

Criminal Jurisdiction and the Nation-State: Toward Bounded Pluralism

Introduction	726
I. The Traditional Model of Criminal Jurisdiction and Its Challengers	730
A. The Traditional Model in a Global Context	730
B. Challenges to the Traditional Model	732
1. Challenges from Below	732
2. Challenges from Above	734
C. Sovereignists, Internationalists, and Pluralists	738
II. Toward A Middle Path-Bounded Pluralism	743
A. Functional Jurisdiction and Supervisory Jurisdiction	744
B. The Bounded Pluralism Approach	747
III. The Challenge from Below—Tribal Criminal Jurisdiction ...	754
A. The Status Quo of Criminal Jurisdiction in Indian Country	754
B. Tribal Jurisdiction: Where Do We Go From Here?	761
IV. The Challenge from Above—International Criminal Jurisdiction	768
A. International Criminal Jurisdiction and the United States: The Status Quo	769
B. The International Criminal Court and the United States: Where Do We Go From Here?	774
Conclusion	779

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INTRODUCTION

Virtually every criminal justice system today overlaps, interacts, and intermingles with other criminal justice systems. The traditional model of a single nation-state possessing exclusive authority to criminally sanction those within its borders is being challenged from below by sub-state demands for communal autonomy and from above by international and global assertions of criminal jurisdiction.¹ The United States is not immune to these jurisdictional challenges, as it confronts demands from Native American tribes for greater criminal jurisdiction and faces an ongoing—if stalled—debate about whether to join the International Criminal Court (ICC).² These battles over criminal jurisdiction are part of a greater global debate about what kinds of political power ought to reside exclusively within nation-state structures and what kinds of power may be allocated to sub-state, supra-state, or other non-state entities.³

It is no surprise that control over criminal justice has become a significant jurisdictional battleground between nation-states and their sub-state and supra-state challengers, for criminal jurisdiction is still considered the *sine qua non* of state sovereignty.⁴ If one follows the classic Weberian definition of the state—that group in society with a monopoly on the exercise of legitimate force⁵—then criminal justice

¹ In addition, nation-states often confront extra-territorial assertions of criminal jurisdiction by *other* nation-states. See Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 820 (2009) (describing and decrying the “rise of extraterritorial domestic law”).

² See discussion *infra* Parts III, IV.

³ See, e.g., ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 22 (2d ed. 2010) (“The assertion of criminal jurisdiction over a person is amongst the most coercive activities any society can undertake.”); Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT’L & COMP. L. REV. 323, 328 (2012) (“It is the primal aspect of jurisdiction—its close association with sovereign authority—which also infuses it with such conflict-generative potential.”).

⁴ The strong connection between the concepts of sovereignty, jurisdiction, and territory dates back to the consolidation of the Westphalian state system in seventeenth-century Europe. See generally LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 9 (1995) (tracing the territoriality principle back to the Peace of Westphalia in 1648); Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline*, in 118 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW no. 2, at 37 (The Faculty of Political Sci. of Columbia Univ. ed., 1925) (pinpointing 1648 and “the treaties making up the Peace of Westphalia” as the moment when the major powers accepted territoriality “as a fundamental principle of international intercourse”).

⁵ Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

must be a state function. After all, the criminal law provides a mechanism to deter and punish the private exercise of violence and at the same time legitimates the exercise of a particular kind of coercive force: criminal punishment itself. Thus, any recognition of sub-state or supra-state criminal jurisdiction would appear to undermine the state's exclusive sovereignty and admit that other units have legitimate coercive power over (at least some of) the state's citizens. This position—often called the Sovereigntist or Nationalist position—underlies much of the opposition to any form of international or sub-national criminal jurisdiction.⁶ The Sovereigntist position has been particularly popular in the United States and has succeeded in keeping the United States out of the ICC and in severely limiting the criminal jurisdiction of Indian tribes domestically.⁷

Opposed to the Sovereigntist position are the Internationalist and Pluralist points of view, which maintain that international and sub-national entities, respectively, can and should play a vital role in criminal justice. Internationalists extol the importance of strong supra-national criminal justice institutions—both those that aim to keep national justice systems in conformity with human rights norms, such as the regional human rights courts, and those that directly prosecute and adjudicate the most serious violations of international criminal law, such as the ICC.⁸ For Internationalists, there are universal norms that demand—or at least recommend—international enforcement mechanisms. From the other end, Pluralists endorse the legitimacy of sub-national community-based criminal justice, especially by and for indigenous peoples and other traditionally marginalized minority groups. Pluralists emphasize that some sub-national communities have long traditions of self-governance and can articulate and enforce communal norms more effectively for themselves than the state structures in which they live.⁹ For Pluralists,

⁶ The term *Sovereigntist* has been in circulation in this sense at least since Peter F. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000. This Article's use of the terms *Sovereigntist* and *Internationalist* follows the path laid down by Austen Parrish in *Reclaiming International Law from Extraterritoriality*. See Parrish, *supra* note 1, at 815–16.

⁷ See discussion *infra* Parts III, IV.

⁸ Among the most prominent Internationalists in the American legal academy today are Anne-Marie Slaughter, Harold Koh, and Kal Raustiala. See *infra* notes 59–61 and accompanying text.

⁹ See discussion *infra* Part I.C.

in short, there are communal norms that demand—or at least recommend—communal enforcement mechanisms.

Sovereigntists, Internationalists, and Pluralists each promote the legitimacy of a particular level of political organization—whether national, international, or sub-national—and aim to lodge criminal jurisdiction at that level. What we need today, however, is an account of criminal jurisdiction that explains how nation-states can, where appropriate, recognize sub-state or supra-state jurisdiction without surrendering all supervisory control over that ceded jurisdiction. In this Article, I propose a position that is neither strictly Sovereigntist, nor wholly Internationalist or Pluralist. I start from the observation that criminal jurisdiction can be divided into first-order functional jurisdiction and second-order supervisory jurisdiction. Functional jurisdiction is the direct authority to criminalize behavior, enforce the criminal law, and adjudicate criminal cases. Supervisory authority, on the other hand, is the authority to lay down limits to the exercise of first-order functional jurisdiction—i.e., limits based on fundamental norms—and to enforce those limits. I argue that the United States ought to be open to ceding certain elements of first-order functional jurisdiction to tribes and to the ICC, but it should insist on retaining second-order supervisory jurisdiction to ensure that those entities respect the fundamental due process norms embedded in the U.S. Constitution. As shorthand, I will refer to my position as Bounded Pluralism, for it recognizes the potential value of a plurality of sub-state and supra-state jurisdictional arrangements, but it demands that such jurisdiction be bound by national—that is, American—due process norms. Bounded Pluralism can serve as both a descriptive and normative approach: some American policies already reflect an unarticulated commitment to Bounded Pluralism, and a clear expression of the approach suggests a number of significant reforms and innovations that have not been proposed to date.

Bounded Pluralism also illuminates common themes and challenges in the seemingly disparate areas of Indian law and international criminal law. Although the jurisdictional issues that arise in both fields receive significant attention—indeed, jurisdiction is one of the central concerns of both fields, both in practice and in academic commentary¹⁰—such issues are usually considered discretely and by

¹⁰ For a discussion of jurisdictional issues in Indian law, see generally Laurie Reynolds, “Jurisdiction” in *Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359 (1997). The place of jurisdiction in international criminal law is best revealed in the classic book *INTERNATIONAL CRIMINAL LAW: A GUIDE TO*

separate sets of specialists. The premise of this Article is that we can understand the values at stake in both sub-state and supra-state jurisdictional disputes better if we situate them within the larger framework of challenges to nation-state authority. Consequently, Part I describes the traditional model of exclusive nation-state criminal jurisdiction and the challenges that model faces today. I then lay out the Sovereignist, Internationalist, and Pluralist positions with respect to these challenges. In Part II, I explain and defend the Bounded Pluralism approach.

In Parts III and IV, I apply the Bounded Pluralism approach to the challenges of tribal criminal jurisdiction and international criminal jurisdiction, respectively. Sovereignists, I argue in these Parts, are correct that the United States should not accede to sub-state or supra-state criminal jurisdiction over U.S. citizens unless such jurisdiction conforms to fundamental U.S. due process standards. But, I argue, the Sovereignists demand can accommodate substantial sub-state and supra-state functional jurisdiction, so long as the United States can maintain meaningful supervisory jurisdiction over tribes and the ICC. Federal policy toward tribal criminal law already reflects the principle that tribes may exercise (severely limited) functional jurisdiction over Indians, but only under the supervisory jurisdiction of federal courts.¹¹ Unfortunately, criminal justice in Indian Country today is shamefully inadequate and unnecessarily hampered by jurisdictional confusion.¹² To improve criminal justice in Indian Country, I suggest that the United States allow tribes to exercise much greater functional jurisdiction in exchange for an enhanced federal supervisory role.

With respect to international criminal jurisdiction, the United States has so far resisted allowing any international institution to exercise criminal enforcement or adjudicatory jurisdiction over U.S. nationals. But if a mechanism existed to allow U.S. courts to review international criminal procedures against Americans, then the United States ought to consider joining such institutions, including the ICC. In sum, the United States ought to insist on supervisory jurisdiction

U.S. PRACTICE AND PROCEDURE (Ved P. Nanda & M. Cherif Bassiouni eds., 1987), where seven out of fifteen essays fall under the heading “Jurisdiction.”

¹¹ See discussion *infra* Part III.A.

¹² See, e.g., Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 149 (2010) (“One of the primary culprits of the high rates of crime in Indian Country is the ‘complex patchwork of federal, state, and tribal law’ and criminal jurisdiction that allows many perpetrators—particularly non-Indians—to go unprosecuted.” (footnote omitted)).

over any sub-state or supra-state entity with criminal jurisdiction over U.S. nationals, but the United States should be open to granting substantial functional jurisdiction to such entities where it retains significant supervisory jurisdiction.

I

THE TRADITIONAL MODEL OF CRIMINAL JURISDICTION AND ITS CHALLENGERS

A. The Traditional Model in a Global Context

Criminal jurisdiction is a sleepy subject—but a sleeping giant. It generates few blockbuster cases, takes up almost no space in law school curricula (unlike civil jurisdiction), and rarely receives the kind of sustained study devoted to civil jurisdiction or to other aspects of substantive criminal law and criminal procedure.¹³ Until recently, this general neglect may have been justified by the relative stability of criminal jurisdiction doctrine. The doctrine of territoriality—according to which criminal jurisdiction is determined by the territorial location of the crime—seems to answer most questions about which criminal justice system has jurisdiction over which crimes.¹⁴ Under the traditional model, criminal jurisdiction, sovereignty, and territory are all congruent and mutually constitutive concepts, all tied to the Westphalian vision of the nation-state.¹⁵ The

¹³ The typical first-year Civil Procedure course covers both personal jurisdiction and subject-matter jurisdiction extensively. By contrast, typical criminal procedure courses and their casebooks do not mention jurisdiction. Compare JOSEPH W. GLANNON ET AL., *CIVIL PROCEDURE: A COURSEBOOK* 37–352 (2011) (devoting over 300 pages of cases and materials to the doctrines of civil jurisdiction), with JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* (2010) (including no sections on jurisdiction and no index reference to jurisdiction).

¹⁴ As Justice Holmes put it, “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

¹⁵ Lisa Ford writes of sovereignty, jurisdiction, and territory as “[t]he legal Trinity of nation statehood.” LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836*, at 1 (2010); see also M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in *UNIVERSAL JURISDICTION* 39, 40 (Stephen Macedo ed., 2004) (“Sovereignty, jurisdiction, and territory have traditionally been closely linked.”); Arnold Brecht, *Sovereignty, in WAR IN OUR TIME* 58, 64 (Hans Speier & Alfred Kähler eds., 1939) (“Within a country’s boundaries no law counts other than that issued by the sovereign . . . no higher law, no imperial law, no divine law, no natural law. There is no appeal to any higher court, no arbiter, avenger or ultimate guardian of peace and justice.”); Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 *MICH. L. REV.* 843, 843 (1999) (“We are now

traditional model posits a sovereign state as one with ultimate, exclusive, and legitimate jurisdiction over people and land within a defined territory—and by corollary, no power over people and land outside that territory.¹⁶ Thus, for any potentially criminal conduct, one could determine which criminal code, which prosecutor's office, and which court system had jurisdiction simply by finding the location of the crime within a particular sovereign state.

While still powerful, this traditional model is breaking down. There is a growing recognition that, across a range of issues, legal pluralism is more often the norm than legal monism.¹⁷ The authority of the state—understood as jurisdiction or as sovereignty—has never been as exclusive or as robust as the traditional models suggests, and the process of globalization has exposed just how diffuse and diverse are the powers once thought to be exclusive to nation-states.¹⁸ Today, there is a substantial body of literature discussing particular jurisdictional complexities generated by developments, such as the increased migration of people and capital across borders, the rise of international firms and nongovernmental organizations (NGOs), the global reach of information technology, and the cosmopolitan outlook of global elites.¹⁹ The interaction of legal regimes that come into

accustomed to territorial jurisdiction—so much so that it is hard to imagine that government could be organized any other way.” (emphasis omitted)).

¹⁶ The classic American statement of the exclusive and absolute nature of territorial jurisdiction comes in *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.”). See also ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 37 (2003) (“Traditionally, individuals have been subject to the exclusive (judicial and executive) jurisdiction of the State on whose territory they live.”).

¹⁷ See, e.g., Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375 (2008) (“Legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level.”).

¹⁸ See, e.g., STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 12 (1999) (“In contemporary discourse it has become commonplace for observers to note that state sovereignty is being eroded by globalization.”).

¹⁹ See generally KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009); SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 181, 183 (1996); Ralf Michaels, *Territorial Jurisdiction After Territoriality*, in *GLOBALISATION AND JURISDICTION* 105

contact due to these phenomena—in short, legal pluralism—has become the subject of increased attention by scholars, and there is a general consensus that legal pluralism is a defining feature of the global legal system.²⁰

B. Challenges to the Traditional Model

1. Challenges from Below

The nation-state, which paradigmatically ruled directly and uniformly within its territorial borders, is increasingly confronted by groups of its citizens demanding separate regimes for themselves. The groups making such demands may be defined primarily by regional geography (e.g., Northern Italy²¹), ethno-cultural identity (e.g., Kurds²²), religious affiliation (e.g., Christians in Iraq²³), indigenous

(Piet Jan Slot & Mielle Bulterman eds., 2004); Anne Orford, *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, 30 MICH. J. INT'L L. 981 (2009); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005).

²⁰ For recent overviews of the literature on legal pluralism, see PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM* (2012); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. SOC. SCI. 243 (2009); and Tamanaha, *supra* note 17.

While the existing literature on legal pluralism has not completely ignored criminal jurisdiction, too little attention has been paid to the unique challenges that pluralism presents to criminal jurisdiction in particular. After all, the conventional understanding of criminal law as a practice and as a concept is uniquely state-centric and territorial. Criminal law is the epitome of public law; crimes are understood to be infractions against the state, the state is the party that brings criminal charges, and the state is the entity that carries out criminal punishment. And at least since Vattel, the principle of territoriality has determined criminal jurisdiction. EMER DE VATTEL, 1 THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 147–48 (Philadelphia, T. & J.W. Johnson & Co. 1867). As Professor Lisa Ford notes, the concepts of sovereignty, jurisdiction, and territory form “[t]he legal Trinity” of statehood. FORD, *supra* note 15, at 1. Even the most enthusiastic legal pluralists, like Professor Berman, admit that nation-states generally still maintain an effective monopoly on the use of coercive force within their borders. See Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 938 n.32 (2006) (“[T]he power to fine, imprison, physically punish, and conduct military operations remains largely a state-based power.”). And because enforcement of criminal law consists precisely of the imposition of coercive force in the form of incarceration, execution, or other physical punishment, the nation-state remains the entity with the best capacity to effectively operate a criminal justice system.

²¹ Lindsay Murphy, *EU Membership and an Independent Basque State*, 19 PACE INT'L L. REV. 321, 321–22 (2007) (noting that the Basque region in Spain, Northern Italy, and Scotland “are demanding independence and the right to self-determination”).

