

# THE CRIMINALIZATION OF FOREIGN RELATIONS

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*Overcriminalization has rightly generated national condemnation among policymakers, scholars, and practitioners alike. And yet, such scholarship often assumes that the encroachment of criminal justice stops at our borders. This Article argues that our foreign relations are also at risk of overcriminalization due to overzealous prosecution, overreaching legislation, and presidential politicization—and that this may be particularly problematic when U.S. criminal justice supplants certain nonpenal U.S. foreign policies abroad. This Article proposes three key reforms—presidential distancing, prosecutorial integration, and legislative de-escalation—to assure a principled place for criminal justice in foreign relations.*

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#### INTRODUCTION

Contemporary criminal legal scholars paint a grim picture of overcriminalization. In their view, criminal justice has relentlessly expanded in scope beyond its proper function, supplanting better forms of regulation. Two forces propel this encroachment of criminal justice: overzealous prosecutors and reflexively “tough on crime” legislators. Drug use, for example, is treated as a crime-control issue instead of a health issue.<sup>1</sup> As one scholar has vividly noted, if each area of law were a different country, criminal law would be an expansionist power that is shrinking neighboring nations’ territories.<sup>2</sup>

And yet this robust body of scholarship tells a largely domestic story, begging the question of whether criminal justice is similarly supplanting U.S. policy options abroad. In other words, the question is whether and how the

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1. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 71 (2017); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 90 (2001); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 58 (2008); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 17–18 (2007); Darryl K. Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL’Y 657, 657 (2011) (“Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes.”); Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1065 (2020) (“[I]n looking at overcriminalization, one needs to look at two separate tiers of this issue: (1) the growing number of federal statutes that allow for increased prosecutions; and (2) the increased discretion provided to prosecutors in enforcement practices that results in heightened prosecution and incarceration.”); see also Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 764 (2005); Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1205 n.86 (2015); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 705–06 (2005); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 542, 576 (2012).

2. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1372 (2017).

expansion of the U.S. criminal justice system—which operates through investigation, prosecution, and incarceration—is growing in our foreign relations. And, in doing so, whether it is supplanting our foreign policy, which traditionally operates through six modalities: diplomacy, cooperation and association agreements, trade, economic sanctions, military force, and the use of foreign aid.<sup>3</sup>

To better grasp the criminalization of foreign relations, let us engage in two analogous thought experiments: one traditionally domestic, the other extraterritorial. First, consider the drug-related conduct mentioned earlier. Should domestic drug use be considered a crime or, instead, a health policy issue? And should domestic drug *possession* be criminalized, and, if so, in what quantity? And what about more harmful conduct, such as drug *distribution* and international drug *trafficking*? Are those criminal concerns or health issues? Such questions tease out the line between the overlapping regulatory regimes of criminal law and health policy, both of which bear on health-related conduct.<sup>4</sup> Second, consider the same question, but compare the desirability of criminal prosecution alongside foreign policy, not health policy. Take the example of corruption and foreign bribery. Which is the best way to discourage corruption abroad: Host a summit of world leaders to address the issue? Engage in rule of law development abroad? Provide economic incentives for countries to reform? Pass criminal legislation such as the Foreign Corrupt Practices Act<sup>5</sup> (FCPA)? Or, as prosecutors, zealously interpret the FCPA to prosecute foreign citizens and foreign companies in foreign countries, on the thin U.S. jurisdictional theory that the transactions are denominated in U.S. dollars?<sup>6</sup> Such questions probe our intuitions regarding the proper normative place of criminal prosecution against other foreign policy tools.

The time is ripe to pose such questions, as even a casual glance at U.S. headlines today raises the question of the function that criminal justice *should* play abroad and how the twin forces of overcriminalization are pressuring that function. The United States is arresting Huawei CFO Meng Wanzhou

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3. See Clair Apodaca, *Foreign Aid as Foreign Policy Tool*, OXFORD RSCH. ENCYCLOPEDIAS (Apr. 26, 2017), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-332> [<https://perma.cc/7YDF-9F7Z>].

