is also consistent with Rawlsian second and third original positions, as well as the rights flowing from them.

200. *See supra* Part I.A.

201. *See supra* note 95.

202. *See supra* Part I.B.

203. *See supra* Part I.B.

it does U.S. nationals prosecuted abroad or, in some instances, even domestically.[204] First, the CLOUD Act excludes U.S. nationals, so by definition foreign countries are advancing investigations into their own or other nationals; this presumably gives the United States a lower stake in the process. Second, in contrast to extraditions, where a foreign government has already indicted an individual, CLOUD Act cases apply to investigations, which almost always arise pre-indictment.[205] There is thus less immediate risk of a flagrant due process or human rights violation, though of course such an investigation may lead to prosecution and incarceration. In other words, the Act saliently provides guidance regarding fundamental fairness when foreign sovereigns are obtaining evidence in the United States, and yet little-to-no guidance exists for concluding extradition treaties or articulating an "outlier test" due process analysis.[206] Such explicit guidance on core criminal procedure—more than in other contexts—is surprising because the U.S. government has less of a stake in these cases.

Another example of such doctrinal incoherence is the treatment of foreign convictions *in absentia*.[207] U.S. courts disfavor such convictions as a basis for extradition abroad, where constitutional criminal procedural rights otherwise have little applicability.[208] And yet domestically, such convictions may be the basis for upward departure for sentences.[209] This is surprising because the U.S. criminal justice system should presumably have more of a stake in the administration of its own sentences than it does in prosecutions abroad.

Why such doctrinal incoherence? The answer lies in the historical development of four distinct legal movements—incorporation, human rights codification, judicial rulings on constitutional extraterritoriality, and internationalization of criminal law enforcement—each coming online at various points in the twentieth century. First, judicial rulings on extraterritoriality are of oldest vintage and are internally incoherent; for example, the Insular Cases, *Reid v. Covert* and *Verdugo-Urquidez*, exemplify constitutional extraterritoriality doctrine decided in the nineteenth century and

204. *See supra* Part I.A.3.
205. *See supra* Part I.A.3.
206. *See supra* Part I.A.3.
207. *See supra* Part I.B.
208. *See supra* Part I.B.3.
209. *See supra* Part I.B.2.

then fractured in the twentieth century.[210] Second, the human rights movement began in the 1940s with the negotiation of the UDHR and subsequent international human rights instruments, though the United States has been slow to ratify many of these treaties since that time.[211] Third, incorporation of the U.S. Bill of Rights did not occur until the Warren Court "revolution," beginning in earnest in the 1960s.[212] And finally, law-enforcement activity abroad has grown aggressively in the last twenty years.[213]

These successive and overlapping legal regimes have led to a lag in the articulation and implementation of criminal procedural norms over time. When the United States was pushing for certain rights to be included in international human rights treaties, many of these rights had not been incorporated in the fifty U.S. states.[214] Similarly, when the U.S. courts were ruling on applicability of the U.S. Constitution abroad, they were doing so in a pre-incorporation era and, mostly, in a pre-human rights era.[215] And from a broader transnational legal process perspective, many of these crosscurrents are interrelated. For example, the international human rights movement derives in large part from American influence on the instruments, and the American influence is largely rooted in the United States Constitution.[216] As such, many of these concepts were "uploaded" from U.S. law to international human rights law, and then "downloaded" to many other countries pursuant to transnational legal process.[217] And yet, in the

210. *See supra* Part I.B.1.

211. *See supra* Part I.A.2.

212. *See supra* Part I.A.1.

213. In criminal procedure in particular, the rise of law enforcement abroad corresponded with the "constitutionalization" of the Bill of Rights during the Warren Court era; reconciling these trends has been an enduring challenge for the federal courts. RAUSTIALA, *supra* note 19, at 184 ("[T]he criminal procedure revolution of the 1960s . . . created a host of legal protections for suspects that fit awkwardly with overseas policing efforts.").

214. *See supra* Part I.A.2.

215. *See supra* Part I.A.1. This is similar to Kal Raustiala's point that various forms of constitutional extraterritoriality and intra-territoriality exist concurrently and incoherently today due to their different legal geneses at various points in our history. *See* RAUSTIALA, *supra* note 19, at 7.

216. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 764–66 (2012) (discussing the one-time influence of the U.S. Constitution on constitutionalism and human rights abroad).

217. *See* Harold Hongju Koh, *Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 747 (2013) ("Twenty-first-century international lawmaking has become a swirling interactive process whereby norms get 'uploaded' from one country into the international system and then 'downloaded' elsewhere into another country's laws or even a private actor's internal rules.").

United States, this download has ironically stalled out in transnational criminal law enforcement.

These successive and overlapping legal regimes have led to confusion in the lower courts.[218] The best example of this has been the *Hernandez* case, which has had a long history both in the Fifth Circuit and in the Supreme Court.[219] The 2010 case involved a U.S. Border Patrol agent, standing in the United States, killing a Mexican citizen, Sergio Adrian Hernandez Guereca ("Hernandez"), standing in Mexico.[220] Hernandez's parents subsequently brought a variety of claims against the agent and the United States, including claims under *Bivens* and the Alien Tort Statute, that turned on the question of whether the U.S. Constitution applied extraterritorially to Mexico.[221] As part of this litigation, the courts struggled with how to reconcile the "voluntary connections" test with the "impracticable and anomalous" test.[222]

218. *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) ("The law that we are bound to follow is, instead, the 'functional approach' of *Boumediene* and the 'significant voluntary connection' test of *Verdugo–Urquidez*."); Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1035 (D. Ariz. 2015) ("In sum, this Court finds most appropriate to apply the 'practical considerations' outlined in *Boumediene* in conjunction with *Verdugo–Urquidez*' 'voluntary connections' test to evaluate whether J.A. was protected by the Fourth Amendment."); Al Bahlul v. United States, 767 F.3d 1, 31–33 (D.C. Cir. 2014) (Henderson, J., concurring) (reconciling the overlapping doctrine to determine extraterritorial applicability of the Fifth Amendment).

219. Hernandez v. United States, 802 F. Supp. 2d 834, 846 (W.D. Tex. 2011) (granting the government's motion to dismiss in its entirety), *aff'd in part, rev'd in part*, 757 F.3d 249, 280 (5th Cir. 2014) (holding that while the United States had not waived sovereign immunity for any of the claims brought against it, appellants were able to bring forth a Fifth Amendment claim against Agent Mesa and had asserted sufficient facts to overcome qualified immunity), *aff'd on reh'g en banc per curiam*, 785 F.3d 117, 119 (5th Cir. 2015) (determining that plaintiffs failed to assert a breach of the Fourth Amendment, and that Agent Mesa was entitled to qualified immunity from the Fifth Amendment excessive-force claim), *cert. granted sub nom.* Hernandez v. Mesa, 137 S. Ct. 291 (2016), *vacated per curiam*, 137 S. Ct. 2003, 2007–08 (2017) (holding that the court of appeals erred in granting qualified immunity to Agent Mesa). On remand, the Fifth Circuit, sitting en banc, affirmed the district court's earlier decision to dismiss plaintiffs' claims against the government and Agent Mesa. Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018) (en banc), *cert. granted in part*, 139 S. Ct. 2636 (2019), *aff'd*, 140 S. Ct. 735, 739, 744, 750 (2020) (declining to extend *Bivens* to the "new context" of a claim arising out of a cross-border shooting); *cf.* United States v. Allen, 864 F.3d 63, 68 (2d Cir. 2017) ("[T]he Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony.").

220. Hernandez v. United States, 757 F.3d at 255.

221. *Id.*

222. *See id.* at 265 ("While the *Boumediene* Court appears to repudiate the

It is time to clear up this confusion and resolve the lag in articulation of criminal procedural norms. Core criminal procedure is the superior approach because it is most consistent with domestic and international legal obligations in a time of increasing law enforcement cooperation. It thus affirms defendants' individual rights—rights which affirm individual dignity, mandate necessary process, and delineate the limits of government authority—at a time where they are most vulnerable in the face of not one, but multiple sovereigns advancing their prosecution. The following Parts will build the normative case for core criminal procedure, provide a methodology for its application, and show its utility in engaging with the broader system of international criminal law.

II. TOWARDS A NEW FRAMEWORK FOR CORE CRIMINAL PROCEDURE

How should the U.S. government engage in criminal procedural line drawing? This Part builds a normative foundation for core criminal procedure. It first theorizes such core, using constitutional and global justice theory. It then argues for a tripartite framework—rooted in constitutional incorporation, international human rights obligations, and comparative functionalism—for the judiciary and political branches to employ when engaging in cross-sovereign line drawing. Finally, it prescribes the role each of the three branches of government should play in applying this standard to foreign criminal justice systems.