²² Steven Menashi, *Ethnonationalism and Liberal Democracy*, 32 U. PA. J. INT'L L. 57, 101 (2010) (“The ongoing struggles in Iraq involve the aspirations to self-determination of the Kurds, whose national population extends into Turkey and Iran . . .”).

status (e.g., Native Hawaiians²⁴), or some combination thereof. And the demands such groups make may range from complete independence (e.g., Kosovo²⁵) to some form of distinct recognition within the existing nation-state (e.g., Catalonia in Spain²⁶). Often, the demand for “autonomy” is inchoate; the group challenging nation-state authority may not be able to articulate exactly which powers it wants or in what precise form. Without losing sight of the uniqueness of each case, there is a larger category into which these diverse demands may be fit—what I am calling Challenges from Below.²⁷

Demands for more self-government from sub-state actors are not new, but since the breakup of the Soviet Union in 1991, the volume and relative success of such Challenges from Below has been notable.²⁸ This larger phenomenon and its implications for a variety of legal issues have received extensive treatment elsewhere.²⁹ Here,

²³ Phillip Smyth, *A New Identity for Middle East Christians*, AM. SPECTATOR (July 18, 2012, 6:07 AM), <http://spectator.org/archives/2012/07/18/a-new-identity-for-middle-east> (“By 1979, Iraqi Christians established their own political party, the Assyrian Democratic Movement (*Zowaa*). The *Zowaa* fought for an autonomous, if not independent territory in northern Iraq. Today, the party pushes for the autonomy of Nineveh Plains as a safe-zone for Iraq’s Christians.”).

²⁴ Jennifer L. Arnett, *The Quest for Hawaiian Sovereignty: An Argument for the Rejection of Federal Acknowledgement*, 14 KAN. J.L. & PUB. POL’Y 169, 171 (2004) (“The Native Hawaiian sovereignty movement is gaining speed. Native Hawaiians are speaking out in favor of the re-institution of their sovereign rights, and after two centuries, people are beginning to listen.”).

²⁵ Rob Dickinson, *The Global Reach and Limitations of Self-Determination*, 20 CARDOZO J. INT’L & COMP. L. 367, 371–72 (2012) (describing Kosovo’s declaration of independence and an International Court of Justice Advisory Opinion finding that the declaration did not violate international law).

²⁶ Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 MICH. J. INT’L L. 1251, 1260–63 (2004) (describing the framework of Catalan autonomy within the Kingdom of Spain).

²⁷ The “challenge” is to conventional nation-state rule, and the word “below” distinguishes such challenges emanating from sub-state actors from challenges from supra-state actors or parallel states.

²⁸ See Robert D. Sloane, *The Policies of State Succession: Harmonizing Self-Determination and Global Order in the Twenty-First Century*, 30 FORDHAM INT’L L.J. 1288, 1306 (2007) (book review) (“Self-determination reemerged as a major issue in the 1990s precisely because of the explosion of post-Cold War State successions: The dissolution of old States (e.g., the former Yugoslavia, Czechoslovakia, and the Soviet Union), the emergence of new ones (e.g., Croatia, Slovenia, Bosnia-Herzegovina, the Czech Republic, the Slovak Republic, Georgia, Eritrea), and the (regrettably often related) brutal ethnic conflicts within nation-States that had been held together in the past by iron-fisted rule or Cold War geopolitical forces.”).

²⁹ See, e.g., ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 133 (1995); NATIONAL SELF-DETERMINATION AND SECESSION (Margaret

my concern is limited to demands from sub-state groups for some form of criminal autonomy—that is, some special criminal jurisdiction—as well as already-operating systems in which criminal jurisdiction resides in part in sub-state entities. Demands for criminal autonomy may be made explicitly or, more often than not, implicitly as part of a larger demand for autonomy across a range of public functions. Examples of Challenges from Below that specifically demand increased autonomy in the realm of criminal justice include those by Acehese Muslims in Indonesia,³⁰ Mindanao Moro in the Philippines,³¹ the Maori in New Zealand,³² and the Volkstaat (Boer) movement in South Africa.³³ In the United States, the most relevant Challenges from Below come from Native American tribes. Many tribes already enjoy significant civil and criminal jurisdiction, but by and large seek much greater criminal jurisdiction.³⁴

2. Challenges from Above

While demands for sub-state jurisdiction test the nation-state from below, the spectacular rise of international criminal law and its claims to supra-national jurisdiction challenge states from above. International criminal law is a field just now coming into its own, but

Moore ed., 1998); PEOPLES' RIGHTS (Philip Alston ed., 2001); Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241, 242 (1994).

³⁰ See generally Moch. Nur Ichwan, *The Politics of Shari'atization: Central Governmental and Regional Discourses of Shari'a Implementation in Aceh*, in ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS 193, 210–15 (R. Michael Feener & Mark E. Cammack eds., 2007); *Islamic Law and Criminal Justice in Aceh*, INT'L CRISIS GROUP (July 31, 2006), <http://www.crisisgroup.org/en/regions/asia/south-east-asia/indonesia/117-islamic-law-and-criminal-justice-in-aceh.aspx>.

³¹ See Justin Holbrook, *Legal Hybridity in the Philippines: Lessons in Legal Pluralism from Mindanao and the Sulu Archipelago*, 18 TUL. J. INT'L & COMP. L. 403, 421 n.120 (2010) (describing disappointment on the part of some Muslim leaders that Shari'a courts do not have explicit criminal jurisdiction); see also Robert Winslow, *Comparative Criminology: Philippines*, SAN DIEGO ST. U. ROHAN ACAD. COMPUTING, http://www-rohan.sdsu.edu/faculty/rwinslow/asia_pacific/philippines.html (last visited Jan. 16, 2013) (“Although Shari'a courts do not have criminal jurisdiction, the MILF [Moro Islamic Liberation Front] asserts that its Islamic law courts do.”).

³² The seminal monograph arguing for a separate Maori criminal justice system in New Zealand is MOANA JACKSON, *THE MAORI AND THE CRIMINAL JUSTICE SYSTEM: A NEW PERSPECTIVE: HE WHAIPAANGA HOU* pt. 2 (1988).

³³ See Hercules Booyesen, *South Africa: In Need of a Federal Constitution for Its Minority Peoples*, 19 LOY. L.A. INT'L & COMP. L.J. 789, 795–96 (1997) (describing the proposal of the Volkstaat Council to create autonomous Afrikaner territories within a federal South Africa).

³⁴ See discussion *infra* Part III.A.

it is not a new phenomenon. At its beginnings, international criminal law consisted of particular substantive crimes deemed so damaging to world order as to allow for the suspension of the usual territorial model of criminal jurisdiction. Piracy is the most established and venerable international crime, and since at least the eighteenth century, international law has recognized that any sovereign could prosecute piracy regardless of the site of the crime, the nationality of the perpetrators, or the nationality of the victims.³⁵ The first major category of international crime, war crimes, became codified in the late nineteenth century in a series of international conventions,³⁶ and the war crimes tribunals in Nuremberg and Tokyo following World War II marked the first institutionalized effort to punish state officials via international criminal proceedings.³⁷

The post–World War II Tribunals were significant because they expanded the field—indeed, the very concept—of international criminal law from a small list of substantive crimes to encompass international institutions and procedures to prosecute and adjudicate alleged violations of substantive international criminal law.³⁸ Most importantly for our purposes, the Nuremberg and Tokyo Tribunals demonstrated that individuals may be subject to criminal prescriptions and procedures authored, enforced, and adjudicated not by sovereign states, but by a supra-national institution—in that case, the special Tribunals themselves.

For almost fifty years, the Nuremberg and Tokyo Tribunals appeared to be aberrations, because the succeeding half-century—the Cold War years—saw no further serious attempts to create institutions to enforce or adjudicate international criminal law.³⁹ Substantive

³⁵ See 4 WILLIAM BLACKSTONE, COMMENTARIES *71 (“Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society.”).

³⁶ See CASSESE, *supra* note 16, at 38–39 (2003) (summarizing the development and codification of war crimes in, inter alia, the Lieber Code (1863), the Oxford Manual (1880), and the Hague Conventions (1899 and 1907)).

³⁷ See *id.* at 333 (“For the first time non-national, or multi-national, institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope.”).

³⁸ *Id.*

³⁹ Of course, the idea of an international court with criminal jurisdiction did not die out completely during the Cold War years. See *id.* at 333–34 (noting the 1948 Convention on Genocide reference to a future “international penal tribunal” and U.N. International Law Commission work on drafting a statute for such a court). But Cold War divisions effectively froze any serious development of such an institution. *Id.* at 334.

international criminal law did evolve during these years, primarily through adoption of a series of international human rights conventions, most importantly the 1949 Geneva Conventions and their Additional Protocols.⁴⁰ These accords broadened the substantive provisions of international criminal law and codified the principle of universal jurisdiction for particular crimes.⁴¹ But they did not lodge any enforcement or adjudicative jurisdiction in any entities other than nation-states.⁴² Thus, while the Geneva Conventions' codification of universal jurisdiction for some crimes pushed against the traditional jurisdictional principle of territoriality, the Cold War years did not see the establishment of supra-national bodies with the power to directly enforce international criminal law or adjudicate such cases.

As the Cold War ebbed in the early 1990s and atrocities in the Balkans and in central Africa seized international attention, interest in international courts was rekindled. The United Nations Security Council created two ad hoc tribunals, one for the former Yugoslavia (ICTY) and one for Rwanda (ICTR).⁴³ The two ad hoc tribunals were given jurisdiction to prosecute and adjudicate cases related to violations of the Geneva Conventions, war crimes, genocide, and crimes against humanity during the respective conflicts in Yugoslavia and Rwanda.⁴⁴ These international courts and the (briefly) optimistic climate of international cooperation of the immediate post-Cold War years reinvigorated efforts to create a permanent international

⁴⁰ See *id.* at 41.

⁴¹ *Id.*

⁴² The 1949 Geneva Conventions provide for universal jurisdiction over “grave breaches” of its substantive provisions and also makes such prosecution (or extradition) mandatory on state parties. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”). But the Conventions do not provide for international institutions to directly investigate, prosecute, or adjudicate alleged violations. See Allison Marston Danner, *International Judicial Lawmaking: The Yugoslav Tribunal and the Laws of War*, 100 AM. SOC’Y INT’L L. PROC., 162, 162 (2006) (“The possibility of enforcing the laws of war in an international court was unanimously rejected by the delegates [to the Geneva Conventions].”); Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 2, 13 (2006).

⁴³ See CASSESE, *supra* note 16, 335–40 (summarizing the establishment and operation of the two ad hoc tribunals).

⁴⁴ *Id.* at 336.

criminal court with the power to enforce international criminal law directly against violators who would otherwise go unpunished.

At the Rome Conference of 1998, the international criminal court made the transition from a mere idea to an institution. Over the objection of the United States and six other countries, 120 countries voted in favor of a treaty—now known as the Rome Statute—to create the ICC.⁴⁵ By July 2002, the Rome Statute had been ratified by over sixty countries, and the ICC began operations.⁴⁶ Today, the Court has 121 State Parties and has taken on high-profile investigations in Sudan, Cote d'Ivoire, Kenya, Uganda, and Libya.⁴⁷ In its first ten years, the Court has indicted thirty defendants, including two former heads of state, and it recorded its first ever conviction in March 2012.⁴⁸ As I will discuss in more detail in Part IV, the United States has to date refused to join the ICC as a State Party and has endeavored to ensure that no American ever ends up in the ICC docks.⁴⁹

While the ICC is the starkest supra-national challenger to the traditional model, other international courts and regimes have also successfully asserted criminal jurisdiction over functions once deemed purely domestic. In particular, regional human rights courts have taken it upon themselves to subject national criminal justice systems to human rights norms and, on some occasions, to effectively force changes in national criminal procedure and substantive criminal

⁴⁵ *Id.* at 342–43. Though deemed a court, the ICC contains both a court in the adjudicatory sense and a prosecutor's office. It thus claims elements of both judicial and executive jurisdiction. Insofar as case law elaborates on and develops legal doctrine, the court also acts in part in a legislative fashion. Rome Statute of the International Criminal Court arts. 9, 21(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (providing that ICC judges may propose amendments to the substantive elements of crimes and authorizing ICC judges to “apply principles and rules of law as interpreted in its previous decisions”).

⁴⁶ *About the Court*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Jan. 14, 2013).

⁴⁷ *Assembly of State Parties*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx (last visited Jan. 14, 2013); *Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Jan. 14, 2013).

⁴⁸ Marlise Simons, *Congolese Rebel Convicted of Using Child Soldiers*, N.Y. TIMES, Mar. 15, 2012, at A12 (reporting on the first—and so far only—ICC conviction); *International Criminal Court*, WIKIPEDIA, http://en.wikipedia.org/wiki/International_criminal_court (last visited Aug. 9, 2012) (noting that the ICC “has publicly indicted 30 people” to date).

⁴⁹ See discussion *infra* Part IV.

law. The European Court of Human Rights has been the most active court in monitoring its member states' criminal laws and practices, and it has found a variety of domestic criminal justice legislation in violation of the European Convention on Human Rights—including sodomy laws in the United Kingdom and Ireland,⁵⁰ the U.K.'s blanket restriction on the voting rights of incarcerated felons,⁵¹ and Turkey's ban on wearing religious attire in a public square.⁵² In sum, today, there is a permanent International Criminal Court that claims direct enforcement jurisdiction over international crimes, and there are human rights courts that claim supervisory jurisdiction over the operation of domestic criminal justice systems. Both institutions constitute significant and novel challenges to the traditional model of state-based territorial criminal jurisdiction.

C. Sovereignists, Internationalists, and Pluralists

How have state officials and legal commentators reacted to the challenges to exclusive state-based criminal jurisdiction summarized above? Painting with a broad brush, there are three distinct positions: Sovereignist, Internationalist, and Pluralist.

Sovereignists decry any perceived diminution in the exclusivity of state-based territorial jurisdiction. Sovereignists welcome neither supra-state jurisdictional assertions, like those of the ICC and the regional human rights courts, nor sub-national jurisdictional assertions by religious, ethnic, or provincial groups seeking more autonomy. The Sovereignist wants to guard the prerogatives of the nation-state and maintain as much as possible the traditional congruence of sovereignty, territory, and jurisdiction. It is easy to understand why state officials and popular nationalists would be drawn to the Sovereignist position, for it explicitly seeks to maximize the power of the nation-state and, by corollary, of state officials. But the Sovereignist position has a strong normative cast as well. The Sovereignist sees the exclusive criminal jurisdiction of the state as

⁵⁰ *Norris v. Ir.*, 142 Eur. Ct. H.R. (ser. A) at 17 (1988) (finding Ireland's sodomy laws in violation of the European Convention of Human Rights, art. 8 (right to "private and family life")); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 20 (1981) (finding Northern Ireland's sodomy law in violation of the European Convention of Human Rights, art. 8).

⁵¹ *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2005).

⁵² *Affaire Ahmet Arslan et Autres c. Turquie* [Case of Ahmet Arslan and Others v. Turkey], App. No. 41135/98, Eur. Ct. H.R. (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97380> (last visited Jan. 17, 2013).

the hard-won triumph of order and social peace over chaos and private violence. The whole point of state-based criminal justice, the Sovereigntist argues, is to take the prerogative of coercive physical punishment out of private hands and vest it exclusively in a single sovereign entity constrained by law. Thus, criminal justice is a core state function and one that cannot be shared with other entities, lest the chaos and violence of the state of nature reassert itself. With respect to international institutions in particular, many Sovereigntists in Western democracies also worry about a “democratic deficit.” On this account, international institutions lack popular support because they are elite creations, they lack democratic accountability because there is no particular electorate to whom they are responsible, and they lack sufficient respect for liberal norms because they are inevitably shaped by the large number of non-liberal states that constitute the present international state system.⁵³ Prominent political leaders who have voiced the Sovereigntist position in the United States include Donald Rumsfeld,⁵⁴ Bob Barr,⁵⁵ and John Bolton.⁵⁶ In

⁵³ For full-throated Sovereigntist arguments against international courts, see JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005), and John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 *STAN. L. REV.* 1175, 1178 (2007) (concluding that the “democratic deficit” of international lawmaking “provides a strong argument against allowing raw international law to become part of domestic law in any respect”). For a more balanced approach, see Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 *N.Y.U. L. REV.* 1971, 2006 (2004) (arguing that American reluctance to submit itself to international legal processes “reflects an American commitment to democratic constitutionalism—which is to say, to self-government”).