4. Cf. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 24–27, 119–22 (2017).

5. 15 U.S.C. § 77dd-1.

6. See Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 388 (2019); see also *Supreme Court Questions Whether Dollar-Denominated Transactions or Other Financial Transactions in the U.S. Are Sufficient to Assert Jurisdiction over Foreign Corporations*, FCPA PROFESSOR (May 8, 2018) [hereinafter FCPA PROFESSOR], <http://fcpaprofessor.com/supreme-court-questions-whether-dollar-denominated-transactions-financial-transactions-u-s-sufficient-assert-jurisdiction-foreign-corporations> [<https://perma.cc/EWS8-Y436>] (describing how several FCPA enforcement actions have alleged jurisdiction because the transactions were denominated in U.S. dollars).

abroad,<sup>7</sup> while at home indicting Venezuelan President Nicolás Maduro,<sup>8</sup> Mexican Defense Minister Salvador Cienfuegos Zepeda,<sup>9</sup> Russian hackers,<sup>10</sup> and Chinese nationals alleged to have stolen COVID-19 vaccine research.<sup>11</sup> Such cases exemplify what I have previously called “foreign affairs prosecutions,” or U.S. criminal cases with some nexus to a foreign country.<sup>12</sup> While such cases may arise due to the autonomous actions of a federal, state, or local prosecutorial office, they may also be the product of U.S. policy choices governing when and how to enforce criminal law outside of American borders—this Article calls this U.S. extraterritorial law enforcement policy “U.S. ELEP.”

This Article argues that the criminalization of foreign relations is occurring and that, worryingly, our foreign relations may be on the verge of overcriminalization due to a rise of U.S. ELEP. This Article contributes a descriptive and normative account of U.S. criminal justice within the broader framework of U.S. foreign relations and argues for presidential restraint in such cases. This Article also marshals this transnational context to bolster scholarship on normative theories of criminalization. This Article thus contributes to the literature at the intersection of criminal law, foreign relations law, and international law.

Criminal law scholars are largely critical of all aspects of contemporary U.S. criminal justice, particularly policing and prisons.<sup>13</sup> Foreign relations law scholars, by contrast, generally see criminal justice as a more appealing alternative to *ad hoc* prosecutions in Guantanamo Bay, drone strikes, or other

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7. Julia Horowitz, *Huawei CFO Meng Wanzhou Arrested in Canada, Faces Extradition to United States*, CNN (Dec. 6, 2018, 11:58 AM), <https://www.cnn.com/2018/12/05/tech/huawei-cfo-arrested-canada/index.html> [<https://perma.cc/Q2UB-EN8F>].

8. Press Release, U.S. Dep’t of Just., Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges (Mar. 26, 2020), <https://www.justice.gov/opa/pr/nicol-s-maduro-moros-and-14-current-and-former-venezuelan-officials-charged-narco-terrorism> [<https://perma.cc/TEE9-XZNE>].

9. See Steven Arrigg Koh, *Criminalizing Foreign Relations: How the Biden Administration Can Prevent a Global Arrest Game*, JUST SEC. (Dec. 18, 2020), <https://www.justsecurity.org/73853/criminalizing-foreign-relations-how-the-biden-administration-can-prevent-a-global-arrest-game/> [<https://perma.cc/T5CX-LE5L>]; see also Azam Ahmed, *Mexico’s Former Defense Minister Is Arrested in Los Angeles*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/mexico-general-cienfuegos-dea.html> [<https://perma.cc/TBE2-6T46>].

10. See Dustin Volz, *U.S. Charges Six Russian Intelligence Officers with Hacking*, WALL ST. J. (Oct. 20, 2020, 8:17 AM), <https://www.wsj.com/articles/u-s-charges-six-russian-intelligence-officers-with-hacking-11603126931> [<https://perma.cc/F6HC-EMDD>].