A. THEORIZING THE CORE

What should be the inviolable inner core of criminal procedure? What is the obligation of any state to provide such process to its own nationals and to other nationals? Does that obligation extend only to

formalistic reasoning of *Verdugo-Urquidez*'s sufficient connections test, courts have continued to rely on the sufficient connections test and its related interpretation of the Fourth Amendment text."); Hernandez v. United States, 785 F.3d at 136 (Prado, J., concurring) ("Citing *Eisentrager* and *Verdugo-Urquidez*, the concurrence asserts that the Supreme Court has foreclosed the question before our Court. This uncomplicated view of extraterritoriality fails to exhibit due regard for the Court's watershed opinion in *Boumediene*, which not only authoritatively interpreted these earlier cases but also announced the bedrock standards for determining the extraterritorial reach of *the Constitution* . . . ."); Hernandez v. Mesa, 137 S. Ct. at 2011 (Breyer, J., dissenting) ("These six sets of considerations taken together provide more than enough reason for treating the entire culvert as having sufficient involvement with, and connection to, the United States to subject the culvert to Fourth Amendment protections. I would consequently conclude that the Fourth Amendment applies.").

cases where the U.S. government is itself prosecuting individuals, or does U.S. involvement in foreign prosecutions trigger certain criminal procedural and/or constitutional obligations? From these fundamental questions emerges an obvious tension, one scholars often overlook: either way, cross-border law enforcement cooperation opens the United States to both praise and criticism. On one hand, arguments for the status quo favor broad law enforcement cooperation and thus promotion of criminal accountability and security—but open the United States to accusations of brutal realism that overrides individual rights and sucks individuals worldwide into its expansive criminal justice system. Conversely, prescribing a rigorous rights framework could promote the United States as laudable arbiter of individual rights, but opens it to charges of both cultural imperialism and reluctance to assist other countries in critical law enforcement goals. As a general rule, a greater insistence on criminal procedural rights will lead to decreasing law-enforcement cooperation—at the extreme, insisting on the identical criminal procedural rights as in the United States would lead to the total cessation of any such cooperation.[223]

One starting point to resolve this tension is to affirm its contemporary inevitability. International cooperation in law enforcement constitutes a consequential, necessary shift in U.S. criminal justice. Such cross-border cooperation addresses one of the central concerns of international criminal law: that global crime metastasizes more rapidly than any domestic or international institution can legally adapt to promote criminal accountability, creating impunity gaps.[224] While this cross-border crime may be traced to piracy in the earliest days of the U.S. republic or the rise of drug trafficking in the 1970s, the accelerating rate of movement of people and information across borders has catalyzed a new era of global crime.[225] The U.S. government knows that while its borders

223. This balance adds a transnational twist to the classic dichotomy between crime control values—emphasizing efficiency, speed, finality, and other characteristics that serve the repression of criminal conduct—and due process—focusing on formal, adjudicative, adversarial processes that instantiate formidable "obstacle course" impediments to carrying an accused further along in the criminal process—first outlined by Herbert Packer in 1964. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9–23 (1964).

224. *See* Koh, *supra* note 12, at 352; Tuerkheimer, *supra* note 16, at 308–14.

225. *See* Koh, *supra* note 12, at 351–52; Tuerkheimer, *supra* note 16, at 309 ("An earlier example of 'global crime' might have been the importation of heroin from Italy to the United States. Today's criminal efforts totally eclipse such earlier 'global' criminal ventures.").

delimit the geographical boundaries of its enforcement jurisdiction, criminality increasingly transcends such borders.[226] As the FIFA and Charles "Chuckie" Taylor, Jr. cases demonstrate, these borders now represent an advantage for criminals, who exploit "national sanctuaries" to live in impunity.[227] In light of this, the question is not *whether*, but *how* to best draw cross-border criminal procedural lines in this contemporary space.[228]

1. Beyond the Social Contract

At first blush, constitutional doctrine and theory could provide a framework for theorizing core criminal procedure, given the long history of complex questions regarding constitutional extraterritoriality and scholarship relating to it. Indeed, debates about constitutional extraterritorial applicability have long turned on shifting accounts of when, where, and to whom the U.S. Constitution applies abroad.[229] As Gerald Neuman has noted, "[t]o resolve the question of the proper scope of the individual rights provisions of the United States Constitution, it is useful to ask what rights in a

226. *See* Koh, *supra* note 12 (discussing the proliferation of U.S. foreign affairs prosecutions).

227. *Id.* at 352–55 (discussing both the 2015 arrest of seven senior FIFA officials and the 2008 conviction of Charles "Chuckie" Taylor, Jr.—son of former Liberian President Charles Taylor—for perpetuating torture while serving as head of the Liberian Anti-Terrorism Unit from 1999 to 2002).

228. In other words, when courts are engaging in "impracticable and anomalous" analysis, "impracticable" does not equal *unbridled* pragmatism or *outlier* pragmatism rooted in only the most flagrant foreign procedural conduct. Instead, this Article calls for a *principled* pragmatism, one that equals fundamental rights, rights informed by constitutional, human rights, and functionalist analysis. This Part structures this analysis.

229. *See* RAUSTIALA, *supra* note 19, at 7. A central tension in these cases has been between a territorial conception of U.S. criminal procedural rights—i.e., wherein constitutional guarantees stop "at the water's edge"—and a conception wherein the Constitution applies more robustly to aliens and to U.S. nationals in foreign territories. *Id.* at 185–86. For example, *Reid v. Covert*, decided in 1957, likely indicates the high-water mark for the extraterritorial application of constitutional criminal procedural rights. 354 U.S. 1 (1957). Writing for a four-justice plurality, Justice Black declared that whenever the United States acts against its citizens abroad, it may do so only in conformity with the Bill of Rights. *Id.* at 5–6. Half a century earlier, by contrast, the Court held in *Neely v. Henkel* that the Bill of Rights retains no force abroad, even for U.S. citizens. 180 U.S. 109, 122–23 (1901). Between these two extremes, perhaps, lies Justice Edward Douglass White's concurring opinion in *Downes v. Bidwell*. 182 U.S. 244, 287 (1901) (White, J., concurring). In its articulation of the doctrine of "territorial incorporation," Justice White's concurrence suggests that even territories unincorporated by the United States may benefit from "inherent . . . principles . . . of . . . free government." *Id.* at 291.

constitution are *for*, and in particular what United States constitutional rights are for."[230] In 1991, at the time of Neuman's writing, that was a pressing question in the space of the extraterritorial enforcement of constitutional rights and one that he resolved through a social contract framework.[231]

However, the Constitution is undertheorized at the edges of its extraterritorial applicability, and beyond that line there is virtually no guidance on how courts should evaluate criminal procedure. As Noah Feldman has noted, social contract theories are so co-extensive with the design of nation states that they provide no guidance about how to do justice to those falling outside the basic requirements of equal citizenship.[232] For example, as described above, per *Verdugo-Urquidez* and *Boumediene*, the Constitution will not apply abroad when it would be "impracticable and anomalous" to do so.[233] As Neuman has noted, the meaning of this phrase is unclear, though the former term may mean compliance is impossible or imposes great costs in foreign territory, while the latter could indicate cultural incongruity with customs in a foreign legal system.[234] And even in cases where foreign law enforcement is operating entirely independently in its criminal investigations and thus the Constitution does not apply, evidence gathered will still be excluded when foreign law enforcement methods "shock the conscience" of the court.[235] This discretion is rooted in

230. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 976 (1991); *see id.* at 917 ("Social contract rhetoric has played a significant role in American constitutionalism. . . . A skeptic who did not ascribe normative force to social contract arguments still could invoke the idea of a social contract as a historically-grounded tool for interpreting American constitutionalism. This sort of reasoning is evident in Chief Justice Rehnquist's opinion in *Verdugo-Urquidez*."). *But see* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1065 (2010) (arguing that the drafting and adoption of the U.S. Constitution was in fact an international affair).

231. *See* Neuman, *supra* note 230, at 919.

232. Feldman, *supra* note 182, at 1034 (citing MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006)).

233. United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring); Boumediene v. Bush, 553 U.S. 723, 770 (2008).

234. Neuman, *supra* note 116, at 391–93 (drawing on Justice Harlan's opinion in *Reid v. Covert*, 354 U.S. 1 (1957)).

235. *See, e.g.*, United States v. Maturo, 982 F.2d 57, 60–61 (2d Cir. 1992); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970).

federal courts' inherent "supervisory powers over the administration of federal justice."[236]

Furthermore, a focus on traditional constitutional norms risks overlooking the international human rights obligations that govern even in the absence of formal constitutional applicability. Often such rights are thought irrelevant once the constitutional inquiry ends; such ambiguity and oversight is reminiscent of debates regarding rights in the War on Terror.[237] In areas where the U.S. Constitution does not apply, does "anything go"?[238] Of course, from the perspective of the first legal movement of Insular constitutional extraterritoriality cases described in Part I.C, the answer could be "yes, anything goes" or "yes, though some limited rights apply." But this answer is of course outdated in the twenty-first century: the structure of international human rights norms now includes virtually all countries of the world, cohering around certain baseline rules and standards that ground equal treatment of individuals, regardless of nationality. For the United States, this means especially the ICCPR, and the UDHR.[239] This

236. United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009) (citing Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir. 1965); United States v. Barona, 56 F.3d 1087, 1091 (9th Cir. 1995)).