⁵⁴ See, e.g., Donald Rumsfeld, Op-Ed., *Why the U.N. Shouldn't Own the Seas*, *WALL ST. J.*, June 13, 2012, at A15 (“The treaty proposes to create a new global governance institution that would regulate American citizens and businesses without being accountable politically to the American people. Some treaty proponents pay little attention to constitutional concerns about democratic legislative processes and principles of self-government, but I believe the American people take seriously such threats to the foundations of our nation.”).

⁵⁵ Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 *HARV. J. ON LEGIS.* 299 (2002).

⁵⁶ John R. Bolton & John Yoo, Op-Ed., *Restore the Senate's Treaty Power*, *N.Y. TIMES*, Jan. 5, 2009, at A21 (“America needs to maintain its sovereignty and autonomy, not to subordinate its policies, foreign or domestic, to international control.”); John Bolton, *The Coming War on Sovereignty*, *COMMENT.* (Mar. 2009), <https://www.commentarymagazine.com/article/the-coming-war-on-sovereignty> (“[T]he nation’s governing elite is in the process of taking a sharp, indeed radical, turn away from the principles and practices of representative self-government that have been at the core of the American experiment since the nation’s founding. The pivot point is a shifting understanding of American sovereignty.”); see also John R. Bolton, *Should We Take Global Governance Seriously?*, 1 *CHI. J. INT’L L.* 205 (2000).

the legal academy, John Yoo,⁵⁷ Jack Goldsmith,⁵⁸ and Jeremy Rabkin⁵⁹ are identified as Sovereignists.⁶⁰

Internationalists, contra Sovereignists, welcome and promote the increasing claims of supra-national criminal jurisdiction by regional, global, and other international institutions. Internationalists point to the general increase in transnational crime, the global commitment to human rights, and growing cosmopolitan identities as grounds for creating and sustaining international institutions with direct power (i.e., jurisdiction) over criminal justice matters of international import.⁶¹ International criminal jurisdiction, on this account, serves as an important mechanism for both managing the challenges of globalization and for institutionalizing universal human rights norms.⁶² Internationalists do not necessarily seek to delegitimize traditional nation-states and territory-based criminal jurisdiction. Rather, they aim to supplement such jurisdiction with effective and robust international regimes that can tackle transnational criminal problems, constrain the exercise of illegitimate state power, and, where necessary, fill in the gaps when no national jurisdiction is willing or able to investigate or prosecute significant crimes. For Internationalists, the establishment of the ICC is the culmination of a

⁵⁷ See, e.g., John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 89 (1998) (arguing that vesting public authority “in officials who are not officers of the United States risks offending both the fundamental principle of popular sovereignty underlying our Constitution and the Appointment Clause’s basic goal of government accountability” (footnote omitted)).

⁵⁸ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 21–22 (2007) (referring to John Yoo as a fellow “new sovereignist”); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

⁵⁹ See, e.g., RABKIN, *supra* note 53; JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* (2004).

⁶⁰ Peter J. Spiro was the first to identify this group of scholars and political figures as “sovereignists” in *The New Sovereignists: American Exceptionalism and Its False Prophets*. Spiro, *supra* note 6, at 9.

⁶¹ See generally Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 288, 325–26 (2004) (“The best illustration of the new sovereignty can be found in the operation of ‘government networks’—networks of national government officials of all kinds operating across borders to regulate individuals and corporations operating in a global economy, combat global crime, and address common problems on a global scale.”).

⁶² See, e.g., Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 3, 18 (Antonio Cassese et al. eds., 2002).

longstanding dream to create a permanent international court with direct jurisdiction over individuals alleged to have committed the most serious international crimes.⁶³ Internationalists also support the regional human rights courts that act as quasi-constitutional checks on national criminal justice institutions.⁶⁴ And many Internationalists—though not all—continue to advocate for universal jurisdiction by nation-states and the development of international criminal law at the nation-state level.⁶⁵ At the popular level, Internationalism is championed by NGOs such as Human Rights Watch and Amnesty International. At the scholarly level, Anne-Marie Slaughter,⁶⁶ Harold Koh,⁶⁷ and Kal Raustiala⁶⁸ generally write from an Internationalist position.

The third extant position is what I call Pluralism.⁶⁹ Pluralists emphasize the multiple overlapping normative communities that exist within (and across) the boundaries of the nation-state. While the Internationalist welcomes challenges “from above,” the Pluralist

⁶³ See, e.g., Robert Badinter, *International Criminal Justice: From Darkness to Light*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 62, at 1931.

⁶⁴ See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (praising the European Court of Human Rights as an effective supra-national legal body).

⁶⁵ See, e.g., PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Stephen Macedo ed., 2001), available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (an attempt by leading scholars and jurists to provide guidance to the national application of universal jurisdiction to criminal prosecutions); see also Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 2 (2005) (arguing for “the participation of the ICC in mixed tribunals that would be established in the state most directly affected by a prosecution”).

⁶⁶ See generally Helfer & Slaughter, *supra* note 64; Slaughter, *supra* note 61, at 325–26.

⁶⁷ See generally Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

⁶⁸ See generally Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

⁶⁹ My use of the term *Pluralist* in this Article is related to, but distinct from, the more general concept of legal pluralism as that term is usually used. Legal pluralism is a contested concept, but it generally refers to a state of affairs in which multiple legal regimes coexist within a single social sphere. See, e.g., Tamanaha, *supra* note 17, at 375 (“Legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level.”). A Pluralist, as I use the term, is someone who has a normative commitment to recognizing and empowering a multiplicity of legal (and quasi-legal) regimes in addition to official nation-state legal systems.

welcomes challenges “from below.”⁷⁰ Pluralists are comfortable with jurisdictional arrangements that vest formal (and informal) authority in institutions, organizations, and communities other than the nation-state. It is, in fact, these non-state communities that exert effective control over behavior in many spheres of life, the Pluralist argues, so the formal state that fails to acknowledge, respect, and interact with these communities’ already-existing authority is doing its citizens a disservice. Pluralism, on this account, simply acknowledges the reality of these sub-state normative regimes—whether based on indigenous, ethnic, religious, or geographical identities—and seeks to negotiate the inevitable tensions between the formal nation-state legal system and the various sub-state regimes.⁷¹ Of course, a Pluralist need not support every assertion of jurisdiction by every community, and a Pluralist may still privilege the formal state legal system in certain jurisdictional disputes. But the Pluralist is committed to taking sub-state assertions of jurisdiction seriously and is, in principle, open to vesting real criminal jurisdiction in sub-state entities. In the academic literature, Paul Berman is perhaps the leading Pluralist theorist, while the many advocates for particular sub-state jurisdictional distributions—e.g., indigenous rights advocates or autonomous region advocates—write from an implicitly Pluralist perspective.⁷²

These brief, idealized descriptions of Sovereignism, Internationalism, and Pluralism do not do justice to the nuances of the various approaches nor to the significant range of differing opinions within each stream. Still, at base, each approach advises the nation-state—the United States government in particular—that it should

⁷⁰ Of course, one could be both an Internationalist and a Pluralist without direct contradiction, but it is important to distinguish the two positions. Internationalists tend to promote global governance and legal *convergence*, while Pluralists celebrate local diversity and legal *divergence*. Internationalists, in other words, are by and large engaged in a project of uniformity while Pluralists revel in variety.

⁷¹ See generally Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. SOC. SCI. 225, 239 (2009) (“In a plural world, law is an ongoing process of articulation, adaptation, rearticulation, absorption, resistance, deployment, and on and on. It is a process that never ends, and international law scholars would do well to study the multiplicity and engage in the conversation, rather than impose a top-down framework that cannot help but distort the astonishing variety of law on the ground.”). Those who embrace federalism “all the way down” and/or the principle of subsidiarity may be included in the Pluralists’ fold. See, e.g., Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 20–21 (2010) (“I both insist that federalism must be pushed all the way down and link our failure to do so to the hold that sovereignty exerts on our collective imagination.”).

⁷² See generally BERMAN, *supra* note 20; Berman, *supra* note 71.

either resist or embrace sub-national and/or supra-national jurisdiction. But a posture of steadfast resistance or open-ended embrace is neither realistic nor pragmatic. What we need is a more sophisticated understanding of the varieties of criminal jurisdiction, a realistic appraisal of the jurisdictional status quo, and an account that demonstrates how the United States might accept certain sub-state or supra-state assertions of jurisdiction while maintaining significant control over the exercise of such jurisdiction with respect to Americans.

II

TOWARD A MIDDLE PATH-BOUNDED PLURALISM

Because neither nation-states nor their sub-state and supra-state challengers are going away any time soon, it is incumbent on policymakers and legal commentators to think more carefully about arrangements and models that can manage overlapping claims to criminal jurisdiction. In this Part, I explain why a better understanding of criminal jurisdiction can lead to a position that is neither rigidly Sovereigntist, nor naively Internationalist or Pluralist. The key point is that *criminal jurisdiction is not a single thing*; it is a concept encompassing a great variety of particular authorities vested in particular institutions performing particular functions. Most significantly, there is a distinction between first-order functional jurisdiction—the kind of jurisdiction that allows for criminal legislation, enforcement, and adjudication—and second-order supervisory jurisdiction that tries to keep the operation of functional jurisdiction within fundamental normative bounds (e.g., constitutional constraints or human rights standards). The United States, I argue, should be open to sharing *functional* criminal jurisdiction with its jurisdictional challengers from below and from above, but it should do so only when it has assurances that (a) the criminal processes of the sub-state or supra-state entities are designed to ensure due process and (b) the United States, through its federal court system, retains supervisory jurisdiction to review convictions of U.S. citizens by sub-state or supra-state criminal processes. This is, in short, a compromise position that acknowledges the legitimacy of sub-state and supra-state criminal jurisdiction while holding fast to the constitutional obligation

not to allow its citizens to “be deprived of life [or] liberty . . . without due process of law.”⁷³

A. *Functional Jurisdiction and Supervisory Jurisdiction*

Criminal jurisdiction is, like the famous description of property, a bundle of sticks—not a unitary power. Criminal jurisdiction is usually understood as constituting three different types of power: legislative (or prescriptive), executive (or enforcement), and judicial (or adjudicatory).⁷⁴ These are the first-order functions of a criminal justice system—to define crimes, to punish them, and to ensure fair adjudication of such punishment.

Each type of jurisdiction plays a particular role in the larger criminal justice system, and particular institutions are tasked with carrying out each kind of functional jurisdiction. Prescriptive jurisdiction constitutes the power to criminalize conduct (or omissions); it is traditionally monopolized by a state legislature and reaches only conduct within the state’s territory.⁷⁵ Executive jurisdiction constitutes the legitimate authority to enforce criminal laws through policing, investigating, prosecuting, and administering punishment consistent with the laws. Under the traditional model, these executive functions are monopolized by the state through specialized state agencies, such as the police and prosecutor’s office, and these executive agencies’ authority to act—i.e., jurisdiction—is limited to the territory of the state. In most developed criminal justice systems, a number of institutions are tasked with exercising executive criminal jurisdiction. In addition to police departments and

⁷³ U.S. CONST. amend. V.

⁷⁴ Sometimes, criminal jurisdiction is divided into prescriptive and enforcement jurisdiction, with judicial jurisdiction folded into enforcement on the theory that adjudication is part of the enforcement mechanism. I separate out enforcement and adjudicatory jurisdiction because, in any advanced criminal justice system, a variety of executive-branch institutions carry out enforcement while adjudication is typically heard by a neutral judicial branch official—namely a judge.

⁷⁵ While the territoriality principle—limiting prescriptive jurisdiction to acts within the territorial bounds of the state—is the most venerable basis for prescriptive jurisdiction, there are a number of long-standing bases for extra-territorial jurisdiction, as well. As a matter of international law doctrine, in addition to territoriality, the nationality principle allows state sovereigns to exert prescriptive criminal jurisdiction over their nationals outside of the state’s territory. More controversially, under the protective and passive personality principles, states may criminalize the conduct of foreigners acting abroad when the conduct threatens certain state interests or state citizens, respectively. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmts. a–i.

prosecutor's offices, there are likely to be crime laboratories, specialized investigation units, a bureau of prisons, parole boards, and reentry programs, among others. The executive institutions are the institutions with which ordinary people are likely to have the most contact. Finally, judicial jurisdiction is what lawyers and judges usually mean when they discuss jurisdiction—the power of a court to hear and render a verdict on a criminal prosecution—i.e., to adjudicate. Here too, the traditional territoriality principle generally provides an answer to whether a court has jurisdiction to hear a criminal case before it: if the alleged crime took place within the predetermined territorial boundaries of the court's jurisdiction, then the court has the authority to hear the case and determine a verdict.

In addition to the various types of functional jurisdiction, advanced criminal justice systems also maintain a second-order supervisory jurisdiction—or power of review—over the exercise of first-order functional jurisdiction. This second-order supervisory review exists to ensure that the exercise of functional jurisdiction conforms to fundamental normative commitments—e.g., constitutional or human rights or due process standards. Supervisory jurisdiction may exist within a single legal system, as when a state appellate court reviews a state trial court's procedure for adherence to state constitutional standards. Or supervisory jurisdiction may exist across legal systems, as when a federal court reviews the actions of a state court or a state policeman or a state legislature for adherence to federal constitutional standards. The key is that an institution may have supervisory jurisdiction without any functional jurisdiction.

The U.S. federal system provides an example of how supervisory and functional jurisdiction can interact across judicial systems. While state criminal justice systems enjoy full-spectrum functional jurisdiction—that is, they have full legislative, executive, and judicial jurisdiction—the exercise of any state jurisdiction is subject to federal constitutional constraints. A state legislature may not, for instance, criminalize activity that is constitutionally protected—e.g., buying birth control or engaging in a consensual sexual relationship.⁷⁶ Thus, a state's legislative jurisdiction is limited by federal constitutional standards. A state police force may not investigate crimes by

⁷⁶ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding unconstitutional the criminalization of “private sexual conduct”); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding unconstitutional a state law prohibiting the use of contraception).

conducting “unreasonable searches or seizures.”⁷⁷ Thus, a state’s enforcement jurisdiction is limited by federal constitutional standards. And a state court may not deny a criminal defendant the right to counsel or the right to a jury trial.⁷⁸ Thus, a state’s judicial jurisdiction is also limited by federal constitutional standards. To ensure that the state criminal justice system conforms to these federal constitutional standards, state criminal defendants alleging a breach in constitutional standards have essentially two mechanisms for reaching federal review: the certiorari process on direct appeal and post-conviction federal habeas.⁷⁹ Review in both cases is limited to allegations that the conviction violated federal standards; neither certiorari nor habeas provides for anything like a new trial at the federal level.⁸⁰

Supervisory jurisdiction exercised by one legal system over another necessarily limits the discretion of the supervised legal system, but it does not negate or overwhelm the autonomy of the supervised criminal regime. Despite the application of federal constitutional norms to state criminal justice systems—i.e., despite the limits—American states still act independently in the field of criminal justice and, indeed, are still the overwhelming actors in criminal justice in the United States.⁸¹ The states are not merely administrative units of the federal criminal justice system—far from it. The states pass criminal laws, enforce them, and adjudicate cases independently, and the very real differences in state criminal laws, enforcement policies, and judicial processes attest to the robust jurisdictional autonomy states have to craft their own criminal justice regimes.⁸² Even with federal courts playing a supervisory rule, the

⁷⁷ U.S. CONST. amend. IV (prohibition on “unreasonable searches and seizures”); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (requiring reasonable suspicion before police may conduct an investigatory arrest).

⁷⁸ U.S. CONST. amends. V, VII (guaranteeing rights to counsel and to jury trial).

⁷⁹ *See* 28 U.S.C. § 2254 (2006) (federal habeas statute covering state criminal defendants); SUP. CT. R. 10–16 (laying out rules related to “jurisdiction on writ of certiorari”).

⁸⁰ *See* 28 U.S.C. § 2254; SUP. CT. R. 10–16.