11. See Julian E. Barnes, *U.S. Accuses Hackers of Trying to Steal Coronavirus Vaccine Data for China*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/politics/china-hacking-coronavirus-vaccine.html> [<https://perma.cc/3WCH-8XFL>].

12. See Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 627–28 (2016); Koh, *supra* note 6.

13. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1638–46 (2019). See generally BUTLER, *supra* note 1; Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815 (2020).

use of force.<sup>14</sup> Meanwhile, international law scholars are largely sanguine about the role of international criminal tribunals to promote accountability for widespread violations of international human rights and humanitarian law.<sup>15</sup>

This Article balances the realities of criminal justice against global foreign policy imperatives. In so doing, this Article describes a reality, a promise, and a fear. Part I describes the reality: we must apprehend the growth of U.S. ELEP in foreign relations. Part I introduces this reality through two case examples and considers the risk of outbreak of a “global arrest game.” Part II then describes the promise: two central characteristics—distinctiveness and expressivism—should define the proper function of U.S. ELEP in foreign relations. Part III underscores the fear: the twin forces driving overcriminalization domestically—overzealous prosecution and legislative overreach—are also doing so extraterritorially and, thus, threaten the proper U.S. ELEP function. Part III also emphasizes a third causal factor, specific to U.S. ELEP: direct presidential politicization under the foreign affairs authority. Finally, Part IV prescribes three reforms: presidential distancing, prosecutorial integration, and legislative de-escalation. The former two regard the executive, clarifying the three-layered Department of Justice (DOJ) roles of the president, agency leadership, and the individual line prosecutor. The latter addresses the remaining cause of overcriminalization—legislative overreach—and considers how a richer normative theory of criminalization could guide the political branches in the development of U.S. ELEP.

Before doing so, a brief word to clarify terms. By “foreign relations,” I mean all interaction between the U.S. government and foreign governments. “Foreign policy” is any of six modalities that the U.S. government traditionally deploys in foreign relations: diplomacy, cooperation and association agreements, trade, economic sanctions, military force, and the use of foreign aid (“six foreign policy modalities”).<sup>16</sup> As noted above, U.S. ELEP refers to the policy governing the development and use of foreign affairs prosecutions. By the “criminalization of foreign relations,” I mean descriptively the increasing use in foreign relations of U.S. ELEP over other foreign policy modalities. And by “foreign relations overcriminalization,” I mean the normatively undesirable overuse of U.S. ELEP over other foreign policy modalities.

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14. See generally Aziz Z. Huq, *The President and the Detainees*, 165 U. PENN. L. REV. 499 (2017); Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLIAMETTE L. REV. 505 (2009).

15. See generally DIANE ORENTLICHER, *SOME KIND OF JUSTICE: THE ICTY’S IMPACT IN BOSNIA AND SERBIA* (2018); Harold Hongju Koh, Address, *International Criminal Justice 5.0*, 38 YALE J. INT’L L. 525, 539–41 (2013); Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52 CASE W. RES. J. INT’L L. 467, 467–68 (2020). But see Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1070 (2015).

16. See Apodaca, *supra* note 3, at 2.

## I. THE REALITY: THE RISE OF U.S. EXTRATERRITORIAL LAW ENFORCEMENT

Our foreign relations are being criminalized.<sup>17</sup> This part lays the foundation for this argument by describing two case examples and then