237. *See, e.g.*, Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially*, 43 ARIZ. ST. L.J. 389 (2011) (surveying foreign and international tribunals' approach to extraterritorial application of human rights treaties); *see also* Young, *supra* note 25, at 123–24 (noting that constitutional courts worldwide have not grasped economic and social rights protections in various national constitutional contexts).

238. *See* TINA M. FIELDING FRYLING, CONSTITUTIONAL LAW IN CRIMINAL JUSTICE 150–51 (2014).

239. Gerald Neuman has called this the multiple positivisation of human rights, or "the creation of different legal regimes at the national and transnational level for the protection of individual rights, and the resulting problem of how these regimes compete or co-operate or can be reconciled with one another." Gerald L. Neuman, *Human Rights and Constitutions in a Complex World*, 50 IRISH JURIST 1, 1 (2013); *see also* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1874 (2003) ("The consensual and suprapositive aspects of fundamental rights each create potential for conflicting claims of legitimacy and authority between the national constitutional system and the international human rights system."); *United States Ratification of International Human Rights Treaties*, HUM. RTS. WATCH (July 24, 2009), https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties [https://perma.cc/Z7XS-Z9YZ] (noting that the United States is party to numerous human rights treaties, including the ICCPR and the CAT). Most countries in the world are also bound by the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Jan. 24, 2007); *see*

tension is salient in cases regarding the war on terror; in criminal justice, this tension is heretofore less visible.

2. Global Justice Theory

Global justice theory can help to update our constitutional conception, highlighting how constitutional law interlocks with international human rights and comparative law. While U.S. criminal justice has traditionally unfolded only on a domestically focused paradigm, similarly "the history of political philosophy has been marked by an interest in domestic justice within the state."[240] But global justice theory is responsive to the contemporary transnational criminal justice questions arising between states.[241]

Returning to the original question: in this contemporary era, what are rights *for*? To whom do we guarantee criminal procedural rights, where, and when? And—just as crucially—*what* amount of process is required in this space? In one conception, attributed originally to Thomas Hobbes and to contemporary scholars in the nationalism school, the absence of a world judicial body means that anarchy, without justice, characterizes international affairs.[242] In another conception, rooted in Immanuel Kant's *On Perpetual Peace*, democratic states promote a peaceful world order, even in the absence of a higher world government.[243] John Rawls' contribution extends this beyond merely democratic nations to "decent peoples" that, though not democratic, respect the rule of law and permit dissent.[244] In his conception, a cosmopolitan, peaceful world means

also United States Ratification of International Human Rights Treaties, *supra* note 239 (noting that the United States has refrained from ratifying any international human rights treaties since December 2002).

240. Thom Brooks, *Introduction* to THE GLOBAL JUSTICE READER xii (Thom Brooks ed., 2008); Feldman, *supra* note 182, at 1025 ("Traditional liberal conceptions of law tend to hold that law, properly so called, can only exist and justifiably coerce people when it emanates from some political association such as a state, a treaty regime, or the international community . . . . But perhaps there are other ways for binding law to come into existence.").

241. Frank J. Garcia, *Three Takes on Global Justice*, 31 U. LA VERNE L. REV. 323, 325 (2009) ("When we speak of global justice we are arguing, in effect, that globalization is creating social outcomes and processes . . . that make justice relevant at the global level, and that we need to consider whether these outcomes and processes are indeed acceptable in terms of core principles.").

242. Brooks, *supra* note 240, at xv; *see* THOMAS HOBBES, THE ELEMENTS OF LAW, NATURAL AND POLITIC 182 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1650) ("For that which is the law of nature between man and man, before the constitution of commonwealth, is the law of nations between sovereign and sovereign, after.").

243. Brooks, *supra* note 240, at xvi.

244. *Id.* at xvi.

"respecting the right of different peoples to establish *varying* political constitutions within *certain safeguards*."[245] This helps to frame questions regarding the duties—including the criminal procedural duties—that states owe to foreign nationals. From a Hobbesian nationalist viewpoint, a state owes no duties to those beyond its borders.[246] To the Kantian, the individual—not the state—is the highest unit of moral concern and thus entitled to equal respect, regardless of citizenship status.[247] From this cosmopolitan vantage point, the question becomes what practical steps a country should take in order to satisfy those duties.[248]

Rawls and another theorist in this tradition—Charles Beitz—provide particular guidance here. To start, Rawls's *Law of Peoples* distinguishes between rights guaranteed domestically and those guaranteed between peoples of different nations.[249] He makes the distinction between reasonable pluralism of comprehensive doctrines within a constitutional democracy and an even greater diversity among decent peoples with many different cultures and traditions.[250] Despite such variety, however, free and democratic peoples will agree

245. *Id.* (emphasis added); *see* GILLIAN BROCK, GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT 3 (2009) ("On one common account of cosmopolitanism, the key idea is that every person has global stature as the ultimate unit of moral concern and is therefore entitled to equal respect and consideration no matter what her citizenship status or other affiliations happen to be.").

246. Feldman, *supra* note 182, at 1028 ("[P]olitical theory since Thomas Hobbes's *Leviathan* has focused largely on the functioning of states."); Brooks, *supra* note 240, at xvi.

247. BROCK, *supra* note 245; Brooks, *supra* note 240, at xvi.

248. Brooks, *supra* note 240, at xix; BROCK, *supra* note 245 ("What policies should a cosmopolitan support in the world we live in today?"). *See generally* SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 146–72 (2018) (discussing the rise of global justice theory in the 1970s and 1980s); KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 151 (2006) ("[C]osmopolitanism is . . . universality plus difference . . . .").

249. John Rawls, *The Law of Peoples*, *in* THE GLOBAL JUSTICE READER, *supra* note 240, at 218, 230 ("The parties' first task in the second original position is to specify the Law of Peoples—its ideals, principles, and standards—and how those norms apply to political relations among peoples."). Since its publication, *The Law of Peoples* has been heavily criticized on a variety of fronts. *See, e.g.*, Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 FORDHAM L. REV. 1761, 1761 (2004) (arguing that Rawls's emphasis on political communities and the modern nation-state abandoned the Kantian framework of liberal cosmopolitanism); Charles R. Beitz, *Rawls's Law of Peoples*, 110 ETHICS 669, 669–96 (2000); Thomas W. Pogge, *Moral Universalism and Global Economic Justice*, 1 POL. PHIL. & ECON. 29, 29–58 (2002).

250. BROCK, *supra* note 245, at 12–13 (acknowledging that moderate cosmopolitanism recognizes a distinction between norms of justice that apply within an individual society and those that apply to a global population at large).

on certain principles of justice, including that they are to "honor human rights."[251] While the specific rights on which Rawls insists is a source of debate,[252] Rawls justifies the core criminal procedure approach to fundamental rights, given that the U.S. federal government has twice made these distinctions—first as a federal arbiter of which rights are fundamental between and among the fifty U.S. states and the federal government, and second by determining which rights are guaranteed between and among nation states.[253] Incorporation first allows for procedural diversity but provides the greatest guidance to individual U.S. states regarding criminal procedural rights guarantees; fewer are then provided in cases of extradition and recognition of foreign criminal judgments.[254] In furtherance of such second category, American leadership in the creation of multilateral institutions such as Interpol,[255] the United Nations Office on Drugs and Crime,[256] the Egmont Group of Financial Intelligence Units,[257] and various parts of the Organization of American States[258] provide some grounding for multilateral criminal law enforcement cooperation and standards, while extradition and

251. JOHN RAWLS, THE LAW OF PEOPLES 36–37 (1999). For "decent peoples," Rawls identifies a narrower core of human rights, such as the right to life, right to liberty, right to property, and to formal equality. *Id.* at 59–65. Such distinctions are one of many critiques that scholars have advanced against *The Law of Peoples*. *See* BROCK, *supra* note 245, at 28 ("Another common observation is that Rawls provides very little argument . . . for why decent societies would endorse only the limited set of human rights [whereas] liberal societies . . . would want to add more to the list of human rights . . . ."). Rawls uses the case of fair trade to show that—in addition to principles that define the basic equality of all peoples—parties will establish guidelines to set up cooperative organizations and agree to standards of fairness of trade alongside provisions for mutual assistance. Rawls, *supra* note 249, at 231.

252. BROCK, *supra* note 245, at 38 ("Quite apart from which [human rights] Rawls actually means to endorse, there is the question of those he should endorse, if his project is to be consistent.").

253. Rawls, *supra* note 249, at 231 (arguing that peoples' "concern for human rights leads them to limit a state's right of internal sovereignty").

254. *See supra* Part I.A.

255. Todd Sandler, Daniel G. Arce & Walter Enders, *An Evaluation of Interpol's Cooperative-Based Counterterrorism Linkages*, 54 J.L. & ECON. 79, 80–82 (2011).

256. Eve de Coning & Gunnar Stolsvik, *Combating Organised Crime at Sea: What Role for the United Nations Office on Drugs and Crime*, 28 INT'L J. MARINE & COASTAL L. 189, 190 (2013).