⁸¹ *See* WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 1.2(b) (4th ed. 2004) (noting that “the federal system is responsible each year for less than 2% of the total number of criminal prosecutions brought in the United States and less than 4% of all felony prosecutions”); *see also* *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (noting that states maintain “primary authority for defining and enforcing the criminal law”).

⁸² *See* LAFAYE ET AL., *supra* note 81, § 1.2(a) (“Under the American version of federalism, the federal (i.e., national) government and each of the fifty states has independent authority to enact criminal codes applicable within the territorial reach of its legislative powers. Each also has the authority to enforce those criminal laws through its

states exercising first-order functional jurisdiction are not agents carrying out the orders of a hierarchically superior principal. Rather, states are pursuing their own aims in the articulation, enforcement, and adjudication of criminal law. In thinking about criminal jurisdiction, then, it is important to distinguish between the multiple first-order functions of a criminal justice system and the second-order supervisory jurisdiction that endeavors to keep the first-order jurisdiction within certain normative bounds.

What we can see after we unbundle criminal jurisdiction into its constituent parts is that jurisdictional overlap (or pluralism) can take on many different forms. It is not necessarily the case that each entity claiming criminal jurisdiction is claiming “full-spectrum” criminal jurisdiction; rather, the claim may be limited to some slice of functional or supervisory jurisdiction. For instance, a sub-state group may demand or maintain its own court system (judicial jurisdiction) or its own prosecution service (executive jurisdiction) without demanding the authority to create or define crimes (legislative jurisdiction).⁸³ Regional human rights courts claim supervisory jurisdiction over domestic criminal justice jurisdiction, but such courts make no claims to exercise first-order functional jurisdiction. Pluralism in criminal justice thus need not take the form of two or more full-spectrum criminal jurisdictions overlapping. Moreover, it is possible to separate out functional jurisdiction and supervisory jurisdiction and assign them to different legal systems.

B. The Bounded Pluralism Approach

The conceptual distinction between functional and supervisory jurisdiction allows for the articulation of a moderate and principled approach to sub-state and supra-state jurisdictional challenges. Simply put, the United States ought to be amenable to granting legitimate

own criminal justice process—that is, through its own criminal justice agencies and its own laws of criminal procedure. Thus, we have, in many respects, fifty-one different criminal justice processes in this country, one for each of the states and one for the federal government.”).

⁸³ In the German federal system, for instance, the substantive criminal code and the code of criminal procedure are set by the national legislature, but the *Länder* do most of the enforcement of the code and adjudication of criminal cases. See Shawn Marie Boyne, *The Cultural Limits on Uniformity and Formalism in the German Penal Code*, 58 CRIME L. & SOC. CHANGE 251, 254–55 (2012) (describing German federalism in the context of criminal justice). In other words, legislative jurisdiction is national, but executive and judicial jurisdiction are sub-national.

sub-state and supra-state entities significant functional criminal jurisdiction, but any functional jurisdiction exercised by such an entity against a U.S. citizen ought to be subject to fundamental due process constraints and supervisory jurisdiction by the U.S. court system. In other words, where appropriate, the United States should offer its primary sub-state and supra-state jurisdictional challengers a deal: substantial functional jurisdiction in exchange for compliance with due process norms and some form of review to ensure such compliance. I will call this the Bounded Pluralism approach. In fact, current doctrine and U.S. policy with respect to tribal jurisdiction and international criminal jurisdiction already somewhat reflects the Bounded Pluralism approach,⁸⁴ but the principle has not yet been clearly articulated in law or policy. In this section, I will explain the normative rationale behind the approach and situate it within the debate between Sovereignists, Internationalists, and Pluralists. In the next two Parts, I will describe in more detail how the Bounded Pluralism approach can help guide U.S. law and policy with respect to tribal criminal jurisdiction and international criminal jurisdiction, respectively.

I use the term “Bounded Pluralism” to describe a state of affairs in which one legal system has supervisory jurisdiction with respect to *another* legal system’s functional jurisdiction. Bounded Pluralism is almost by necessity a state of significant tension. The entity subject to limits on its jurisdiction will feel that its very jurisdictional independence is being trampled when it brushes up against those limits, and the reviewing entity will often feel tempted to take over the direct functional exercise of authority in order to ensure compliance with its norms. In the American federal regime, this dynamic plays out fairly regularly across a range of criminal justice matters.⁸⁵ The post-1960s expansion of federal habeas review of state criminal convictions has polarized officials and commentators into two broad camps: those who think the federal intrusions into state criminal procedure have gone too far in eroding state control over criminal justice,⁸⁶ and those who think that federal intrusions should

⁸⁴ See discussion *infra* Part III.A.

⁸⁵ See, e.g., Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 645–46 (1997) (describing debate about growing “federalization” of criminal law); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977).

⁸⁶ The classic article arguing that federal habeas doctrine impinges too much on state prerogatives is Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

go much further so as to vindicate federal constitutional norms.⁸⁷ Intersystemic tension has its costs, of course—repeated intrusions into another legal regime really do eat into the scope of independence (jurisdiction) that the other regime possesses, and repeated defiance by the supervised regime really does require more oversight by the reviewing regime.

But as students of American federalism have argued, there is a creative dynamic at work in Bounded Pluralism as well. Writing in the context of federal review of state criminal procedure, Professors Aleinikoff and Cover argued persuasively that a model of pluralism “premised upon conflict and indeterminacy” and shot through with redundancy and overlapping areas of jurisdiction has the advantage of spurring genuine dialogue between the legal regimes.⁸⁸ Federal court review of state procedures is at its best, they argue, when it constitutes a dialogue between the systems about what federal constitutional norms require, leading both legal systems themselves to adopt reforms consistent with constitutional norms.⁸⁹ This federal-state dialogue—far from being a one-way imposition—allows for a full airing of the values at stake for each side in any given area of review. The states are not treated as naughty children, but rather as jurisdiction-bearing adults with the legitimate concerns of running a functional criminal justice system. The federal judiciary, for its part, becomes better attuned to the concerns of the states’ criminal justice systems and has the benefit of hearing how pronouncements about procedural rights affect ground-level criminal justice.⁹⁰

⁸⁷ See, e.g., Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1302 (2008) (“Over the past fifty years, since the doctrine of selective incorporation was announced, limitations on federal habeas review and the Court’s willingness to permit variation as to substantive rights announced under the Eighth Amendment have effectively rendered the promise of uniformity in the enforcement of the Bill of Rights hollow.”).

⁸⁸ Cover & Aleinikoff, *supra* note 85, at 1048.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1046–47. Robert Ahdieh has extended the work of Aleinikoff and Cover to the relationship between supra-state institutions and those of nation-states. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004). Ahdieh argues for the benefits of “a pattern of dialectical review between international and national courts [which] can help to facilitate the emergence, evolution, and internalization of universal norms of due process.” *Id.* at 2030. Ahdieh’s work points out that, in the international context, it is often the nation-state itself that is under the supervision of supra-national legal entities. *Id.* at 2033. One example of this

The Bounded Pluralism that we see in American federalism, while full of tensions and problems, offers the best model for U.S. policy toward its sub-state and supra-state jurisdictional challengers. The Fifth and Fourteenth Amendments of the U.S. Constitution guarantee that no person shall be deprived of life or liberty “without due process of law.”⁹¹ And while the interpretation and construction of that simple phrase has been—and continues to be—subject to serious and voluminous debate, the core ideal of due process in criminal justice is that nobody may be punished unless the process leading to such punishment is fundamentally fair and procedurally scrupulous.⁹² To be sure, the Due Process Clause applies directly to the actions of the federal and state governments in the criminal justice system; it does not apply to the actions of tribal governments or international organizations.⁹³ So the argument here is not that tribal and international processes must, under current constitutional doctrines, conform to the U.S. Constitution; it is a legal policy argument that the United States ought to seek to ensure due process protections for its citizens subject to any sub-national or supra-national criminal jurisdiction. After all, the principle behind due process protections—that individuals should not be subject to loss of life or liberty (i.e., criminal punishment) except via fundamentally fair procedures—does not depend on the federal or state identity of the system exercising criminal jurisdiction. From the perspective of an individual defendant, whether it is a state policeman or a tribal prosecutor or an international judge who acts unfairly makes no difference.

form of bounded pluralism is the relationship of the European Court of Human Rights to the national courts of its member states. *Id.*

⁹¹ U.S. CONST. amends. V, XIV.

⁹² See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“The failure to accord an accused a fair hearing violates even the minimal standards of due process. ‘A fair trial in a fair tribunal is a basic requirement of due process.’” (citations omitted)).

⁹³ On their own terms, the Fifth Amendment and Fourteenth Amendment Due Process Clauses apply to federal and state action, respectively. See U.S. CONST. amends. V, XIV. With regard to Indian tribes, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes*, 163 U.S. 376 (1896), this Court held that the Fifth Amendment did not ‘operat[e] upon’ ‘the powers of local self-government enjoyed’ by the tribes. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.” (alteration in original) (citation omitted)).

Fundamentally fair procedures ought to be the precondition of any criminal punishment, regardless of the jurisdictional lines.⁹⁴

Sovereignists, then, are correct that the U.S. should not accede to sub-state or supra-state criminal jurisdiction over U.S. citizens unless such jurisdiction conforms to fundamental U.S. due process standards. This requires that any sub-state or supra-state regime adopt internal procedures consistent with due process before the United States recognizes its criminal jurisdiction *and* that, even after recognizing its functional jurisdiction, the United States retain some supervisory jurisdiction to ensure that due process norms are in fact followed. Such supervisory jurisdiction can take the form of habeas review. There are, of course, significant criticisms of the current operation of federal habeas review with respect to state prisoners. Many commentators argue that the grounds for habeas review are too many (or too few), that the burden of proof is too high (or too low), that habeas focuses too much (or too little) on process at the expense of substantive guilt and innocence.⁹⁵ Likewise, there is a long history of debate about what exactly constitutes “due process of law” in criminal procedure: is due process simply the enumerated rights of the first eight constitutional amendments, or is it an independent standard encompassing more or, perhaps, less than the other Bill of Rights provisions?⁹⁶ Resolving these long-standing debates is far beyond the scope of this Article, and unnecessary for the argument advanced here. However the courts and “We The People” resolve these debates

⁹⁴ Of course, the United States cannot guarantee its citizens abroad a fair trial in foreign legal systems. When an American goes abroad, he or she is typically subject to the full-spectrum criminal jurisdiction of the foreign state where he goes, and he has no right to U.S. review of any criminal punishment imposed by the foreign state. In those situations, there is no mechanism for the U.S. to take any jurisdiction—functional or supervisory—over the case. But with sub-state or supra-state jurisdiction, the reason the federal government can and ought to demand due process compliance is that the United States could itself seize direct functional jurisdiction over the case if it so chose. In other words, the United States is ceding jurisdiction to sub-state or supra-state entities, and my argument is that the United States should not do so unless it can be assured that its citizens will enjoy due process protections under the sub-state or supra-state regime.

⁹⁵ For a good review of the debates over federal habeas corpus, see David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735 (1994), and Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 582–88 (1993).

⁹⁶ See, e.g., *Medina v. California*, 505 U.S. 437, 443 (1992) (“In the field of criminal law, we have defined the category of infractions that violate fundamental fairness very narrowly based on the recognition that, “[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.” (alteration in original) (internal quotation marks omitted)).

about the meaning of due process, those minimum standards of fundamental fairness ought to apply to sub-state and supra-state entities seeking criminal jurisdiction over Americans.

Where Bounded Pluralism differs from the Sovereigntist position is in recognizing the legitimacy of *functional* criminal jurisdiction at a sub-state or supra-national level. There is nothing unique about the nation (or the state) that gives it an exclusive warrant to exercise criminal jurisdiction. And there can be significant values associated with certain sub-state or supra-state assertions of criminal jurisdiction. Of course, not every entity demanding its own criminal justice system deserves one. But in the particular cases of interest to us here—tribal criminal jurisdiction and international criminal jurisdiction—the values are particularly compelling and worth briefly restating.

The United States has long recognized the unique communal status of Native American tribes; the fact that they have exercised powers of self-government longer than the United States itself; and the history of dispossession, discrimination, and decimation they have faced.⁹⁷ At least since the Indian New Deal of the 1930s, the federal government has explicitly pursued a policy of encouraging tribal self-government, while the Supreme Court has referred to tribes as “dependent sovereign[s]” and “separate people[s] with the power of regulating their internal and social relations.”⁹⁸ The Supreme Court and Congress have time and again recognized the “inherent” power of Indian tribes to operate their own criminal justice systems.⁹⁹

⁹⁷ See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (describing Indian tribes as “distinct, independent political communities, retaining their original natural rights” in matters of local self-government).

⁹⁸ *United States v. Lara*, 541 U.S. 193, 202–03 (2004) (referring to Indian tribes as “dependent sovereign[s]” and noting that “Congressional policy . . . now seeks greater tribal autonomy within the framework of a ‘government-to-government relationship’ with federal agencies”); *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) (“They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.”); see also *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973) (“It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”); Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICH. L. REV. 953, 977 (1987) (“The centerpiece of the ‘Indian New Deal’ was the Indian Reorganization Act of 1934, which brought the allotment policy to an end and promoted tribal self-government.” (footnote omitted)).

⁹⁹ *Lara*, 541 U.S. at 197, 204 (reiterating that the power of a tribe to criminally prosecute its own members is “inherent”). While the term “sovereignty” is often used as a

Recognition of tribal criminal jurisdiction thus reflects a deep commitment to Indian communal survival, tribal autonomy, and self-regulation.¹⁰⁰ Simply put, the United States honors its “first nations” when it recognizes that they can and do exercise criminal jurisdiction in their own sphere of self-government.

For its part, the international criminal jurisdiction of the ICC reflects the significant human rights values that have formed the normative bedrock of the international system since the end of World War II.¹⁰¹ The particular international crimes under ICC jurisdiction are precisely the crimes that constitute the gravest violations of human rights—war crimes, crimes against humanity, and genocide.¹⁰² These are crimes that the United States already recognizes as crimes of an international character—and crimes that demand accountability.¹⁰³ Indeed, the United States itself set up the first major international courts to exercise direct enforcement and adjudicatory jurisdiction over such crimes, namely the Nuremberg and Tokyo Tribunals. And the United States long supported the establishment of a more permanent court to prosecute and try such crimes.¹⁰⁴ One need not be starry-eyed about the “international community” to think that

rationale for tribes’ unique powers of self-government, including criminal jurisdiction, my argument here is not that tribes ought to have criminal jurisdiction *because* they are sovereign. Rather, the argument is that the tribes’ actual history and current practice of self-government coupled with their indigenous status gives rise to a legitimate claim for criminal jurisdiction.

¹⁰⁰ *Id.* at 197 (“[T]his Court has held that an Indian tribe acts as a separate sovereign when it prosecutes its *own members*.”).

¹⁰¹ *See, e.g.,* Cassese, *supra* note 62, at 18 (describing the ICC as “the central pillar in the world community for upholding fundamental dictates of humanity”).

¹⁰² Rome Statute, *supra* note 45, art. 5, § 1. The crime of aggression was also included in the Rome Statute, but its precise definition was left open pending further negotiations on its elements. *See id.* art. 5, § 2. Such negotiations culminated in an agreement on the definition of the crime of aggression at the Kampala Conference in 2010, but the earliest that the ICC can take jurisdiction over the crime of aggression is 2017. Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT’L L.J. 357, 362–65 (2012) (describing the Kampala negotiations).

¹⁰³ John B. Bellinger, III, Legal Adviser to the Sec’y of State, U.S. Dep’t of State, Remarks at the Fletcher School of Law and Diplomacy: U.S. Perspectives on International Criminal Justice (Nov. 14, 2008), *available at* <http://www.cfr.org/international-criminal-courts-and-tribunals/bellingers-speech-international-criminal-justice/p17777> (“Indeed, the United States recognizes that international criminal tribunals, in the right circumstances, play a key role in ensuring accountability for those who commit war crimes, genocide, and crimes against humanity.”).

¹⁰⁴ *Id.* (noting that the United States had “long [been] a proponent of the idea of a permanent international criminal court”).

there is a strong symbolic and substantive value in the existence of an international institution tasked with investigating and, where appropriate, prosecuting those responsible for human rights atrocities when no national government is willing or able to do so. And explicit U.S. support for the ICC would lend its mission both the prestige and resources of the world's greatest military and economic power.