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17. The intersections between criminal justice and foreign policy are tremendously variegated. The president of the United States may pressure another country's foreign leader to investigate and prosecute a case. *See*, e.g., Julian E. Barnes et al., *Trump Pressed Ukraine's Leader on Inquiry into Biden's Son*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/20/us/politics/trump-whistle-blower-ukraine.html> [https://perma.cc/DL4X-4FBA]. The United States may or may not extradite a U.S. or foreign national back to a country where the national is alleged to have perpetrated a crime and in doing so trigger international controversy. *See*, e.g., Carol D. Leonnig et al., *Giuliani Pressed Trump to Eject Muslim Cleric from U.S., A Top Priority of Turkish President, Former Officials Say*, WASH. POST (Oct. 15, 2019), [https://www.washingtonpost.com/politics/giuliani-pressed-trump-to-eject-muslim-cleric-from-us-a-top-priority-of-turkish-president-former-officials-say/2019/10/15/bf43d1ec-ef68-11e9-b648-76bcf86eb67e\\_story.html](https://www.washingtonpost.com/politics/giuliani-pressed-trump-to-eject-muslim-cleric-from-us-a-top-priority-of-turkish-president-former-officials-say/2019/10/15/bf43d1ec-ef68-11e9-b648-76bcf86eb67e_story.html) [https://perma.cc/M84M-53Y2] (reporting that Rudolph Giuliani urged President Trump to comply with the Turkish government's requests to eject Fethullah Gülen, a permanent U.S. citizen, to stand trial in Turkey for allegedly plotting a 2016 coup attempt against President Recep Tayyip Erdogan); Kanishka Singh, *U.S. Judge Orders Release of Peru Ex-President on Bail Due to Coronavirus Outbreak*, GUARDIAN (Mar. 20, 2020, 1:04 AM), <https://www.theguardian.pe.ca/news/world/us-judge-orders-release-of-peru-ex-president-on-bail-due-to-coronavirus-outbreak-427005/> [https://perma.cc/5TMW-LSHV] (discussing the pending extradition proceedings against Alejandro Toledo, former Peruvian president, who was arrested in California in 2019 and faces serious corruption charges in Peru); Laurel Wamsley, *Wife of U.S. Diplomat Flees U.K. After Fatal Car Crash, Avoiding Police Investigation*, NPR (Oct. 7, 2019, 1:58 PM), <https://www.npr.org/2019/10/07/767925703/wife-of-u-s-diplomat-flees-u-k-after-fatal-car-crash-avoiding-police-investigati> [https://perma.cc/2JMJ-MYSX] (reporting that British Prime Minister Boris Johnson condemned a U.S. citizen's use of diplomatic immunity after the individual, who is married to a U.S. diplomat, allegedly struck and killed a motorist with her car in England); Michael Wilson, *How a Death at a Caribbean Resort Became an International Incident*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/nyregion/gavin-scott-hapgood-anguilla-manslaughter.html> [https://perma.cc/BWL2-7AHY] (discussing the fallout after Scott Hapgood, a U.S. citizen, refused to attend a court hearing in Anguilla concerning a physical altercation between Hapgood and an Anguilla hotel worker that ended in the worker's death). The United States may be seen as pressuring a foreign criminal justice system to release a U.S. national detained or prosecuted abroad. *See*, e.g., Bassem Mroue, *Judge in Lebanon Appeals Order to Release Lebanese-American*, ASSOCIATED PRESS (Mar. 17, 2020, 1:30 PM), <https://www.usnews.com/news/best-states/new-hampshire/articles/2020-03-17/lebanese-judge-orders-retrial-of-lebanese-american> [https://perma.cc/497S-XF4F] (describing how a military tribunal ordered the release of Lebanese-American, Amer Fakhoury, who had been detained in Lebanon since September 2019, to face charges of allegedly torturing prisoners while working for an Israeli militia more than ten years ago). The United States may lead in the establishment of, or actively thwart the work of, international criminal tribunals. *See*, e.g., Nahal Toosi & Natasha Bertrand, *Trump Authorizes Sanctions Against the International Criminal Court*, POLITICO (June 11, 2020, 9:59 AM), <https://www.politico.com/news/2020/06/11/white-house-international-criminal-court-sanctions-313070> [https://perma.cc/2LQ6-X69F]. *See generally* Koh, *supra* note 15, at 539–41. U.S. political actors may or may not—in the case of Chinese Uighurs, Iraqi Yazidis, or Ottoman Armenians—declare certain foreign conduct a genocide. *See* Eldad Ben Aharon, *Armenian Genocide: US Recognition of Turkey's Killing of 1.5 Million Was Tangled Up in Decades of Geopolitics*, CONVERSATION (Mar. 6, 2020, 8:01 AM), <https://theconversation.com/armenian-genocide-us-recognition-of-turkeys-killing-of-1-5-million-was-tangled-up-in-decades-of-geopolitics-129159> [https://perma.cc/U5QF-YYP5]; Agence France-Presse, *US Senators Seek to Declare Uighur 'Genocide' by China in Bipartisan Push*, GUARDIAN (Oct. 27, 2020, 9:04 PM), <https://www.theguardian.com/world/>