257. Endre Nyitrai, *Money Laundering and Organised Crime*, 2015 J. E.-EUR. CRIM. L. 94, 95.

258. David P. Warner, *Law Enforcement Cooperation in the Organization of American States: A Focus on REMJA*, 37 U. MIA. INTER-AM. L. REV. 387, 395–97 (2006).

mutual legal assistance treaties ground bilateral law enforcement cooperation.[259]

Even more to the point, Charles Beitz advances two potential grounds for thinking about human rights—and thus, by definition, certain criminal procedural rights—as a neutral, "nonparochial" basis for criminal procedural line drawing.[260] First, human rights could meet a reasonableness—as opposed to complete agreement—standard.[261] This then provides a universal and legitimate basis from which to criticize states and, thus, constrain them.[262] Drawing on Michael Walzer, Beitz notes that a comparison of moral codes across societies may produce a set of universal standards—including human rights and certain rules such as those prohibiting murder, deceit, torture, and oppression—that constitute a "moral minimum."[263] Second, Beitz also offers the Rawlsian idea of "overlapping consensus" of political moralities to accentuate rights acceptable by a reasonable person consistently with acceptance of any of the main global conceptions of political and economic justice.[264] Broader than a "common core" of human rights, it would instead reflect a broad account of rights that each culture could reasonably accept as consistent with its moral conventions.[265] Without fully endorsing either conception, Beitz notes that human rights signal the minimal legitimacy of a society.[266] In other words, while human rights may not indicate that a nation is fully legitimate, such rights may meet the threshold necessary for the nation to merit respect as a minimally legitimate cooperating member of international society.[267]

Beitz's framework helps theorize a field in which judges, law enforcement, and diplomats are making criminal procedural decisions in law enforcement cooperation. In this space, criminal procedural

259. *Id.*

260. Charles R. Beitz, *Human Rights as a Common Concern*, 95 AM. POL. SCI. REV. 269, 272 (2001).

261. Thom Brooks, *Introduction to Part III* to THE GLOBAL JUSTICE READER, *supra* note 240, at 117. *See generally* KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY 140–71 (2019) (describing the emergence of global justice theory in the 1970s and 1980s).

262. Brooks, *supra* note 261.

263. Beitz, *supra* note 260. R.J. Vincent has similarly pointed to a certain "lowest common denominator . . . core of basic rights that is common to all cultures despite their apparently divergent theories." *Id.*

264. *Id.* at 273.

265. *Id.*

266. *Id.* at 274.

267. *Id.*

rights are not rigid protections that simply do or do not exist.[268] Instead, a broad standard of reasonableness governs cooperation, as certain rights provide indicia of minimal legitimacy for purposes of extradition, mutual legal assistance, and other forms of information sharing.[269] And furthermore, multilateral human rights treaties provide a contractarian foundation for the legal duties that states owe to their own and other nationals, in the form of criminal procedural rights.[270] This both explains and justifies U.S. law enforcement cooperation with certain countries. Germany, South Korea, and Argentina necessarily lack the exact same constellation of rights that exist in the United States, but at the same time have some minimum core of criminal procedural rights that resemble our own.[271] From a political theoretical perspective, their commitment to enumerated human rights as holistic systems, while not identical, provide reasonable protection along certain constitutional safeguards. This is what Rawls identified as one of the essential criteria for liberal peoples, namely, a reasonably just constitutional democratic government that serves their fundamental interests.[272] Such governments are effectively under the political and electoral control of their people, answering to and protecting fundamental interests that are specified in constitutions and their interpretations.[273] But in doing so, they apply coercive law to certain individuals in an arranged, interpreted manner that, ultimately, legitimizes the global set of legal

268. *See* Feldman, *supra* note 182, at 1062–63.

269. Protection of basic human rights—along with non-arbitrary judgments and punishment for heinous crimes—may constitute three moral requirements for a legal system to qualify as legitimate. *See id.* (citing KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 88–99 (2005)).

270. *Id.* at 1056 ("Association is made the condition of legal duty—it is just that the association is extended globally, either through the original social contract or through some secondary contract among peoples or states."). While Feldman considers natural law as a foundation for a cosmopolitan conception of law, natural law seems unnecessary where human rights treaties provide a contractarian foundation for certain criminal procedural rights.

271. ICCPR, *supra* note 96. *See generally* CAT, *supra* note 104.

272. Rawls, *supra* note 249, at 222 ("Liberal peoples have three basic features: a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by what Mill called 'common sympathies'; and finally, a moral nature."); *see also* Feldman, *supra* note 182, at 1062 ("[L]egal systems must embrace certain universal commitments simply in virtue of being legitimate legal systems. To be a legitimate legal system, on this view, requires satisfying some basic moral requirements . . . . [This] justifies the very undertaking of doing law, of coercing and demanding compliance.").

273. Rawls, *supra* note 249, at 222.

systems.[274] And in doing so, governments must honor human rights as a necessary—but not sufficient—condition to be considered among free and democratic peoples.[275]

B. FROM THEORY TO PRACTICE: HOW TO EVALUATE FOREIGN CRIMINAL JUSTICE SYSTEMS

Moving now from theory toward practice, what constitutes reasonableness when evaluating a foreign country's criminal justice system? Evaluation of foreign criminal justice systems is a particular, "longstanding problem" for U.S. judges.[276] Judges from Holmes[277] to Posner[278] have run the gamut in their comfort and willingness to evaluate such foreign legal systems.[279] The answer is to ground rights

274. Feldman, *supra* note 182, at 1066.

275. Additionally, this global justice framework does not merely inform criminal procedure; real-world criminal procedural line drawing also informs global justice theory by focusing on a legal methodology to assess what specific legal rights may constitute a "core" from a Rawlsian law of peoples perspective.

276. Jia, *supra* note 22 (manuscript at 30–31) ("Can American judges accurately apply continental law? How much weight should be accorded to statutes, judicial decisions, or treatises? Are the two systems close enough as to preclude the need for experts?").

277. Diaz v. Gonzalez, 261 U.S. 102, 106 (1923) ("When we contemplate [a foreign legal] system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.").

278. Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring) ("[O]ur linguistic provincialism does not excuse intellectual provincialism. It does not justify our judges in relying on paid witnesses to spoon feed them foreign law that can be found well explained in English-language treatises and articles.").

279. Jia, *supra* note 22 (manuscript at 31–32) (situating Holmes and Posner on opposite ends of a continuum of legal-cultural translation). To some degree, this question is inherent—and, arguably, an inherent flaw—in any reasonableness standard. To use a famous and familiar example, the *Katz* test—which asks whether an individual's subjective expectation of privacy is one that society recognizes as reasonable for purposes of determining what constitutes a "search" under the Fourth Amendment—is often criticized for placing such societal determinations in the hands of the subjective assessments of judges. Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring); *see, e.g.*, Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007) ("[N]o one seems to know what makes an expectation of privacy constitutionally 'reasonable'"); Carpenter v. United States, 138 S. Ct. 2206, 2246 (2018) (Thomas, J., dissenting) ("The only thing the past three decades have established about the *Katz* test is that society's expectations of privacy bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable." (internal quotations omitted)). In the cross-border context,

in a methodology that all three U.S. government branches should apply.[280]

In this cross-border space, both international human rights law and comparative legal method are applicable.[281] First, international human rights norms provide a global baseline of individual protections, rooted in universality, human autonomy, and human dignity.[282] Furthermore, due to their force of law in virtually all countries today, human rights laws protect U.S. and foreign nationals at home but also when being prosecuted in foreign systems. And they provide a mutually agreed upon criminal[283] procedural foundation for the interaction of two systems when they cooperate in cross-border law enforcement. Indeed, human rights may be a ground for foreign

policymakers and judges may similarly default to their own expectation of what is reasonable, which to some degree is rooted in their historically and culturally contingent assessments as to what process is "good enough." This may open them to the charge that they find Western countries "good enough" and non-Western countries lacking, a variation on the racial disparity questions that plague criminal justice systems today. *See* Jia, *supra* note 22 (manuscript at 58–59) (describing how a judge may use "*a Western ear*" to cause bias).

280. A broad reasonableness regime is also evident in the European Court of Human Rights' "margin of appreciation," wherein compromises are made between the goals of fundamental rights and the circumstances for limitations to these rights in particular national jurisdictions. *See* Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495, 498 (2018). The Restatement (Third) of Foreign Relations Law also advanced reasonableness as a limitation on the jurisdiction to prescribe, though this was removed in the Fourth Restatement. *Compare* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 403(1) (AM. L. INST. 1987) ("Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."), *with* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. (AM. L. INST. 2018). *See generally* Steven Arrigg Koh, The Criminalization of Foreign Policy (unpublished manuscript) (on file with author) (calling for a principled engagement when engaging with foreign countries that have politicized their criminal justice systems).

281. A cosmopolitan conception of legal duty may involve each system applying its version of certain universal laws to everyone with whom it comes into contact. *See* Feldman, *supra* note 182, at 1064. In so doing in the criminal space, each system must apply its version of certain universal procedural protections as well. *Id.*

282. *See* Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 281, 297, 306 (2007). Other scholars have noted the usefulness of human rights treaties as a procedural baseline in the extradition and constitutional extraterritoriality contexts. *See* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 2007–14 (2010).