The Bounded Pluralism approach thus seeks to honor the robust American commitment to due process while recognizing the strong normative values associated with tribal and international criminal jurisdiction. This balanced approach can be achieved by accepting the *functional* jurisdiction of tribes and of the ICC while demanding *supervisory* jurisdiction over those processes. Of course, Bounded Pluralism also represents a compromise position between Sovereignism, Internationalism, and Pluralism. It is Sovereignist in its demand for supervisory jurisdiction, Internationalist in its openness to participation in the ICC, and Pluralist in its commitment to tribal self-government.

In the next two Parts, I will lay out in more detail what a Bounded Pluralism approach would suggest for both tribal criminal justice and international criminal jurisdiction, respectively.

III

THE CHALLENGE FROM BELOW—TRIBAL CRIMINAL JURISDICTION

In this Part, I argue that criminal jurisdiction on tribal lands already reflects major elements of the Bounded Pluralism approach I support, but that criminal justice in Indian Country could be improved if tribes had greater functional jurisdiction *and* if the federal government had greater supervisory authority to set fundamental-rights constraints on that jurisdiction.

A. The Status Quo of Criminal Jurisdiction in Indian Country

American Indian tribes are unique entities in American law and governance. Often described as “dependent sovereigns,” tribes have a semiautonomous self-governing status recognized by the federal government as distinct from any other sub-state actors and distinct from the states of the Union.¹⁰⁵ The exact contours of tribal power

¹⁰⁵ See, e.g., *Lara*, 541 U.S. at 203 (referring to Indian tribes as “dependent sovereign[s]”); *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) (“They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of

(“sovereignty”) have been in dispute for as long as the United States has existed, and it is no surprise that criminal justice—that area of the law so long associated with sovereignty and territorial control—would be a prime battleground over which tribes, the states, and the federal government would fight incessantly.¹⁰⁶ The result of that long struggle has been the regrettable “maze” of criminal jurisdiction that exists in tribal lands today.¹⁰⁷

Perhaps the clearest place to begin describing tribal criminal jurisdiction is to explain who and what is *not* subject to tribal criminal jurisdiction. Under current statutes and precedent, tribes have no criminal jurisdiction at all over non-Indians.¹⁰⁸ Tribes cannot prescribe criminal rules for non-Indians, and thus cannot enforce or adjudicate criminal cases against non-Indians. When a non-Indian commits a crime on tribal land, either state or federal law applies.¹⁰⁹ This means that tribes, unlike American states or other nation-states, are powerless to use criminal law to regulate the behavior of non-Indians on their “sovereign” tribal land. And it means that non-Indians on tribal land are subject to federal and state criminal jurisdiction, but not directly to tribal jurisdiction.

sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.”).

¹⁰⁶ FORD, *supra* note 15, at 2–3 (describing how the assertion of criminal jurisdiction became the “crucible[]” in which colonial settlers and indigenous people clashed and fought over sovereignty and territory).

¹⁰⁷ See, e.g., DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 483 (6th ed. 2011) (referring to the “jurisdictional maze” of criminal jurisdiction in Indian Country); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

¹⁰⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding that tribes have no criminal jurisdiction over non-Indians).

¹⁰⁹ Pursuant to the General Crimes Act, 18 U.S.C. § 1152 (2006), when a non-Indian commits a crime against an Indian in Indian Country, federal criminal law usually applies to the exclusion of state or tribal law. See CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 279 (6th ed. 2010) (“Under *Oliphant*, a non-Indian who commits a crime against the person or property of an Indian victim must be tried in federal court generally under 18 U.S.C. § 1152 (unless a federal statute, such as Public Law 280, has granted the state jurisdiction over crimes occurring on reservations).”). And when a non-Indian commits a crime against another non-Indian—or commits a victimless crime—in Indian Country, state criminal law usually applies to the exclusion of federal or tribal law. See WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 196–97 (5th ed. 2009).

Indians on tribal land are subject to both federal law and tribal law¹¹⁰ and, in some cases, state law as well. Jurisdiction over crimes by Indians depends on who the victim is and on the nature of the crime.¹¹¹ First, the Major Crimes Act grants the federal government direct jurisdiction to punish fifteen specific felonies if committed by an Indian in Indian Country, regardless of who the victim is.¹¹² The crimes listed in the Major Crimes Act are the most serious felonies in most criminal justice systems, including murder, manslaughter, kidnapping, felony child abuse, arson, burglary, and robbery.¹¹³ Second, an Indian defendant is subject to all federal criminal laws applicable within federal enclaves.¹¹⁴ In practice, this means that specific federal criminal statutes applicable in federal enclaves—e.g., receiving stolen property¹¹⁵—apply to Indians on tribal lands if the victim of the crime is a non-Indian. Moreover, through the Assimilative Crimes Act, substantive state criminal law may be incorporated by reference into federal criminal law in federal enclaves.¹¹⁶ Thus, when the victim is a non-Indian, Indians may be subject to state substantive criminal law as assimilated into federal criminal law pursuant to the Assimilative Crimes Act.¹¹⁷

Finally, Indian tribes maintain their own full-spectrum criminal jurisdiction to create and punish crimes by Indians on tribal lands, and such jurisdiction exists in addition to any overlapping federal or state jurisdiction.¹¹⁸ For crimes not covered by the Major Crimes Act,

¹¹⁰ See CANBY, *supra* note 109, at 199–200.

¹¹¹ *Id.*

¹¹² 18 U.S.C. § 1153.

¹¹³ *Id.*

¹¹⁴ *Id.* § 1152.

¹¹⁵ *Id.* § 662.

¹¹⁶ *Id.* § 13.

¹¹⁷ To be clear, the Assimilative Crimes Act does not grant states any criminal jurisdiction over Indians; rather, it incorporates substantive state criminal law into pre-existing federal jurisdiction over Indians. See *id.*; *Rice v. Rehner*, 463 U.S. 713, 742 n.5 (1983) (Blackmun, J., dissenting) (noting that the Assimilative Crimes Act, *inter alia*, does “not confer any regulatory or enforcement jurisdiction on the States”).

¹¹⁸ *United States v. Lara*, 541 U.S. 193, 197, 204 (2004) (reiterating that power of a tribe to criminally prosecute its own members is “inherent”); *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (“[A]n Indian tribe’s power to punish tribal offenders is part of its own retained sovereignty”); *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (“That the tribes retain jurisdiction over crimes within the Major Crimes Act is the conclusion already reached by distinguished authorities on the subject.”); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 9.04 (Nell Jessup Newton et al. eds., 2005) (“As sovereigns, tribes possess the power to exercise at least concurrent jurisdiction over all

where the victim is Indian, Indians are thus subject to exclusive tribal jurisdiction.¹¹⁹ However, tribal criminal jurisdiction is severely limited by the Indian Civil Rights Act which, among other things, sets a general cap of a one-year prison sentence and \$5,000 fine on the punishment available for any single criminal offense under tribal jurisdiction.¹²⁰ In essence, this means that Indian criminal jurisdiction is limited to misdemeanor-level offenses because no matter how profound the evil, a tribal criminal justice system cannot imprison an offender beyond a year for any one crime.

The upshot of this “crazy quilt”¹²¹ of criminal jurisdiction in Indian Territory is this: despite the rhetoric of sovereignty, tribes have no criminal jurisdiction over non-Indians, and they have only very limited functional jurisdiction over Indians—essentially misdemeanor-level jurisdiction. But within that small jurisdictional ambit, tribes enjoy legislative, executive, and judicial jurisdiction arguably greater than that of states because tribes are not subject to federal constitutional limits. The rights enumerated in the Constitution apply to states and to the federal government, but not to tribal governments.¹²² Tribal sovereignty is understood to be extra-constitutional (or pre-constitutional) insofar as the adoption of the Constitution did not affect a change in the status of tribes as sovereigns apart from the states and federal government.¹²³ This lack of constitutional accountability comes as a surprise to many

crimes committed by an Indian against the person or property of another Indian in Indian country.”).

¹¹⁹ See CANBY, *supra* note 109, at 200; see also 18 U.S.C. § 1152 (excepting “offenses committed by one Indian against the person or property of another Indian” from the General Crimes Act).

¹²⁰ 25 U.S.C. § 1302(a)(7)(B) (Supp. IV 2011).

¹²¹ Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring) (using the phrase “unstable jurisdictional crazy quilt” in reference to a civil jurisdiction issue in Indian Country); Janine Robben, *Life in Indian Country: How the Knot of Criminal Jurisdiction Is Strangling Community Safety*, OR. ST. B. BULL., Jan. 2012, at 29, 29 (quoting Professor Robert James Miller of Lewis & Clark Law School as describing criminal jurisdiction in Indian Country as “a crazy quilt of jurisdiction”); Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants’ Rights in Conflict*, 22 U. KAN. L. REV. 387, 387 (1974) (describing criminal enforcement in Indian Country as a “jurisdictional crazy-quilt”).

¹²² Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

¹²³ *Id.*

unfamiliar with Indian law, and it is both symbolically and doctrinally significant. Symbolically, it affirms the independence of Indian tribes: they are not agents of the state or federal government, and they are not creatures of the Constitution. Doctrinally, it means that tribes are simply not susceptible to suit or challenge for violations of constitutional rights.¹²⁴

On the other hand, of course, tribes are not free from federal control. Congress's plenary power to directly legislate on tribal matters has been clearly upheld time and again.¹²⁵ And in order to ensure that tribal governments act within the bounds of basic constitutional norms, Congress passed the Indian Civil Rights Act of 1968 (ICRA).¹²⁶ ICRA imposes by statute most, though not all, of the Bill of Rights provisions on Indian tribes.¹²⁷ For instance, ICRA has provisions directed at tribes analogous to the Free Exercise Clause, the Free Speech Clause, the Due Process Clause, the Double Jeopardy Clause, the Self-Incrimination Clause, the Speedy Trial Clause, and the Equal Protection Clause, among others.¹²⁸ In the realm of criminal justice, one notable difference between the U.S. Constitution and ICRA is that the latter grants a defendant a right to counsel only "at his own expense" while the federal constitutional right to counsel includes the right to appointed counsel for indigent defendants.¹²⁹

Despite the Bill of Rights-like list of rights that ICRA guarantees, there is in fact only one way for an individual to secure federal review of alleged tribal violations of ICRA: the provision of ICRA allowing for habeas review of any person detained by a tribal justice system.¹³⁰ The Supreme Court held in *Santa Clara Pueblo v. Martinez* that tribes

¹²⁴ *Id.* at 56, 58 (noting that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers").

¹²⁵ *Id.* at 56 ("As the Court in *Talton* [*v. Mayes*, 163 U.S. 376 (1896)] recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

¹²⁶ *Id.* at 57 ("In 25 U. S. C. § 1302 [ICRA], Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.").

¹²⁷ *Id.*

¹²⁸ 25 U.S.C. § 1302(a)(1), (3), (4), (6), (8) (Supp. 2011).

¹²⁹ Compare *id.* § 1302(a)(6) (conferring right "at his own expense to have the assistance of counsel for his defense"), with *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (holding that the Sixth Amendment guarantees the right to counsel to indigent defendants as well as to those who can afford an attorney).

¹³⁰ *Santa Clara*, 436 U.S. at 70 (holding that ICRA "authorize[s] federal judicial review of tribal actions only through the habeas corpus provisions").

enjoy sovereign immunity from suit and that, apart from the habeas provision, ICRA does not create any rights of action in federal court.¹³¹ Both ICRA and *Santa Clara* elicited controversy. Predictably, tribal advocates who protested ICRA as an unwarranted intrusion of federal law into tribal matters hailed *Santa Clara* as respecting tribal sovereignty, and those who supported ICRA feared that *Santa Clara* left tribes too unaccountable.¹³²

In the realm of criminal jurisdiction, ICRA does provide habeas as a means for challenging tribal action that leads to detention in federal court.¹³³ Habeas is, of course, a very narrow and usually unsuccessful means for challenging one's detention.¹³⁴ One must be in "detention by order of an Indian tribe" to bring a habeas petition, one must exhaust tribal remedies first, and one must show that one's detention is in violation of federal law.¹³⁵ In the usual habeas case brought by a

¹³¹ *Id.*

¹³² Compare Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 271–72 (1997) ("Thus, under the guise of strengthening tribal governance, Congress further imposed the Anglo-American legal tradition on the Indian nations through the ICRA and continued its 100-year attack on traditional methods of governance and dispute resolution."), with Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 170 (1991) ("This Note argues that an expansion of the ICRA is necessary to protect Native American women from discriminatory actions by their tribes."). See also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 118, § 14.04[2] ("ICRA has engendered considerable controversy, both from those who believe it went too far and those who believe it did not go far enough in constraining tribal actions."); Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 508–09 (1994) (describing the debate between those who privilege individual rights over tribal sovereignty and vice versa).

¹³³ 25 U.S.C. § 1303 (2006).

¹³⁴ Research by Nancy King has revealed that the overall success rate of non-capital habeas corpus cases in federal court is approximately 0.8%. Nancy J. King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 310 (2012); see also Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941, 974 (2011) ("Against this historical backdrop, Congress considered and rejected several proposals for expansive federal jurisdiction to review tribal court decisions. Instead, Congress deliberately chose the narrow habeas remedy, which limits federal intrusion into tribal affairs." (footnote omitted)).

¹³⁵ 25 U.S.C. § 1303; see also *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 890–93 (2d Cir. 1996) (construing "detention" requirement of ICRA as congruent in scope with the "in custody" requirements of federal habeas under 28 U.S.C. § 2255). Tribe members who seek to challenge their tribal detention in federal court via habeas corpus usually must exhaust tribal remedies first, though non-members are not necessarily

state prisoner, the prisoner-petitioner alleges that the state violated the federal Constitution in convicting or detaining him.¹³⁶ An Indian prisoner bringing a habeas claim against tribal detention, however, cannot allege a federal constitutional violation because the Constitution does not apply directly to the actions of the tribe.¹³⁷ The Indian habeas petitioner, thus, must argue that his detention violates ICRA or another federal statute.¹³⁸ Although many of the individual rights provisions in ICRA are substantively similar to federal constitutional rights,¹³⁹ tribal action is not formally subject to constitutional review even in habeas, but only to statutory review.¹⁴⁰

Utilizing the concepts of functional and supervisory jurisdiction helps us see how criminal jurisdiction in Indian Country operates systemically. On the functional side, the federal government has seized the bulk of the functions—legislative, enforcement, and adjudicatory—normally associated with a criminal justice regime. Through the Major Crimes Act, it subjects Indians to direct federal jurisdiction for the most serious antisocial crimes, such as murder, robbery, and dangerous assault.¹⁴¹ And through the penalty limits of ICRA, the federal government has taken out of Indian jurisdiction crimes serious enough to warrant more than a year in prison or more than a \$5,000 fine.¹⁴² What is left to functional tribal jurisdiction is legislative, executive, and judicial jurisdiction over misdemeanor-

required to do so. *See Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953–54 (9th Cir. 1998) (discussing the basis for the exhaustion doctrine and when exhaustion will be required).

¹³⁶ 28 U.S.C. § 2254(a) (2006) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”).

¹³⁷ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

¹³⁸ Eric Wolpin, *Answering Lara’s Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process Requirements?*, 8 U. PA. J. CONST. L. 1071, 1086 (2006) (“[A]n individual seeking to assert a violation of individual rights by tribal actors must typically pursue that claim as violation of rights provided by the ICRA (in the form of a habeas petition) and not as a claim of a violation of constitutional rights.”).

¹³⁹ *Santa Clara*, 436 U.S. at 57 (holding that ICRA imposes “restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment”).

¹⁴⁰ Wolpin, *supra* note 138, at 1086.

¹⁴¹ 18 U.S.C. § 1153 (2006).

¹⁴² 25 U.S.C. § 1302(a)(7)(B) (Supp. 2011).

level crimes.¹⁴³ However, within that small ambit of functional jurisdiction left to tribes, there are only minimal boundaries from outside the system. Strictly speaking, there are no federal constitutional limits because the U.S. Constitution has been held not to apply to the actions of tribal governments.¹⁴⁴ But there are the quasi-constitutional bounds of the ICRA.¹⁴⁵ ICRA, however, provides only a single remedy—habeas relief if the prisoner is being detained in violation of ICRA itself or other federal statutes.¹⁴⁶ In short, tribes have a very small ambit of functional jurisdiction, indicating a relatively low level of autonomy, but they also enjoy few supervisory constraints within that ambit of jurisdiction, indicating a high level of autonomy. The current arrangement—for all its problems—illustrates the viability of a “limited autonomy” criminal regime. And, crucially for reform purposes, tribes enjoy full-spectrum functional jurisdiction, which means that they have (at least nascent) institutions charged with carrying out all of the major functions of a criminal justice regime—legislatures, law enforcement agencies, and courts.

B. Tribal Jurisdiction: Where Do We Go From Here?

For the most part, tribes and their advocates seek much greater tribal autonomy in the criminal realm than they currently have. They want to enlarge their jurisdiction to a wider purview of substantive crimes, to a wider range of sentencing options, and to include non-

¹⁴³ *Id.* (restricting tribal criminal jurisdiction to offenses carrying a maximum penalty of one year and \$5000 fine); see also Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 563 (2009) (“So, under *Oliphant*, the *Duro Fix*, and the federal statutory scheme, tribal court criminal jurisdiction is restricted to misdemeanor crimes committed by Indians in Indian country.”).

¹⁴⁴ *Santa Clara*, 436 U.S. at 56.

¹⁴⁵ *Id.* at 57 (holding that ICRA imposes “restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment”).

¹⁴⁶ *Id.* at 70 (holding that ICRA “authorize[s] federal judicial review of tribal actions only through the habeas corpus provisions”). It should be emphasized that habeas is the only practical means by which the federal government exerts supervisory control over the actions of those areas of criminal justice under tribal jurisdiction. Defendants in tribal court do not, for instance, have an appeal right to a non-Indian court. Nor can the federal government enjoin the workings of the tribal court system. The remedy of habeas is simply release of the successful petitioner from tribal detention, not any personal or group liability of the tribe or its officials. Habeas is thus a very indirect and very infrequent check on the activities of the tribal criminal justice system.

Indians who commit antisocial acts on tribal lands.¹⁴⁷ Waving the flag of sovereignty, tribal advocates criticize the functional limits on tribal jurisdiction, as well as the (limited) federal habeas review available to defendants convicted in tribal courts.¹⁴⁸ What tribal advocates and their Pluralist supporters want, in short, is the full-spectrum, exclusive, unbounded jurisdiction traditionally associated with nation-state sovereignty. On the other hand, Sovereignist critics of tribal jurisdiction find the jurisdiction already in tribal hands deeply troubling, and they reject all attempts to expand such jurisdiction, especially over non-Indians.¹⁴⁹

The problems with the current arrangement of criminal jurisdiction in Indian Country are, indeed, numerous and well-documented.¹⁵⁰ Tribal jurisdiction is so functionally limited that tribes have not been incentivized to build up suitably professional and functional criminal justice institutions of their own.¹⁵¹ Tribes have very little reason to

¹⁴⁷ See, e.g., Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 845–55 (2006) (arguing that significant expansion of tribal criminal authority is necessary to achieve true tribal self-government); National Congress of American Indians, The Proposed “Tribal Governance and Economic Enhancement Act” (Nov. 11, 2002) (draft legislation), available at <http://www.citizensalliance.org/links/pages/fact%20sheets/Senate%20Hearing-7-30-03%20TGEEI-2.doc> (last visited Jan. 29, 2013) (providing draft legislation that would grant tribes full criminal jurisdiction over members and non-members within tribal territory).

¹⁴⁸ Porter, *supra* note 132, at 271–72 (“Thus, under the guise of strengthening tribal governance, Congress further imposed the Anglo-American legal tradition on the Indian nations through the ICRA and continued its 100-year attack on traditional methods of governance and dispute resolution.”).

¹⁴⁹ See, e.g., *A Threat to Indian Sovereignty*, Editorial, N.Y. TIMES (Mar. 21, 1998), <http://www.nytimes.com/1998/03/21/opinion/a-threat-to-indian-sovereignty.html> (criticizing then-Senator Slade Gorton’s proposed legislation to strip tribes of sovereign immunity).

¹⁵⁰ See, e.g., Hart, *supra* note 12, at 140–49 (“The high levels of gang and domestic violence in Indian Country are topics receiving an unusually large amount of attention recently, both in Washington and in the mass media. For example, Attorney General Eric Holder recently stated that ‘in many parts of the Indian country, the situation is dire. Violent crime has reached crisis proportions on many reservations.’” (footnotes omitted)); Andrea L. Johnson, Note, *A Perfect Storm: The U.S. Anti-Trafficking Regime’s Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 679 (2012) (“Extremely limited policing resources and the unwillingness or inability of tribal, state, and federal law enforcement to assume jurisdiction over sex trafficking crimes not only leaves American Indian victims with even fewer chances of receiving law enforcement protection, it increases their risk of being trafficked.”); N. Bruce Duthu, Op-Ed., *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008, at A17.

¹⁵¹ See Maire Corcoran, Note, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415, 421 (2009) (“The degree to which ICRA has rendered tribes

invest resources and manpower in their criminal justice systems when those systems can do little more than prosecute misdemeanor-level offenses. On the other end, largely because the tribes are peripheral to the larger concerns of the federal courts and prosecutors, the federal government has also failed to invest the resources necessary to provide adequate criminal justice where it has exclusive jurisdiction.¹⁵² In particular, federal law enforcement agencies and U.S. Attorney's Offices have a poor record of investigating and prosecuting serious crimes in Indian Country, precisely those crimes over which the federal government has exclusive jurisdiction.¹⁵³ This

impotent to handle rape in particular, and crime in general, is perhaps one of the reasons why 'tribes have never developed the law enforcement resources to prosecute and punish serious crimes'; Matthew Handler, Note, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 BROOK. L. REV. 261, 281 (2009) ("[D]ue to restraints in criminal jurisdiction over non-Indians and the limited resources in Indian country, tribally funded departments remain the least common and least robust form of law enforcement within tribal lands."). The development of criminal enforcement capacity has been particularly hampered in Public Law 280 states where states have been granted criminal jurisdiction over Indians on tribal land by statute. See Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J. L. GENDER & SOC'Y 185, 198 (2010) ("The enactment of Public Law 280 has had the naive consequence of discouraging the development of tribal legal institutions, including courts and police forces despite the fact that it did not inhibit tribal jurisdiction over Indians.").

¹⁵² A Department of Justice study from 2006 revealed that federal prosecutors brought only 606 criminal cases that year in all of Indian Country, a shockingly low figure. Duthu, *supra* note 150, at A17; see also Hart, *supra* note 12, at 149 ("One of the primary culprits of the high rates of crime in Indian Country is the 'complex patchwork of federal, state, and tribal law' and criminal jurisdiction that allows many perpetrators—particularly non-Indians—to go unprosecuted. Many Native Americans must rely upon federal prosecutors, who are often hundreds of miles away, to prosecute even minor crimes. Not surprisingly, this leaves many offenses, even very serious ones, unprosecuted." (footnotes omitted)); Johnson, *supra* note 150, at 703 ("Taking jurisdiction away from tribal authorities and failing to fill the void with federal or state law enforcement or prosecutorial resources is in direct breach of this responsibility. More fundamentally, a 50% prosecution decline-rate for Indian Country crimes—in the face of some of the highest crime rates in the nation—suggests that the federal government is treating American Indian victims as second-class citizens. When it comes to a law of nationwide applicability, like the TVPA, there is no excuse for a disproportionate failure to prosecute on tribal land.").

¹⁵³ CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 162 (1997) ("In practical application, federal law enforcement agents, particularly the Federal Bureau of Investigation and the U.S. Attorney's Office, have demonstrated a history of declining to investigate or prosecute violations of the Major Crimes Act."); Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2188 (2000) ("[M]any United States Attorneys have abdicated their responsibility to prosecute crimes in Indian country committed by non-Indians."); Matthew L.M. Fletches, *ICT on Tribal Law and Order Act*, TURTLE TALK (Apr. 16, 2009, 10:56 PM), <http://turtletalk.wordpress.com/2009>

means that adequate criminal justice is neither delivered by the tribe, nor by the federal government. The political entity with the greatest interest in providing criminal justice for its members (the tribe) is hamstrung by federal incursion, and the political entity with jurisdiction to prosecute and adjudicate the most serious crimes in Indian Country (the federal government) has other pressing priorities. Thus, the particular allocation of functions between sub-state and nation-state operating in Indian Country is producing deplorable results.¹⁵⁴

There are also significant problems with the extent to which tribal criminal jurisdiction is bound by fundamental due process standards. The activities of Indian tribes are not formally subject to the Bill of Rights, which contains the key American procedural protections afforded criminal suspects and defendants.¹⁵⁵ As noted, the tribes are subject to ICRA, which provides a similar—though not identical—set of rights.¹⁵⁶ And the sole mechanism for an individual tribe member to vindicate his or her ICRA-derived rights against the tribe in federal court is through a habeas proceeding, which can occur only if the individual is in tribal custody.¹⁵⁷ The imposition of ICRA's quasi-constitutional standards on the operation of tribal jurisdiction is understandably controversial.¹⁵⁸ There is no doubt that ICRA limits tribal jurisdiction. But criticism that it infringes on the tribe's "sovereignty" betrays the same archaic commitment to the traditional Holy Trinity of sovereignty, territory, and jurisdiction that underlies

/04/16/ict-on-tribal-law-and-order-act/ ("Between 2004 and 2007, the United States declined to prosecute 62 percent of Indian country criminal cases referred to federal prosecutors, including 72 percent of child sexual crimes and 75 percent of adult rape cases.").

¹⁵⁴ Cf. Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N.D. L. REV. 1249, 1251 (2006) ("[T]he failure of the federal criminal justice system in Indian country is a result of the ineffective criminal jurisdictional scheme created by the Major Crimes Act (MCA), the Indian Civil Rights Act of 1968 (ICRA) and the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*." (footnotes omitted)).

¹⁵⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

¹⁵⁶ *Id.* at 57 (holding that ICRA imposes "restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment").

¹⁵⁷ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 118, § 14.04[2] (noting that the Supreme Court in *Santa Clara Pueblo v. Martinez* "interpreted ICRA to limit federal court enforcement to habeas corpus jurisdiction over claims by persons in tribal custody").

¹⁵⁸ *Id.* ("ICRA has engendered considerable controversy, both from those who believe it went too far and those who believe it did not go far enough in constraining tribal actions.").

the Sovereigntist criticism of tribal jurisdiction itself. Any system of overlapping criminal jurisdiction is impossible if one accepts the traditional model of exclusive national jurisdiction. Tribal advocates who argue that sovereignty necessarily entails exclusive and unreviewable criminal jurisdiction for tribes are buying into the same outdated model as those who deny the possibility of any tribal jurisdiction at all. The very existence of Indian jurisdiction, functionally limited and bound as it is, demonstrates that criminal jurisdiction need not be exclusive in the traditional manner.

Contrary to the protestations of some tribal advocates, the problem with the current amount of federal review over tribal jurisdiction is not that there is too much; there is too little. American Indians today are American citizens *as well as* tribal members,¹⁵⁹ and the criminal regime they live under recognizes that dual identity in its functional pluralism. However, the meager federal review available to defendants in tribal courts does not accord with individual defendants' expectations as American citizens to baseline procedural protections in criminal matters. To say that individual Indians have such due process rights against state governments and against the federal government, but not against tribal governments, may be doctrinally correct.¹⁶⁰ But it is not normatively supportable. The reason to protect the fundamental rights of criminal defendants in state and federal courts applies with equal force to criminal defendants in tribal courts: they risk coercive criminal punishment. Such punishment should be allowed only after a fundamentally fair process. The review system established by ICRA provides a second-class version of federal fundamental rights review; it does not directly impose constitutional constraints on the tribes, it does not include the same right-to-counsel doctrine as the U.S. Constitution, and it provides habeas as the sole remedy for unlawful tribal action.¹⁶¹ As

¹⁵⁹ 8 U.S.C. § 1401(b) (2006); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 118, § 14.01[1] (noting that before the 1924 Act, which explicitly conferred U.S. citizenship on native-born Indians, "the prevailing non-Indian view held tribal affiliation to be inconsistent with United States and state citizenship as a matter of policy").

¹⁶⁰ Thanks to the citizenship provision of the Fourteenth Amendment, Indians are citizens of their state of residence by virtue of their national citizenship. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

¹⁶¹ 25 U.S.C. § 1302(a)(6) (Supp. 2011) (conferring right "at his own expense to have the assistance of counsel for his defense"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,

American citizens, Indians deserve full and formal constitutional protection when subject to criminal jurisdiction, not the second-class statutory protection they have today.

In fact, the perceived legitimacy of tribal jurisdiction—among Indians and non-Indians—would increase, not decrease, if criminal proceedings by tribes were subject to greater fundamental rights review by federal courts. As it is, even defenders of tribal jurisdiction admit that there are too many violations of fundamental rights committed by tribal law enforcement and tribal courts.¹⁶² Indeed, the reality and perception that tribal justice is too often unreliable, unfair, and immune to fundamental rights review undermines confidence in the tribe's jurisdiction—and makes widening the functional jurisdiction of tribes an uphill climb.¹⁶³ Subjecting tribal criminal jurisdiction to the same level of federal review that state criminal justice systems currently face would go a long way toward ameliorating perceptions of tribal criminal justice. Direct application of federal constitutional standards would not, of course, magically solve all of the resource and professionalism problems of tribal criminal justice.¹⁶⁴ And it might marginally increase the friction between tribes and the federal government, just as federal oversight of state criminal justice systems engenders tension. But the dialectic of federalism could have the same creative force in the federal-Indian relationship that it has in federal-state relations.¹⁶⁵

Crucially, regularized federal review would allow tribes to advocate for greater functional jurisdiction as part of a Grand Bargain with the federal government: more functional jurisdiction in exchange for greater fundamental rights protection. The 2010 Tribal Law and Order Act (TLOA) constituted an important and promising step in the

70 (1978) (holding that ICRA “authorize[s] federal judicial review of tribal actions only through the habeas corpus provisions”).

¹⁶² See, e.g., U.S. COMM’N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 71–74 (1991) (noting that the most significant impediment to securing the rights codified in ICRA was lack of funding and resources for tribal justice systems); cf. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 513–15 (1998) (noting that most tribal defendants cannot afford defense counsel, but finding that tribal courts have generally done a fine job in vindicating the rights codified in ICRA).

¹⁶³ See, e.g., U.S. COMM’N ON CIVIL RIGHTS, *supra* note 162, at 72 (noting that legitimacy of tribal justice system suffers because of its current inadequacy).

¹⁶⁴ See, e.g., *id.* at 71–74 (noting that the most significant impediment to securing the rights codified in ICRA was lack of funding and resources for tribal justice systems).

¹⁶⁵ See discussion *supra* Part II.B.

direction of such a Grand Bargain.¹⁶⁶ Among its many provisions, TLOA amended ICRA to allow tribes to impose imprisonment of up to three years per offense (up to nine years of total incarceration per case) and fines of up to \$15,000.¹⁶⁷ But these new and increased penalties are available only if, among other conditions, the tribe “provide[s] to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution” and “at the expense of the tribal government, provide[s] an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States.”¹⁶⁸ In short, the TLOA jurisdictional provision adopts the basic form of the Grand Bargain: greater functional jurisdiction in exchange for greater fundamental rights protection. A May 30, 2012, report from the Government Accountability Office (GAO) reported that, to date, no tribes out of 109 surveyed had put the new enhanced sentencing provisions into effect, with many tribes reporting “challenges to exercising this authority due to funding limitations.”¹⁶⁹ Still, over a third of the tribes surveyed indicated that they intend to make use of the new authority and enact the concomitant protections embodied in TLOA.¹⁷⁰ So, two years after its passage, it remains to be seen whether the TLOA amendments will prove effective. Nevertheless, these provisions mark a significant step in the right direction.¹⁷¹

¹⁶⁶ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (codified as amended in scattered sections of 25 U.S.C.); *see also* Statement from Mich. State Univ. Coll. of Law Indigenous Law & Policy Ctr., Tribal Law and Order Act (Nov. 10, 2011), *available at* <http://www.indianlawandordercommission.com/featured-commentary/?p=5> (assessing the Act and arguing, *inter alia*, that “the Tribal Law and Order Act is a necessary first step for the restoration of general tribal criminal jurisdiction over Indian country”).