283. *See* Piet Hein Van Kempen, *Introduction* to CRIMINAL LAW AND HUMAN RIGHTS xiii (P.H.P.H.M.C. van Kempen ed., 2014) ("Human rights have touched on almost every aspect of criminal procedure law and practice, regardless of the specifics of any given criminal justice system.").

cooperation, not just coercive intervention.[284] Second, comparative functionalism guides how foreign criminal justice systems' procedural protections may reasonably be interpreted *on their own terms*.[285] This gets to the nub of how, holistically, certain sets of rights and procedures in a foreign criminal justice system constitute sufficient criminal process, even though individual rights may not—indeed, cannot—function in precisely the same way in any two systems. As with any system—political, linguistic, or religious, for example—a comparative approach reveals the historical and cultural contingency of a system that justifies itself completely from an internal perspective but takes on a new valence from an external perspective. In criminal justice, for example, cultures of punishment vary: America's culture of

284. Beitz, *supra* note 260, at 275–76.

285. *See, e.g.*, Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1238–69 (1999) (examining the role of functionalism in comparative constitutional law). Of course, as an epistemological matter, one criminal justice system cannot completely understand another from that foreign criminal justice system's "internal perspective," given that legal rules and texts are themselves deeply rooted within a distinct economic, political, moral, and cultural context. Nils Jansen, *Comparative Law and Comparative Knowledge*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 28, at 306 ("For a long time, comparative lawyers have regarded it as their methodological problem to be gaining knowledge of another system and understand its way of reasoning: in applying concepts, rules or precedents, and, more basically, in knowing the relevant sources of knowledge."). Criminal justice is "culture-bearing," and as an artifact of culture brings with it the challenges of translating one culture to another. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 940 (2016) ("[Criminal justice] is . . . the site at which cultures negotiate certain kinds of issues connected to wrongdoing and community, social order and violence, identity, the power of the state, and the terms of collective ethical life."). *See generally* MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY (2009) (discussing the varied conceptions of French, American, and European Union judicial decision-making and related discursive practices within each system). And functionalism itself is both mainstream and highly criticized as a comparative legal methodology. *See* Jansen, *supra*, at 308 ("[C]omparative lawyers have always analysed legal rules and systems in their historical context, reconstructing the individual functions of rules from within the individual legal system."); Ralf Michaels, The Functional Method of Comparative Law, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 28, at 340–43 ("The functional method has become both the mantra and the *bête noire* of comparative law."). While a more rigorous defense of functionalism is beyond the scope of this Article, suffice it to say that functionalism advantageously avoids essentializing any particular legal element in a given legal system, instead focusing on its connection with another variable element and, more generally, describing groups of legal elements without the specificity that comes with traditional, abstracted legal classification. *Id.* at 355–56.

punishment likely views offender criminality as immutable and devaluing, while European culture does not.[286]

This Part addresses this question by providing a tripartite framework for evaluating foreign sovereigns. It then prescribes process roles for each of the three branches of government in furtherance of such framework.

1. A Tripartite Framework: Constitutional, Human Rights, and Comparative

Let us now operationalize the tripartite framework. Judges and policymakers should draw on three sources when articulating core criminal procedure. First, judges and policymakers should use U.S. constitutional procedure rights as their baseline. This can include both resemblance to enumerated rights in the U.S. Constitution and lessons from the incorporation of procedural guarantees. For example, as noted above, the Fourteenth Amendment due process clause does not incorporate the Fifth Amendment right to indictment by grand jury, suggesting that it is not as fundamental to Anglo-American jurisprudence as, say, the right to a speedy and public trial.[287] This provides a clear basis upon which to reject any defendant challenge that a foreign process violates this right because it lacks indictment by grand jury.

Second, the branches should consider international human rights standards. As noted in Part I above, the history of negotiation and ratification of international human rights instruments demonstrates the U.S. government's willingness to affirm certain rights as core. And such instruments affirm the duties owed to the United States and

286. Kleinfeld, *supra* note 285, at 941; *see also* James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 934 (2016) (noting that continental European courts place less emphasis on the presumption of innocence than the United States does, opting instead for protections for the guilty and thus inflicting less excessive punishment). The doctrine evinces this awareness at the limits of constitutional applicability. For example, *Boumediene* noted that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." Boumediene v. Bush, 553 U.S. 723, 764 (2008) ("A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid:* the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."). And it provides some guidance that "cultural inappropriateness"—for example, the Insular Cases reticence to impose common law procedures on a population accustomed to the civil law—is one of the factors the *Boumediene* court identified when courts may identify enforcement of a right as "impracticable and anomalous." Boumediene v. Bush, 553 U.S. 723, 770 (2008); *see* Neuman, *supra* note 127, at 269.

287. *See supra* Part I.A.1.

other nationals in cross-border criminal cases. For example, the right to the trial by jury is conspicuously absent, whereas the right against retroactivity is integral to all.[288] In so doing, they may also consult the general comments and reports of the human rights treaty bodies that monitor the implementation of human rights treaties.[289]

Third and finally, the relevant legal actors may use functionalism to ask how certain rights have been or will be upheld in a foreign criminal justice system. This functionalism analysis materially differs from the incorporation context, which asks more narrowly whether the provision was fundamental to *Anglo-American* jurisprudence.[290] Instead, the query is whether such rights may be reasonably interpreted as upheld *based on that legal system's own terms*. So, for example, the role of the civil law investigating judge is foreign to common law judges and policymakers, in particular the idea that a judge can build a record that is automatically admitted into evidence before criminal proceedings begin. But from a functionalist perspective this judicial role makes sense, given civil law judges act within a broader system lacking a jury; in such systems, judges are making factual and legal determinations as neutral adjudicators determining guilt or innocence. Indeed, a functionalist perspective focuses "not on rules alone but on their effects, not on doctrinal structures . . . alone but on the consequences they bring about."[291]

288. UDHR, *supra* note 83, art. 11(2) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."); ICCPR *supra* note 96, art. 15.1 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); U.S. CONST. art. I, § 9 ("No . . . ex post facto Law shall be passed."); U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law.").

289. *See, e.g.*, Hum. Rts. Comm., *supra* note 96, ¶ 5 ("While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.").

290. Timbs v. Indiana, 139 S. Ct. 682, 689–90 (2019) (incorporating the Excessive Fines Clause and noting that "protection against excessive fines has been a constant shield throughout Anglo-American history").

291. Michaels, *supra* note 285, at 47–48 ("Institutions, both legal and non-legal, even doctrinally different ones, are deemed comparable if they are functionally equivalent, i[.]e[.], if they fulfill similar functions in different legal systems."). For example, Akhil Amar has argued that the Sixth Amendment right to trial by jury is a required component of a tribunal's structure not just an accused's individual right to be waived at her discretion. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196 (1991). As Raustiala has noted, the latter interpretation would provide greater restraint on the government—just as the U.S. Senate in Mexico could not bypass bicameralism, a U.S. tribunal located elsewhere may not bypass a jury in convicting a person of a criminal offense. *See* RAUSTIALA, *supra* note 19, at 67.

Applying this tripartite framework to the right to trial by jury is instructive. First, the right to trial by jury is codified in both Article III and the Sixth Amendment of the U.S. Constitution and has been incorporated through the Fourteenth Amendment Due Process Clause to apply to the states.[292] Owing to this, as Justice Scalia once memorably noted, courts engaging with this guarantee are "operating upon the spinal column of American democracy."[293] But this right is lacking in any international human rights treaty—most saliently the ICCPR—given it is a creature of common law and conspicuously absent from most civil law jurisdictions.[294] And second, deploying a functionalist view, the absence of a jury trial right in foreign jurisdictions is not problematic from a holistic comparative perspective, given that in civil law countries judges are making factual and legal determinations as neutral adjudicators. As such, courts may deny defendants' challenges to admission of evidence, upward departure of sentences, or extradition if such challenges are grounded in the argument that civil law countries lack a jury trial right. This affirms the rhetorical flourish of the U.S. District Court for the Eastern District of Pennsylvania, which as described in the Introduction, held that it would be "cultural imperialism" to insist on a Sixth Amendment right to trial by jury abroad.[295]

By contrast, the tripartite framework affirms the right to counsel as part of the inner core of criminal procedure. First, like the right to trial by jury, the right to counsel is codified in the Sixth Amendment and applies to the U.S. states through incorporation.[296] But it is also codified in the ICCPR, wherein Article 14(3)(b) affirms defendants' right "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."[297] And finally, a functionalist comparative analysis affirms that virtually

292. U.S. CONST. art. III, § 2; *id.* amends. VI, XIV.

293. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring) ("When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.").

294. *See generally* Hans, *supra* note 165 (surveying and comparing lay participation systems worldwide).

295. *Cf.* United States v. Moskovits, 784 F. Supp. 193, 196 (E.D. Pa. 1992) ("It would, however, be a form of cultural imperialism for the United States to insist that it would not countenance, for U.S. purposes, recognition of a foreign criminal judgment which came from a legal culture which did not employ the jury . . . .").

296. Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel).