¹⁶⁷ 25 U.S.C. § 1302(a)(7)(C)–(D) (Supp. 2011).

¹⁶⁸ *Id.* at § 1302(c)(1)–(2).

¹⁶⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS 3 (2012), *available at* <http://www.gao.gov/products/GAO-12-658R>.

¹⁷⁰ *Id.*

¹⁷¹ In addition, the fact that tribal criminal jurisdiction includes legislative, executive, and judicial functions—however meager—means that tribal criminal justice systems have, or are building, institutions to cover the full range of criminal justice functions. This is ideal for a criminal justice system aiming to expand its functional jurisdiction, as it allows institutions to grow and experiment first when the stakes are relatively low and build up capacity for a time when the stakes are higher—i.e., when such justice systems have more significant jurisdiction.

IV
THE CHALLENGE FROM ABOVE—INTERNATIONAL CRIMINAL
JURISDICTION

It would be easy to tell a story in which the United States plays the role of adversary-in-chief to the whole project of international criminal law. The United States refuses to join the ICC, refuses to join the Inter-American Court of Human Rights,¹⁷² and even withdrew from the Optional Protocol to the Vienna Convention on Consular Relations to avoid the embarrassment of repeated failures to notify consulates of foreign criminal defendants.¹⁷³ Indeed, the United States is often criticized not just for its aversion to international criminal law, but in some cases, for allegedly violating international criminal law itself.¹⁷⁴ In this narrative, the United States is a country fiercely resisting claims of supra-national criminal jurisdiction. But one could just as easily portray the United States as the most important state promoter of international criminal law. The United States was an early champion of the codification of war crimes, promulgated the first international criminal tribunal, and pushed for adoption of human rights conventions in the post-War period.¹⁷⁵ America's relation to international criminal law is complicated and defies a quick sketch. Rather than uniformly opposing all supra-national claims of criminal jurisdiction, the United States has consistently affirmed the prescriptive jurisdiction of international criminal law while refusing to allow its own citizens to be subject to

¹⁷² See Pamela Stephens, *Applying Human Rights Norms to Climate Change: The Elusive Remedy*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 49, 82 (2010) (“[T]he failure of the United States and Canada to fully participate in the Organization of American States (‘OAS’), including their failure to ratify the American Convention and thereby accept the jurisdiction of the Inter-American Court of Human Rights, weakens the system and leaves it without any effective remedy against either country.”).

¹⁷³ See Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES (Mar. 10, 2005), <http://www.nytimes.com/2005/03/10/politics/10death.html> (reporting U.S. withdrawal from Optional Protocol to the Vienna Convention on Consular Relations).

¹⁷⁴ See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 824–38 (2005) (cataloguing U.S. violations of Geneva Convention and international human rights law after 9/11); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT'L L. 295, 320 (2007) (arguing that the U.S. government program of “extraordinary rendition” violated the Geneva Conventions).

¹⁷⁵ Leila Sadat refers to the apparent U.S. repudiation of its own heritage of promoting international criminal law as the “Nuremberg Paradox.” Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151 (2010).

supra-national enforcement or judicial jurisdiction for alleged violations of international criminal law. This position is unlikely to change in the near future, but I suggest that the United States is more likely to join the ICC if it can maintain supervisory jurisdiction over cases where the defendant is an American.

A. International Criminal Jurisdiction and the United States: The Status Quo

The United States has not always resisted international enforcement of international criminal law. Indeed, the Nuremberg and Tokyo Tribunals, largely run by the United States under international auspices, are considered the first major supra-national tribunals with direct jurisdiction over violations of international criminal law.¹⁷⁶ After World War II and throughout the Cold War, the United States supported the establishment of a more permanent international criminal tribunal to enforce international criminal law.¹⁷⁷ But when serious negotiations aimed at establishing just such a court finally took place in the mid-1990s and resulted in adoption of the Rome Statute in 1998, the United States balked.¹⁷⁸ The United States voted against the final accord, and though President Clinton decided to sign the Rome Statute on the last possible day, he refused to submit the treaty to ratification and even advised his successor against its adoption.¹⁷⁹ The Bush Administration proved even more hostile to the Rome Statute, effectively removing the United States from the treaty by sending notice to The Hague that it did not accept even signatory-level responsibilities to the ICC.¹⁸⁰ Congress subsequently passed, and President Bush signed, the American Service-Members Protection Act (ASPA), colloquially known as the “Invade the Hague” Act, which aimed to curtail or prohibit U.S. cooperation with the ICC.¹⁸¹ Among other provisions, ASPA prohibited states and the

¹⁷⁶ CASSESE, *supra* note 16, at 329–33 (describing the post–World War II international tribunals).

¹⁷⁷ Bellinger, *supra* note 103 (noting that the United States was “long a proponent of the idea of a permanent international criminal court”).

¹⁷⁸ See, e.g., Turner, *supra* note 65, at 9–11 (detailing United States resistance and rejection of the ICC).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See, e.g., L. Rush Atkinson, *Knights of the Court: The State Coalition Behind the International Criminal Court*, J. INT’L L. & INT’L REL., Fall 2011, at 66, 92 n.154 (citing “the infamous ‘Invade the Hague clause’ of the *American Servicemembers’ Protection Act*”).

federal government from extraditing defendants to the ICC, cut off aid to countries that did not sign bilateral agreements immunizing U.S. citizens from extradition to the ICC, and conditioned U.S. participation in U.N. peacekeeping activities on immunity for U.S. peacekeepers.¹⁸²

How did the United States, the country that practically invented the international tribunal after World War II, come to be the ICC's chief critic and adversary? The short answer is that the United States of the post-Cold War Era—the “world's sole remaining superpower”¹⁸³—found itself as both the chief promoter of liberal internationalism and its chief target. The United States projected military force around the world—in some cases, at least, to vindicate humanitarian values. But these very force projections exposed the United States to more international hostility and its citizens to more vulnerability to international crime allegations than any other country. The United States thus worried that an international criminal court, like other international organizations, would be susceptible to anti-American

(ASPA)”; U.S.: “Hague Invasion Act” Becomes Law, HUM. RTS. WATCH (Aug. 4, 2002), <http://www.hrw.org/en/news/2002/08/03/us-hague-invasion-act-becomes-law>.

¹⁸² Many commentators have noted a softening in the United States stance toward the ICC in recent years. See, e.g., Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528, 529 (2011) (“Now, just over two years into the Obama presidency, the world has witnessed renewed and significant U.S. engagement with the Court.”); Prashant Sabharwal, *Manifest Destiny: The Relationship Between the United States and the International Criminal Court in a Time of International Upheaval*, 18 NEW ENG. J. INT'L & COMP. L. 311, 312 (2012) (noting that a “softening” in the U.S. attitude toward the ICC began in the latter half of the Bush Administration and has accelerated during the Obama Administration). The economic and foreign aid sanctions of ASPA and associated legislation have lapsed. See *Congress and the ICC*, AMICC, <http://www.amicc.org/usicc/congress/> (last visited Jan. 19, 2013). The United States approved of the ICC investigation of atrocities committed by the Lord's Resistance Army in Uganda. See David H. Lim, *Beyond Kampala: The U.S.' Role in Supporting the International Criminal Court's Mission*, 39 SYRACUSE J. INT'L L. & COM. 441, 443–44 (2012). The United States also cosponsored and voted in favor of a Security Council resolution referring the situation in Libya to the ICC. See S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011). And the United States participated in a number of Assemblies of State Parties reviewing the Rome Statute. See Lim, *supra*, at 460. In 2010, State Department Legal Adviser Harold Koh summed up the evolving relationship thus: “[a]fter 12 years, I think we have reset the default on the U.S. relationship with the court from hostility to positive engagement.” Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks on U.S. Engagement with the International Criminal Court and the Outcome of the ICC Assembly of States Parties Conference (June 15, 2010), available at <http://www.cfr.org/international-criminal-courts-and-tribunals/koh-rapps-remarks-us-engagement-international-criminal-court-outcome-icc-assembly-states-parties-conference-june-2010/p22454>.

¹⁸³ William H. Taft, IV, Address, *A View From the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT'L L. 503, 510 (2006).

hostility and would possess ample opportunities to brand U.S. military interventions or particular military strikes as violations of international criminal law.¹⁸⁴ Consequently, in the negotiations over the creation of the ICC, the United States sought assurances that its leaders, soldiers, and officials would not be subject to “politically motivated prosecutions before an unaccountable court.”¹⁸⁵ The primary U.S. negotiating strategy for achieving this end was to propose limiting the ICC’s jurisdiction to issues referred to the ICC by the U.N. Security Council where the U.S. has a permanent veto.¹⁸⁶ Ultimately, this U.S. position was not adopted by the conference, and the final Rome Statute allowed for ICC jurisdiction pursuant to state referral and *proprio motu* investigations in addition to Security Council referral.¹⁸⁷ This left open the possibility that U.S. nationals operating in a State Party—or in a state that accepts issue-specific jurisdiction—could come under ICC jurisdiction despite U.S. refusal to ratify the Rome Statute. Though the possibility of an American ending up in the docks in the Hague was—and remains—quite remote, the United States could not go along with an international court that, by its own terms and without American ratification, had jurisdiction to try Americans for international criminal violations.

The exact jurisdictional claims and contours of the ICC were the subject of extensive debate and negotiation in the run-up to the adoption of the Rome Statute.¹⁸⁸ What resulted was a compromise known as “complementarity.”¹⁸⁹ Under the complementarity principle, the ICC may initiate prosecution only if no state has proper jurisdiction over the alleged crime or the states with jurisdiction are “unwilling or unable genuinely to carry out the investigation or

¹⁸⁴ Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 95–96 (2003).

¹⁸⁵ *Id.* at 95.

¹⁸⁶ *Id.* at 90 (“The United States argued in Rome (the site of the ICC’s founding conference) that ICC prosecutions should be . . . limited to cases referred by the Security Council.”).

¹⁸⁷ Rome Statute, *supra* note 45, art. 13 (laying out bases of ICC jurisdiction); Goldsmith, *supra* note 184, at 90 (“[T]he prevailing parties in Rome believed that the Security Council—and in particular the opportunistic votes of veto-wielding permanent members—was part of the problem.”).

¹⁸⁸ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 384 (2000) (describing long and “grueling” negotiations).

¹⁸⁹ Rome Statute, *supra* note 45, pmb., art. 1.

prosecution” of the alleged violation.¹⁹⁰ Thus, if the ICC determines that an alleged violation is already properly under investigation or prosecution by a nation-state with preexisting jurisdiction, then the ICC will disclaim jurisdiction. If, on the other hand, the ICC determines that no state is sincerely and effectively exercising its own criminal jurisdiction with respect to the alleged violation, then the ICC may take jurisdiction. The idea is to give nation-states priority in exercising criminal jurisdiction where they already have it, but to allow the ICC to serve as a backstop prosecutor and court where no nation-state is willing or able to investigate, prosecute, or punish a serious violation of international criminal law.¹⁹¹

Complementarity is not the only jurisdictional provision in the Rome Statute. The ICC is limited to investigating, prosecuting, and adjudicating only four classes of substantive crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁹² Its subject-matter jurisdiction, then, is limited to only the most serious of international crimes, the so-called “great crimes” of international law.¹⁹³ ICC jurisdiction is also constrained by the territory on which the alleged crime occurred and by the nationality of the alleged perpetrator. Any qualifying crime that occurs on the territory of a State Party, or a state that avails itself of ICC jurisdiction, is subject to ICC jurisdiction, regardless of the nationality of the perpetrator.¹⁹⁴ And any qualifying crime committed by a national of a State Party is also subject to ICC jurisdiction, regardless of the location of the crime.¹⁹⁵ Finally, if the U.N. Security Council refers an incident to the ICC, then there is no territorial or nationality limit on the ICC’s jurisdiction.¹⁹⁶

¹⁹⁰ *Id.* art. 17, § 1(a). The Statute does not define unwillingness or inability but instead directs the Court to consider particular factors for each criterion. *Id.* art. 17, § 2.

¹⁹¹ Of course, it is ultimately up to the ICC—not the country in question—whether a country is “unwilling or unable genuinely to carry out the investigation or prosecution.” *Id.* art. 17, § 1(a).

¹⁹² *Id.* art. 5. I will refer to these four crimes as “qualifying crimes.”

¹⁹³ See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 572 (Samantha Besson & John Tasioulas eds., 2010) (referring to crimes against humanity, genocide, serious war crimes, and aggressive war as “‘the great crimes’, because they represent the very worst atrocities that people commit against each other”).

¹⁹⁴ Rome Statute, *supra* note 45, art. 12, § 2(a). In addition, a state can choose to put itself under issue-specific ICC jurisdiction. *Id.* art. 12, § 3.

¹⁹⁵ *Id.* art. 12, § 2(b).

¹⁹⁶ There are three ways the ICC may commence investigation and prosecution of alleged crimes: (1) state referral of potential crimes, (2) U.N. Security Council referral of

The upshot of the jurisdictional scheme is that the ICC can take jurisdiction of any alleged crime that (a) occurs on the territory of a State Party regardless of the nationality of the perpetrator, (b) is committed by a national of a State Party regardless of the location of the crime, or (c) is referred to the ICC by the U.N. Security Council regardless of nationality or location. Thus, a citizen of a non-Party—e.g., an American or a Saudi national—may come under ICC jurisdiction if he or she commits a qualifying crime on the territory of a State Party or if the case is referred to the ICC by the U.N. Security Council. Libya, for instance, is not a member of the ICC, but because the Security Council referred to the ICC alleged crimes committed by the Gadhafi regime in 2011,¹⁹⁷ the ICC asserted jurisdiction and subsequently brought charges against Muammar Gadhafi, his son Seif-al Islam Gadhafi, and Gadhafi's intelligence chief Abdullah Senusi.¹⁹⁸

A citizen of the United States who remains within the United States is effectively immune from ICC jurisdiction because the United States is not a State Party and because the United States has a permanent veto right within the U.N. Security Council—thus precluding prosecution based on a Security Council referral. However, by the terms of the Rome Statute, U.S. soldiers or contractors operating on the territory of a State Party—e.g., Mexico or Jordan—may be subject to ICC jurisdiction.¹⁹⁹ Of course, many other factors besides the jurisdictional provisions of the Rome Statute make ICC prosecutions extremely rare in general—the small budget and limited resources of the ICC, political considerations that militate against prosecution, and the ICC's still-fledgling legitimacy.²⁰⁰ These factors weigh especially

potential crimes, or (3) the ICC office of the prosecutor may initiate investigation and prosecution on its own (*proprio motu*). *Id.* art. 13. Read together, articles 12 and 13 of the Rome Statute make clear that U.N. Security Council referrals are not subject to limits based on territory or nationality. *Id.* arts. 12, 13.

¹⁹⁷ See S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

¹⁹⁸ Marlise Simons, *International Court Faces Key Test on Libya Captives*, N.Y. TIMES, Nov. 21, 2011, at A8.

¹⁹⁹ See Rome Statute, *supra* note 45, art. 12, § 2(a).

²⁰⁰ See Matthew Rushton, *Global Justice at a Crossroads*, INT'L B. NEWS, Oct. 2009, at 14, 17 (“The ICC is limited by resources to six to seven cases at a time, and by global political-economic realities to cases that can best be handled in a justice context”, says Judge Patricia Wald, a former judge on the ICTY.”). In its ten years of operation, the ICC has brought a grand total of 30 indictments, resulting in a single conviction. *List of People Indicted by the International Criminal Court*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_people_indicted_in_the_International_Criminal_Court (last visited Jan. 19, 2013).

heavily against any ICC prosecution of American citizens, for such a prosecution would undoubtedly provoke a firestorm of U.S. criticism of the ICC. Still, even the remote possibility of American soldiers operating abroad facing ICC investigations provoked substantial anxiety and furious reactions by the Bush Administration in the mid-2000s.²⁰¹

B. The International Criminal Court and the United States: Where Do We Go From Here?

This recent history explains why it is easy to see the United States and international criminal jurisdiction as adversaries. But that would be a mistake, and not only because of the recent softening in the U.S. tone toward the ICC.²⁰² While it is true that the United States continues to reject the executive or judicial jurisdiction of the ICC over Americans, the United States has always recognized and affirmed the legitimacy of international criminal law *as law* and continues to do so.²⁰³ The United States accepts and promotes the criminality under international law of war crimes, crimes against humanity, genocide, torture, aggression, piracy, hijacking, and other crimes.²⁰⁴ This fact goes unremarked—indeed, almost unnoticed—because it is so deeply assumed. It would, of course, be a scandal if the United States or any other nation-state rejected the legitimacy of international criminal law *in toto*. But it is also remarkable that the United States—along with other nation-states—accepts that crimes created and defined by institutions and practices at the international level qualify as substantive criminal law. As the Supreme Court

²⁰¹ See Turner, *supra* note 65, at 10.

²⁰² See, e.g., Fairlie, *supra* note 182, at 529 (“Now, just over two years into the Obama presidency, the world has witnessed renewed and significant U.S. engagement with the Court.”); Sabharwal, *supra* note 182, at 312 (noting that the “softening” began in the latter half of the Bush Administration and has accelerated during the Obama Administration).

²⁰³ See, e.g., U.S. CONST. art. I, § 8 (granting Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159–60 (1795) (“[A]ll piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it.”).

²⁰⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.”).

famously put it in *The Paquette Habana*, “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”²⁰⁵ In effect, this means that the United States admits that there are lawmaking processes outside of its own constitutional structure—at the supra-national level no less—that can create “laws of the United States.”²⁰⁶ Of course, there is a big debate about exactly how and when international law can be enforced by the executive and judicial branches within the United States,²⁰⁷ but the essential legitimacy of international law as law—including international criminal law—is well settled in the United States.²⁰⁸ The United States is emphatically not a unilateralist “cowboy” country fundamentally opposed to international criminal law.

Rather, the United States has always embraced international criminal law as an important component of world public order and, under the Obama Administration, has even supported significant ICC

²⁰⁵ *The Paquette Habana*, 175 U.S. 677, 700 (1900).

²⁰⁶ *See* *Henfield’s Case*, 11 F. Cas. 1099, 1100–01 (C.C.D. Pa. 1793) (No. 6360) (Jay, C.J.) (“[I]t may be proper to observe, that the laws of the United States admit of being classed under three heads of descriptions. 1st. All treaties made under the authority of the United States. 2d. The laws of nations. 3dly. The constitution, and statutes of the United States.”). Thus, the United States grants that the international community has real, if limited, legislative jurisdiction.

²⁰⁷ *See, e.g.*, JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES passim* (2d ed. 2003) (arguing that customary international law is part of the “law of the United States”); Bradley & Goldsmith, *supra* note 58 (arguing that customary international law is not part of the laws of the United States); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (criticizing Bradley & Goldsmith); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (criticizing Bradley & Goldsmith); *see also* Curtis A. Bradley & Jack L. Goldsmith, Commentary, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (responding to Koh).

²⁰⁸ *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, intro. note (1987) (“From the beginning, the law of nations, later [sic] referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done.”); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 (1984) (calling status of international law as law “unquestioned today”); *see also* Koh, *supra* note 182 (describing consistent U.S. “support for policies of accountability, international criminal justice, and ending impunity”).

investigations and prosecutions.²⁰⁹ But at the same time, as the world's strongest military power, the United States has a legitimate concern that an international criminal court composed primarily of middling and small powers may be tempted to use the court to harass American officials and service-members through politically motivated investigations and prosecutions.²¹⁰ Given the status quo, there is practically no way to imagine the United States embracing the ICC fully, and even less reason to imagine that the United States will become a State Party in the foreseeable future. The best that supporters of the court can hope for is opportunistic U.S. cooperation with the court when such cooperation furthers U.S. interests and values.²¹¹ But the basic impasse will remain.

If supporters of the ICC wish to see the United States fully embrace the court, then a different jurisdictional scheme will need to be made available. The ICC today claims a very narrow functional jurisdiction—by its own terms, its mandate is limited in numerous ways (e.g., to only four types of crime and only three modes of case initiation).²¹² However, once the ICC is seized of a case, it operates with unbounded discretion. That is to say, its processes are not reviewable by some *other* legal system's courts or institutions. Of course, the court and its processes have been created *ex ante* by nation-states, but there is no *ex post* review of court procedures or verdicts by another legal system. This is, of course, the norm with international courts. Countries set up international adjudicatory institutions to take certain decisions *away* from single nation-state control, so there would be something paradoxical about subjecting

²⁰⁹ The United States has explicitly supported ICC investigations of atrocities committed by the Lord's Resistance Army in Uganda and voted in favor of the Security Council resolution referring the situation in Libya to ICC jurisdiction. *See* Lim, *supra* note 182, at 443; S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

²¹⁰ *See* Goldsmith, *supra* note 184, at 95.

²¹¹ *See* Fairlie, *supra* note 182, at 573 (“U.S. membership is unlikely to materialize any time soon.”); *see also* Koh, *supra* note 182 (describing how “principled engagement” with the ICC “can protect and advance our [U.S.] interests” and lead to “a better relationship going forward between the U.S. and the ICC”); Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State, Remarks on U.S. Engagement with the International Criminal Court and the Outcome of the ICC Assembly of States Parties Conference, *supra* note 182 (“[I]t’s clear that joining the court is not on the table, as far as a U.S. decision at this time. But as you know, the United States takes a very long time to adopt international conventions and treaties, and sometimes doesn’t. I mean, it took us 40 years to ratify the Genocide Convention. . . . And who knows what the future may hold?”).

²¹² Rome Statute, *supra* note 45, arts. 5, 11, 12, 13.

international court decisions to national review.²¹³ Yet that is precisely what I propose here.

Among the consistent themes of those opposed to U.S. participation in the ICC is that ICC procedures fail to meet the constitutional standards of American criminal courts and that the ICC is unaccountable to such standards.²¹⁴ On this account, Americans should not be put in jeopardy by a criminal justice system that lacks American due process standards, jury trials, or any mechanism of federal review.²¹⁵ Others argue that the court's procedures fully conform to—or exceed—constitutional due process standards and that there would be no constitutional infirmity in its trying American defendants.²¹⁶ But whether the ICC procedures on paper meet constitutional standards or not, the fact is that there is no direct mechanism for U.S. courts to review ICC procedures for conformity to due process standards in any particular case.

The principle that Americans should not be deprived of life or liberty without due process of law suggests not only that ICC procedures should conform to fundamental due process standards, but also that United States courts ought to have a chance to review ICC convictions of American citizens to ensure such conformity. Such review could take a number of different procedural forms, but the habeas review available to state and tribal prisoners is the most relevant and attractive model.²¹⁷ Under this arrangement, the United

²¹³ One interesting and successful attempt by a nation-state to shape an international court to its interests took place during the protracted ratification of Protocol 14 to the European Convention of Human Rights, a measure aimed at increasing the efficiency of the European Court of Human Rights. See *Russia: Ratification of Protocol Promotes Justice*, HUM. RTS. WATCH (Jan. 15, 2010), <http://www.hrw.org/news/2010/01/15/russia-ratification-protocol-promotes-justice>. Russia effectively conditioned its ratification of Protocol 14 to the European Court of Human Rights (ECHR) on the assurance that a Russian judge will always sit on ECHR panels issuing final judgment in cases brought against Russia. See *Russian Duma Has Accepted Protocol 14 Today*, ECHR BLOG (Jan. 15, 2010), <http://echrblog.blogspot.com/2010/01/russian-will-ratify-protocol-14-today.html>.

²¹⁴ See, e.g., Lee A. Casey & David B. Rivkin, *The International Criminal Court vs. the American People*, HERITAGE FOUND. (Feb. 5, 1999), <http://www.heritage.org/research/reports/1999/02/the-international-criminal-court-vs-the-american-people> (arguing that U.S. accession to the ICC would be unconstitutional).

²¹⁵ *Id.*

²¹⁶ See David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983 (2008).

²¹⁷ The exact scope of such review, its procedures, governing standards, and operational institutions could be determined by negotiations between the United States and the current ICC State Parties.

States would get assurance that its court system could review ICC convictions of Americans and, if appropriate, grant relief to such persons. The ICC, in turn, would secure U.S. participation as a State Party as well as its full support, with all the power and prestige that such support would entail. ICC investigations against Americans could, if appropriate, proceed. And convictions against Americans would still be possible and would still carry huge significance, even if subsequent U.S. review would lead to the release of the defendant.

The suggestion here is that supra-national criminal jurisdiction might itself be subject to nation-state review. Implicitly, international lawyers and academic commentators assume a strict hierarchy running up from sub-state actors at the bottom, nation-state actors in the middle, and supra-national actors at the top.²¹⁸ And international courts are designed as top-level courts subject to no further review. The European Court of Human Rights, for instance, is a classic example of a supra-national court whose very purpose is to bind the functional nation-state legal systems “below” it to human rights standards.²¹⁹ But where an international institution takes direct functional jurisdiction—and includes executive functions like the ICC’s Prosecutor—then it is legitimate to suggest that it too should be bound by some supervisory authority. Of course, allowing a powerful country, such as the United States, to supervise ICC judgments against its citizens would constrain the ICC’s independence, and, insofar as the United States alone would enjoy such supervisory jurisdiction, it would violate the norm of nation-state equality. But supporters of the ICC, and Internationalists more generally, need to take seriously the idea that jurisdictional pluralism implies bounds on the international court as much as it allows for international jurisdiction over conduct that takes place within nation-states.

Thus, my counterintuitive proposal to allow U.S. review of ICC convictions of Americans serves three purposes. First, it reflects a basic U.S. commitment to ensuring that its citizens are afforded due process before they may be criminally punished. Second, it suggests a political compromise between the United States and the ICC that,

²¹⁸ It is admittedly difficult to jettison such hierarchical thinking. This Article too relies on hierarchical imagery describing sub-national jurisdictional claims as challenges from “below” and supra-national claims as challenges from the “top.”

²¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., art. 1, Nov. 4, 1950, 213 U.N.T.S. 222 (1955) (describing aim of Convention to “secure to everyone within their jurisdiction” the fundamental “rights and freedoms” codified therein).

however unlikely, might make Americans more open to ICC membership. And, most importantly, it adds a new model for mapping the relationship between nation-state legal systems and international legal regimes. Nation-state courts, that is, could themselves exercise supervisory jurisdiction over international legal regimes, especially where the latter have direct functional jurisdiction.

CONCLUSION

Reports of the death of the nation-state are much exaggerated. Nation-states will continue to be the primary jurisdictional agents of criminal justice—the principal legislators, enforcers, and adjudicators of criminal law—for the foreseeable future. But sub-state and supra-state challenges to that jurisdiction are not going away, and criminal justice officials and legal commentators must come to grips with the reality of partially autonomous criminal justice regimes at the sub-state and supra-state levels. The current fights among Sovereignists, Internationalists, and Pluralists are not going to end in decisive victory for any one vision of criminal jurisdiction. A Bounded Pluralism approach, however, offers a way forward that honors nation-state values while allowing for supra-national and sub-national assertions of jurisdiction.

To be sure, Bounded Pluralism will not resolve all the major disputes of sub-state and supra-state criminal jurisdiction, even if it were adopted today as official U.S. policy. As a compromise, it cannot satisfy many of the most fervent advocates of tribal sovereignty or the most passionate promoters of international criminal enforcement.

Some tribal activists and their supporters object to the already-existing federal supervisory jurisdiction over tribal criminal justice.²²⁰ They want full-spectrum functional jurisdiction without supervision from the federal courts. After all, they argue, a truly “sovereign” entity does not submit itself to review by another power.²²¹

²²⁰ See, e.g., Porter, *supra* note 132, at 271–72 (criticizing federal oversight over tribal justice).

²²¹ See, e.g., Mark Savage, *The Great Secret About Federal Indian Law—Two Hundred Years in Violation of the Constitution—and the Opinion the Supreme Court Should Have Written to Reveal It*, 20 N.Y.U. REV. L. & SOC. CHANGE 343, 344 (1993) (arguing against federal “plenary” authority over Indian tribes’ internal affairs); see also *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., dissenting) (noting that “[t]he sovereign is, by definition, the entity ‘in which independent and supreme authority is vested’” and thus

Moreover, defenders of maximal tribal sovereignty have argued that imposing American standards of due process on tribal criminal processes is nothing less than cultural imperialism in the name of legal liberalism.²²²

At the same time, although nothing like the kind of approach I have suggested for the ICC exists, one can well anticipate that any nation-state review of ICC convictions would be anathema to most of the international court's supporters. Nation-state review of an ICC conviction would effectively repatriate the case to the nation-state level and thus undermine the very premise of an international criminal court. If abused, such review might allow the United States—and any other country that successfully demanded such review—to effectively shield its citizens from international justice and thus resurrect precisely the impunity for human rights atrocities that the ICC was created to combat.²²³

The Bounded Pluralism approach is thus unlikely to win over those dedicated to complete tribal independence or to a completely independent international criminal court. A criminal regime that must adhere to American norms of due process and habeas-like review by American courts is, indeed, a bound regime.

Nevertheless, tribal courts and the ICC could exercise significant functional jurisdiction and accomplish most, if not all, of their goals within a system of Bounded Pluralism. Even within tightly bound constraints, tribal criminal justice systems today provide crucial law enforcement functions for tribal members, as well as significant opportunities for community building and self-regulation. The existence of federal supervisory jurisdiction does nothing to prevent tribes from improving the quality of criminal justice they provide

arguing that commitments to both tribal sovereignty and plenary Congressional authority over tribes are incompatible).

²²² What to do when pluralist commitments to communal rights clash with liberal commitments to individual rights is an important and complex problem in contemporary politics and political theory. *See, e.g.*, SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001).

²²³ Moreover, under the principle of complementarity embodied in the Rome Statute, the ICC takes jurisdiction of a case only if it determines that no national government is able or willing to investigate and/or prosecute the alleged crime. Rome Statute, *supra* note 45, art. 17, § 1(a). Thus, for instance, if an American were ever convicted by the ICC, the ICC necessarily would have already determined that the United States was either unable or unwilling to properly exercise its own jurisdiction over the individual. It would be very odd, then, for the ICC to give the United States supervisory jurisdiction to review the conviction, even for adherence to fundamental due process.

right now, and the Grand Bargain I propose in this Article would significantly increase the scope of tribal criminal jurisdiction.²²⁴ As for the International Criminal Court, it is true that any provision allowing for U.S. review of ICC convictions would undermine the ICC's legitimacy in the eyes of some—especially if the United States were the only country to secure such review. And grafting a review process onto the ICC today is, of course, much more difficult than it would have been to create such a mechanism at the creation of the court. Still, nothing that the ICC has already accomplished would be diminished by the existence of such U.S. review, and the ICC could continue to serve exactly the role it intends even with such review. ICC prosecutors could continue to investigate alleged crimes, indict those it deems responsible, and punish them if they are found guilty. The development of international criminal law—and the human rights norms behind the law—could continue. And if Bounded Pluralism were successful in enticing the United States to join the ICC as a full State Party—a big if—then the cause of international criminal enforcement would be immeasurably enhanced, even if it came at the perceived cost of some special provisions for American defendants.

In sum, the Bounded Pluralism approach describes and justifies a particular way to manage the tensions inherent in jurisdictional overlap. It does not demand that the nation-state either fiercely resist or fully embrace the various sub-state and supra-state assertions of criminal jurisdiction that it faces; rather, it suggests a way in which the nation-state can remain faithful to its national values, while recognizing the legitimacy of certain international and sub-national jurisdictional claims. At a deeper level, perhaps, Bounded Pluralism might mirror the way each of us endeavors to honor the multiple allegiances that make up our identities while staying true to a core set of personal values.

²²⁴ Nobody has argued that law and order on reservations suffers *because* tribes adhere to the due process provisions of the Indian Civil Rights Act.