297. ICCPR, *supra* note 96.

all states guarantee a right to counsel.[298] Indeed, while counsel in a civil law system relies less on adversarial functions such as cross-examining witnesses, it plays a largely analogous function vis-à-vis the state and the judiciary in civil law systems.[299] But in the case of Rwandan *gacaca* courts, which included a community-based conception of justice but lacked a functional equivalent of a right to counsel,[300] U.S. courts should not rely on such proceedings for purposes of upward departure. The U.S. District Court for the Northern District of Iowa was thus wrong in its use of Rwandan *gacaca in absentia* convictions in its upward departure at sentencing in *Ngombwa*.[301]

2. Separation of Powers

Let us now consider how the three branches of government may apply this tripartite framework to better articulate core criminal procedure.

The tripartite framework prescription must balance the inherent tension when foreign affairs and criminal justice mix: the executive branch has comparative foreign affairs expertise, while the legislature has an affirmative mandate to articulate criminal law and procedure. In traditional criminal cases, all three government branches play familiar roles. Congress passes criminal laws, the executive branch enforces them, and the judiciary adjudicates questions arising from them. But contemporary cross-border law enforcement cooperation complicates this picture, particularly because courts are less equipped—though arguably not ill-equipped—to evaluate foreign jurisdictions' criminal justice systems. In other words, criminal procedural line drawing is both outside of core judicial competence—because courts are not foreign affairs authorities[302]—and within it—

298. Laura K. Abel & Lora J. Livingston, *The Existing Civil Right to Counsel Infrastructure*, JUDGES J., Fall 2008, at 24, 24 (2008).

299. *See* VIVIENNE O'CONNOR, PRACTITIONER'S GUIDE: COMMON LAW AND CIVIL LAW TRADITIONS 20–21 (2012), https://www.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%20Traditions.pdf [https://perma.cc/NQC2-XPYF] (surveying the role of defense counsel in civil law countries).

300. *See* United States v. Ngombwa, No. 14-CR-123-LRR, 2017 WL 508208, at *4 (N.D. Iowa Feb. 7, 2017) (explaining how Rwandan communities were tasked with prosecuting genocide perpetrators).

301. United States v. Ngombwa, 893 F.3d 546, 556 (8th Cir. 2018); *see also Ngombwa*, 2017 WL 508208, at *19 n. 8.

302. *Compare* U.S. CONST. art. I, § 8 (giving congress the power to declare war and collect imposts (among other things)), *and id.* art. II, § 2 (empowering the President to make treaties and appoint ambassadors), *with id.* art. III, § 2 (giving the judiciary the power to hear cases involving foreign actors, but not actively make policy).

because they regularly adjudicate defendant rights.[303] The political branches, then, are left with unusually wide discretion to enact new laws, ratify treaties, and enforce domestic and foreign criminal laws within this framework. A prescriptive account may thus resolve many of the doctrinal tensions and ambiguities above by drawing on the executive's foreign affairs expertise, followed by Congress and the judiciary exercising their more traditional functions as criminal justice system actors.

Broadly speaking, a prescriptive institutional account must uphold two broad principles. First, returning to the descriptive taxonomy in Part I, criminal procedural evaluation in this space should shift toward the core criminal procedure approach—which includes a deliberate, *ex ante*, core criminal procedure to which other sovereigns must adhere—from the outlier approach—a more *ad hoc*, retrospective, generalized assessment of foreign criminal justice systems.[304] More explicit guidance in this space allows for a better evaluation of foreign criminal justice systems and a more established framework for resolving the numerous criminal procedural questions that arise in cross-border spaces.[305] And second, all three branches should have the opportunity to engage more explicitly in an assessment of the tripartite framework described above—rooted in constitutional, international human rights, and comparative law.[306]

Starting with Congress, it should continue to codify its guidance regarding cross-border criminal procedural rights, as it has recently done with the CLOUD Act. After all, the written statute requirement in criminal law dictates that legislatures codify both substantive offenses and procedure, given the liberty interests at stake in criminal justice.[307] Why is it, for example, that Congress currently insists upon certain rights protections regarding transfer of electronic data abroad

303. Scholars addressing the rule of non-inquiry have addressed this institutional design question to some degree. John Parry, for example, has called for a more engaged judicial role in the extradition process and, thus, a more limited version of the rule of non-inquiry. *See* John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 2003 (2010) ("I do not want to overstate the current willingness of courts to relax their deference to foreign affairs concerns .... Similarly, I do not mean to deny the importance of foreign affairs concerns.").

304. *Supra* Part I.A.

305. *Supra* Part I.A.

306. *Supra* Part I.A.

307. *See The Nature, Purpose, and Function of Criminal Law*, *in* CONTEMPORARY CRIMINAL LAW 1, 5 (2019).

for purposes of prosecuting foreign nationals[308] but does not do so in the context of extradition, wherein a U.S. citizen may be physically transferred abroad to be prosecuted there? More explicit guidance provides notice to defendants, both American and non-American, regarding the procedural rights at stake in cross-border prosecutions.

For its part, the executive branch likely already engages in some form of this tripartite inquiry when deciding, for example, whether to conclude a bilateral law enforcement treaty with another sovereign.[309] As noted at the outset, core criminal procedure is an explanatory account, grounded in what is likely State Department attorney practice. It is not a coincidence, for example, that the United States has a more robust law enforcement relationship with the United Kingdom than it does with China or Rwanda, owing to the rule of law in such countries.[310] The State Department, in conjunction with DOJ, has the foreign affairs expertise and negotiation capability to conclude law enforcement treaties with foreign countries. But the State Department should also make such findings more explicit, particularly in the transmittal of such information to Congress for advice and consent prior to ratification. As of now, such findings are largely non-existent.[311] In virtually all cases, this ensures that the executive branch's evaluation of foreign process—rooted in its foreign affairs expertise—will inform Congress's evaluation of the relevant treaty or law.

308. 18 U.S.C. § 2523(b)(1)(B)(iii). The Act also specifies certain requirements for the agreements themselves, such as a prohibition on targeting U.S. persons. *See* 18 U.S.C. § 2523(b)(4). As noted above, the CLOUD Act specifies fair trial rights; freedom of expression, association, and peaceful assembly; prohibitions on arbitrary arrest and detention; and prohibitions against torture and cruel, inhuman, or degrading treatment or punishment.

309. *See generally* U.S. DEP'T OF STATE, SUPPLEMENTARY HANDBOOK ON THE C-175 PROCESS: ROUTINE SCIENCE AND TECHNOLOGY AGREEMENTS (2009) (providing an overview of treaty negotiation and ratification, which includes inter-agency consultation and review).

310. By "rule of law" I mean, broadly, "a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong." Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008) (citing RONALD A. CASS, THE RULE OF LAW IN AMERICA 17 (2001)). Rule of law thus emphasizes legal certainty, predictability, settlement, the determinacy of certain societal norms, and the state's reliable administration of such norms. *Id.*

311. *See, e.g.*, Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Kosovo, U.S.-Kos., Mar. 29, 2016, T.I.A.S. 19-613.

Turning to the judiciary, such explicit findings will inform courts' decisions as to whether a foreign criminal justice system satisfies core criminal procedure. Currently, DOJ rarely makes representations on the merits about foreign procedure at extradition hearings, instead insisting simply that courts abide by the rule of non-inquiry.[312] When the executive branch enters into an extradition treaty, "that branch is presumed to have studied the other country's criminal justice system and determined that [extradition of individuals to that country] is sufficiently fair."[313] As such, the executive has no occasion to argue about foreign criminal procedure in an extradition proceeding. Thus, courts are right to generally uphold the rule of non-inquiry, given that it reflects the considered position of the executive branch in evaluating, among other things, process in a foreign country. But often, courts are relying on *ad hoc* determinations about foreign criminal process.[314] More explicit executive branch findings regarding foreign process mitigates the problem of the parochial district court judge making such determinations beyond his or her core judicial competence.[315] Additionally, courts may use the tripartite framework described above—domestic constitutional guarantees, international

312. *See, e.g.*, Memorandum of Law in Support of Extradition at 9, *In re* Extradition of Howard, 2017 U.S. Dist. LEXIS 104582 (D. Nev. 2017) (No. 2:15-MJ-00627-NJK) ("It is the role of the Secretary of State, not judicial officers, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment the fugitive will likely receive on return to the requesting country."); Brief for United States at 17, Hilton v. Kerry, 754 F.3d 79 (2014) (No. 13-2444) ("Here, [Appellant's] claims—which go to the procedures or treatment that he will receive if extradited to the United Kingdom and the fairness of the Scottish system of criminal procedure—are precisely the type of claims barred by the rule of non-inquiry."); *see also* Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) (criticizing the district court's consideration of the "fairness" of requesting country's criminal procedures).

313. Rachel A. Van Cleave, *The Role of United States Federal Courts in Extradition Matters: The Rule of Non-Inquiry, Preventive Detention and Comparative Legal Analysis*, 13 TEMP. INT'L & COMPAR. L.J. 27, 40 (1999).

314. *See supra* notes 194–98.

315. For a country with which law enforcement cooperation is minimal, the executive branch may lack public representations regarding the state of the country's criminal justice system. For example, as noted above, the United States does not have an extradition treaty relationship with Rwanda. *See* 18 U.S.C. § 3181. Thus, even if explicit findings at time of treaty ratification were routine State Department practice, there would likely be less regarding Rwandan *gacaca* courts having sufficient process for purposes of upward departure. The State Department does, however, issue annual Country Reports on Human Rights Practices, pursuant to the Foreign Assistance Act of 1961 and the Trade Act of 1974. *2018 Country Reports on Human Rights Practices*, U.S. DEP'T STATE (2018), https://www.state.gov/reports/2018-country-reports-on-human-rights-practices [https://perma.cc/HB5P-F7W7]. Such reports could constitute a basis for judicial evaluation of foreign countries' criminal process.

human rights standards, and functionalist comparative evaluations—in order to ensure that core criminal procedure's fundamental rights are being upheld.[316]

III. ENGAGEMENT WITH INTERNATIONAL CRIMINAL INSTITUTIONS

Core criminal procedure has implications beyond individual U.S criminal cases; it has the potential to recast national engagement with international courts and investigative mechanisms. This international application may at first appear distinct from the domestic and transnational contexts described above. And yet the ultimate concern—how the United States conceives of criminal procedure rights when engaging with other jurisdictions—is the same. As such, this Part completes the discussion of core criminal procedure by considering its function in the third of three tiers in which criminal justice is articulated today: international criminal courts and investigative mechanisms.

A. THE INTERNATIONAL CRIMINAL COURT

Core criminal procedure informs debate about U.S. engagement with international criminal courts. As is well known, the United States—and the international community as a whole—has created

316. While it is beyond the scope of this Article, in the long term courts could also "constitutionalize" this space—or, arguably, do so once again. As noted above, the Supreme Court has oscillated in its approach to when the U.S. Constitution—and, specifically, its Bill of Rights guarantees—applies, where, and to whom. *See* discussion *supra* Part I.A.1. The Court could return to its jurisprudence before *Verdugo-Urquidez* in 1990, applying a more robust conception of rights both extraterritorially and to U.S. and other citizens abroad. In other words, if many of these questions lie just outside of the edge of constitutional applicability, the Court could expand constitutional application to regulate this space. This would not be unprecedented: the United States holds within it other domestic sovereigns, and the Supreme Court has, at times, "closed the gap" to ensure that individual states may not circumvent federal protections. *See, e.g.*, Elkins v. United States, 364 U.S. 206 (1960). The clearest example of this is the mechanism of incorporation, which closes cross-sovereign law enforcement loopholes. Take, for example, the previously problematic "silver platter doctrine": prior to 1960, evidence illegally obtained by state law enforcement authorities could nonetheless be introduced at trial in federal court, as long as federal officials played no role in gathering it. *Id.* at 208. In *Elkins v. United States*, the Supreme Court closed this gap, holding that such a doctrine engendered too many "practical difficulties" to continue to be upheld "in an era of expanding federal criminal jurisdiction . . . ." *Id.* at 211. Cross-border law enforcement represents yet another front in which the role of other sovereigns may factor into criminal cases outside of orthodox criminal process.

international and hybrid tribunals to prosecute atrocity crimes.[317] U.S. leadership has included creation of the post-World War II International Military Tribunals in Nuremberg, as well as the U.N. International Criminal Tribunals for the former Yugoslavia and for Rwanda.[318] More recently, however, the United States has entered a period of oscillating hostility and engagement towards the International Criminal Court (ICC) and has signed but not ratified the Rome Statute of the ICC.[319] For example, when serving as Trump Administration National Security Adviser, John Bolton openly declared that the United States "will let the ICC die on its own" given that "the ICC is already dead to us."[320]

How does core criminal procedure influence our conception of this international system? It undermines a key argument against Rome Statute ratification, namely, that it would deny U.S. nationals the process that U.S. criminal justice customarily affords them.[321] A classic critique of the ICC is that it lacks the proper U.S. criminal procedural safeguards. As grounding for their criticism, scholars have used as a baseline both the Bill of Rights and more granular criminal procedure, such as the ability to object to the introduction of hearsay as evidence at criminal trials.[322] Most often invoked is that the ICC lacks a jury trial, as guaranteed by Article III and the Sixth Amendment of the U.S. Constitution.[323]

317. *See generally* Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE INT'L L. 525 (2013) (reviewing the history of U.S. leadership and engagement with international criminal tribunals, including that of the Obama administration with the ICC and ICC assembly of State Parties).

318. *Id.* at 525–30.

319. *Id.* at 533.

320. John Bolton, Nat'l Sec. Advisor, Address at the Federalist Society (Sept. 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html [https://perma.cc/H4Y5-G93L].

321. *Id.* ("The framers of our constitution considered such a melding of powers unacceptable for our own government, and we should certainly not accept it in the ICC. Other governments may choose systems which reject the separation of powers, but not the United States.").

322. *See, e.g.*, Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 861–64 (2002) ("[N]either international criminal courts in general, nor the ICC in particular, provide protections to the accused equivalent to those guaranteed by the Bill of Rights."); Andrew J. Walker, *When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 278–79 (2004) (holding that the ICC is silent on, *inter alia*, the right to privacy, the introduction of hearsay, and the definition of effective counsel).

323. *See* Casey, *supra* note 322, at 861 ("First, and foremost, the Rome Statute makes no provision for trial by jury."); JOHAN D. VAN DER VYVER, IMPLEMENTATION OF

Core criminal procedure undermines this claim. As the above discussion makes clear, the U.S. legal system long ago abandoned a strict demand for criminal procedural sameness when it—in contrast to certain civil law jurisdictions, such as Brazil[324]—made the determination that it would extradite its own nationals for prosecution in other countries.[325] And the U.S. government has since demonstrated across various doctrinal areas that it is relatively comfortable with deferring to foreign criminal process so long as it does not violate certain criminal procedural norms.[326] As already discussed above, the right to trial by jury is not and likely should not be affirmed as necessary at all times in the cross-border context, particularly given that international tribunals operate with judges as fact finders in a manner derived from civil law systems.[327] And notwithstanding this particular right, the ICC meets all other constitutional thresholds.[328] Even a cursory glance at the ICC's Rules of Procedure and Evidence demonstrates a pre-trial, trial, and

INTERNATIONAL LAW IN THE UNITED STATES 181 (2010) ("The argument that seems to surface most frequently questions the constitutional tenability of a treaty that would expose nationals of the United States to criminal prosecution without the benefit of a jury trial as guaranteed by the Sixth Amendment . . . ." (citing JACKSON NYAMUYA MAOGOTO, STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: VERSAILLES TO ROME 275–76 (2003))); Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 92 N.Y. INT'L L. REV. 27, 37–38; Cara Levy Rodriques, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, 814–15 (1999); Robinson O. Everett, *American Servicemembers and the ICC*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 137 (Sarah B. Sewall & Carl Kaysen eds., 2000); Casey, *supra* note 322, at 842, 853, 861–63, 867–68.

324. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. LI (Braz.) ("[N]o Brazilian shall be extradited, except for a naturalized Brazilian for a common crime committed prior to naturalization, or proven involvement in unlawful traffic in narcotics and similar drugs, as provided by law.").

325. *See supra* Part I.B.3.

326. *See supra* Parts I, II.

327. *See supra* notes 258–66 and accompanying text.

328. Scheffer & Cox, *supra* note 26, at 1047–48, 1048 n.353 ("[A]n examination of the due process rights demonstrates that with the exception of the right to trial by jury . . . the ICC would provide a U.S. defendant with essentially the same due process rights as enjoyed in U.S. courts." (citing Ruth Wedgwood, *The Constitution and the ICC*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 119, 119–23 (Sarah B. Sewall & Carl Kaysen eds., 2000))) ("[T]he ICC is carefully structured with procedural protections that closely follow the guarantees and safeguards of the American Bill of Rights and other liberal constitutional systems."); Patricia M. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 345 (2006) ("Opposition is sometimes voiced . . . that the procedures of the ICC do not provide the fundamental due process guarantees that our country holds indispensable . . . [y]et all of the international tribunals so far, and certainly the ICC, have adopted the main principles of the ICCPR, to which the United States is a signatory.").

appellate procedural system that safeguards the Rome Statute's Article 55 rights of persons during an investigation—which includes protections against self-incrimination and torture and the right to counsel—as well as the Article 67 rights of the accused—including the right to a public hearing, to be tried without undue delay, and to the examination of witnesses.[329]

In the past, both scholars and State Department officials have emphasized the ICC's procedural acceptability.[330] Louis Henkin, writing before the advent of the ICC, emphasized this point in comparison to extradition; from a contemporary perspective—which includes the codification of ICC process and an expansive cross-border system of criminal procedural flexibility—this only rings more true.[331] More recently, David Scheffer and Ashley Cox have already gone right-by-right through the Rome Statute, showing how—broadly speaking—the ICC upholds all fundamental rights in this space.[332] Notably, they advise that "one can quibble about lack of precise parity" with certain U.S. constitutional rights, but notes that the Rome Statute system "do[es] not give rise to any serious doubt" about fundamental protections.[333] In this regard, they are correct.

This is not to say that the ICC's procedural system is ideal, or lacking need for reform. Scholars and practitioners alike have criticized the ICC's "hybrid" system of justice on its own merits,[334] not to mention the length of its trials and the disproportionate impact of selective prosecutions on certain regions.[335] Such critiques are

329. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

330. Scheffer & Cox, *supra* note 26, at 1047–49.

331. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 270 (1996) (noting that ICC procedure is not more troubling than that arising in interstate extradition); *accord* Scheffer & Cox, *supra* note 26, at 1033–34, 1034 n.268 (noting that the U.S. Constitution does not require jury trials abroad, as evidenced by extradition practice).

332. Scheffer & Cox, *supra* note 26, at 1050–59.

333. *Id.* at 1049–56 (reviewing ICC guarantees such as the right to remain silent, prohibition against ex post facto crimes, and presence at trial). The Rome Statute even prohibits trials *in absentia*, matching U.S. practice in the extradition context. *Id.* at 1054 (citing Rome Statute of the International Criminal Court, *supra* note 329, art. 63 ("The accused shall be present during the trial.")).

334. Casey, *supra* note 322, at 842–43 ("Even the most closely related of the world's legal systems, the Common Law and the Civil Law, begin from fundamentally different assumptions about the role of a criminal trial in the pursuit of justice.").

335. Iain Macleod & Shehzad Charania, *Three Challenges for the International Criminal Court*, OUPBLOG (Nov. 16, 2015), https://blog.oup.com/2015/11/three-challenges-international-criminal-court [https://perma.cc/K462-MFCW]; *cf.* Tessa Alleblas, Eamon Aloyo, Geoff Dancy & Yvonne Dutton, *Is the International Criminal*

related—but distinct from—the question here, which is whether the ICC passes a *minimum threshold* of procedural permissibility, judged by the constitutional standards of the United States and the practice of cross-border law enforcement cooperation.

B. INVESTIGATIVE MECHANISMS

Finally, core criminal procedure advances understanding of U.S. engagement with new investigative, independent mechanisms relevant to the development of international criminal law. One such innovation is the development of international mechanisms that collect evidence for the duration of armed conflict in afflicted states.[336] The underlying idea behind such mechanisms is for state and international actors to ultimately promote accountability for such crimes through a variety of accountability mechanisms, including international tribunals and domestic prosecutions.[337]

Two prominent mechanisms relate to Syria and Myanmar.[338] The former, established in December 2016 pursuant to U.N. General Assembly Resolution 71/248, is formally called the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011 (IIIM).[339] Its formal mandate is to collect evidence of

Court Biased Against Africans? Kenyan Victims Don't Think So, WASH. POST (Mar. 6, 2017, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/06/is-the-international-criminal-court-biased-against-africans-kenyan-victims-don't-think-so [https://perma.cc/S6YC-7Y4Q] (discussing that Kenya's government has consistently argued that the ICC is biased toward Africans).

336. *See* Lara Talsma, *UN Human Rights Fact-Finding: Protecting a Protection Mechanism*, 20 ILSA Q. 29 (2012) ("After sporadic use of [human rights fact-finding] mechanism[s] in the 1960s and 1970s through *ad hoc* missions, a system of both permanent and *ad hoc* fact-finding missions was developed since the 1980s and is now well established within the UN framework.").

337. *See id.* at 33 ("[O]ne of the main purposes of fact-finding missions is to hold perpetrators accountable.").

338. *See* Isabella Regan, *Justice in an Ever-Evolving (Digital) World—A Reflection on the Annual International Bar Association's War Crimes Conference*, 11 AMSTERDAM L.F. 50, 61–63 (2019). The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), established in 2017, represents a variation of such mechanisms. The difference between this mechanism and IIIM, the UN mechanism for Syria, is that the former's mandate is much narrower, focusing on one group alone, known as Daesh. Its main tasks are "collecting, preserving and storing evidence" of Daesh's war crimes, as well as coordinating collection efforts with local actors within Iraq and Syria. *Id.* at 62.

339. *Mandate*, INT'L, IMPARTIAL & INDEP. MECHANISM, https://iiim.un.org/mandate [https://perma.cc/9BYZ-9PKJ].

human rights violations committed in Syria for the purpose of presenting such evidence in future national or international criminal proceedings.[340] Thus far, it has collected over a million records and received requests from judicial authorities in at least five countries for cooperation in Syria-related cases.[341] The Human Rights Council established the latter, called the Independent Investigative Mechanism for Myanmar (IIMM), in September 2018 through resolution 39/2.[342] Similarly, its mandate is to assemble evidence of international crimes and violations of international law committed in Myanmar for use in future prosecutions.[343] Thus far, it conducted its first mission to Bangladesh in November 2019, explaining its mandate and leading discussions with representatives of the community and other civil leaders.[344]

The link to core criminal procedure is likely, at this point, obvious to the reader. These United Nations mechanisms are collecting information to be used in criminal prosecutions; if such information is later introduced as evidence in U.S. criminal prosecutions for individuals in the United States who were alleged to have perpetrated crimes in these relevant countries, and the United States has jurisdiction over such crimes, the focus will likely turn to the U.N. methods of collection and whether such methods violate domestic norms for criminal procedure rights. Although some NGOs such as Global Rights Compliance have attempted to codify a range of minimum standards for the investigation of international crimes,[345] no standard procedure governs how fact-finding should be conducted by such international investigatory mechanisms.[346] Thus, every

340. *Id.*

341. Stephanie Nebehay, *U.N. Investigators Hot on Trail of Syrian War Criminals*, REUTERS (Mar. 8, 2019, 6:16 AM), https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes/un-investigators-hot-on-trail-of-syrian-war-criminals-idUSKCN1QP1AF.

342. *Independent Investigative Mechanism for Myanmar*, U.N. HUM. RTS. COUNCIL, https://ohchr.org/EN/HRBodies/HRC/IIMM/Pages/Index.aspx [https://perma.cc/L2UM-CDGB].

343. *Id.*

344. *Myanmar Mechanism Conducts First Official Mission to Bangladesh*, U.N. HUM. RTS. COUNCIL (Nov. 18, 2019), https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25310 [https://perma.cc/3FPE-SMKW].

345. *See Basic Investigative Standards for International Crimes Investigations*, GLOB. RTS. COMPLIANCE, https://www.globalrightscompliance.com/en/projects/basic-investigative-standards-for-international-crimes-investigations [https://perma.cc/9798-GQNZ]. Many of Global Rights Compliance's standards are modeled on those utilized by the International Criminal Court. *Id.*

346. Talsma, *supra* note 336, at 32.

mandate-holder needs to decide such standards for itself. In the case of the IIIM, it has yet to clarify any procedural guidelines relating to the mechanism's evidence-gathering and review functions.[347] Similarly, with respect to the IIMM, its precise procedures and methods of work remain unspecified, although it has articulated that such procedures and methods, once developed, would be designed to ensure [the evidence's] "integrity and preservation" and protect the "security and privacy of witnesses."[348] Given this opacity, whether and how such information is introduced into evidence in U.S. prosecutions remains an open question. Very likely, defendants will assert that introduction of such information would shock the conscience, or offend some other set of rights. Future research will illuminate this intriguing procedural question, at the intersection of U.S. criminal prosecutions and emerging international criminal legal institutions. But a core criminal procedure approach, rooted in the tripartite methodology described above, will provide the most effective means of safeguarding criminal defendant rights in this emerging transnational criminal space.

CONCLUSION

"To what criminal procedural standard do we hold another sovereign?"

This question has sounded throughout U.S. legal history. Justice Frankfurter and Justice Black posed this question when disputing the meaning of the due process clause of the Fourteenth Amendment. Eleanor Roosevelt presented this issue to U.S. State Department diplomats when creating the United Nations UDHR, and U.S. senators debated it before giving advice and consent to the ratification of ICCPR. And the question arises today when U.S. prosecutors and law enforcement agencies cooperate with other nations to advance foreign and domestic criminal cases.

This Article provides the answer to this question: core criminal procedure. This standard both upholds defendants' fundamental rights and provides enough flexibility to facilitate cross-border law enforcement realities. The approach already manifests itself in

347. *See Methods of Work*, INT'L, IMPARTIAL & INDEP. MECHANISM, https://iiim.un.org/working-methods/ [https://perma.cc/7A98-KXD6] ("Once a final version is adopted, the Methods of Work will be disseminated among various stakeholders, including civil society, in order to provide transparency as to the Mechanism's approach to its core tasks.").

348. Hum. Rts. Council, Rep. of the Indep. Investigative Mechanism for Myanmar, ¶¶ 36–37, U.N. Doc. A/HRC/42/66 (Aug. 7, 2019).

incorporation, human rights, and electronic evidence doctrine; it must also be applied to foreign evidence material to conviction, foreign judgments material to sentencing, and extradition. Political theory bolsters this approach, in which the three government branches evaluate rights rooted in constitutional criminal procedural guarantees, international human rights standards, and a functionalist assessment rooted in comparative law. This framework then informs U.S. engagement with international criminal tribunals and investigative mechanisms.