considering the overall picture of U.S. ELEP in contemporary foreign relations.

### A. Two Cautionary Case Examples

#### 1. Venezuela: The Indictment of President Nicolás Maduro

Venezuela's government, led by President Nicolás Maduro Moros, has faced national unrest in the wake of extreme economic turmoil and electoral dysfunction over the last decade.<sup>18</sup> In January 2019, President Donald J. Trump recognized opposition leader and president of the National Assembly of Venezuela, Juan Guaidó, as the interim president of Venezuela in the wake of elections that the United States declared to be illegitimate.<sup>19</sup> In his statement, President Trump announced that he would “continue to use the full weight of United States economic and diplomatic power to press for the restoration of Venezuelan democracy.”<sup>20</sup> Months later, he imposed new sanctions on the regime.<sup>21</sup>

In the midst of this, U.S. ELEP emerged as another aspect of this foreign relations story. In March 2020, the United States indicted President Maduro in New York, Washington, D.C., and Miami for conspiring with Fuerzas Armadas Revolucionarias de Colombia (FARC) to facilitate a decades-long narco-terrorism and international cocaine trafficking regime.<sup>22</sup> Specifically, the federal indictments charged Maduro with illegally importing hundreds of tons of cocaine into the United States.<sup>23</sup> Although the indictment of a presumed head of state is unusual, President Trump justified it on the ground

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2020/oct/28/us-senators-seek-to-declare-uighur-genocide-by-china-in-bipartisan-push [https://perma.cc/ADH5-Q43Y]; *U.S. Decries ISIS ‘Genocide’ of Christians, Other Groups*, NBC NEWS (Aug. 15, 2017, 1:10 PM), <https://www.nbcnews.com/news/us-news/u-s-decries-islamic-state-genocide-christians-other-groups-n792866> [https://perma.cc/E8GM-97DB]. Or the criminal justice may constitute the foreign policy itself. As the case of Hong Kong showed, President Trump ended the “special” relationship with Hong Kong—including its law enforcement relationship, which involved extradition—in light of Chinese encroachment on Hong Kong’s independent legal system. See Michael Crowley et al., *Rebuking China, Trump Curtails Ties to Hong Kong and Severs Them with W.H.O.*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/05/29/us/politics/trump-hong-kong-china-WHO.html> [https://perma.cc/KPL2-RN9Q]. While such procedural permutations vary, the overall trends are the same: a globalized world in which criminal justice helps or hinders relations between states.

18. See *Venezuela Crisis: How the Political Situation Escalated*, BBC NEWS (Dec. 3, 2020), <https://www.bbc.com/news/world-latin-america-36319877> [https://perma.cc/GN42-A84J].

19. See Press Release, Statement Announcing United States Recognition of National Assembly President Juan Gerardo Guaidó Márquez as Interim President of Venezuela (Jan. 23, 2019), <https://www.govinfo.gov/content/pkg/DCPD-201900046/pdf/DCPD-201900046.pdf> [https://perma.cc/BZ38-VULZ].

20. *Id.*

21. See Michael Crowley & Anatoly Kurmanaev, *Trump Imposes New Sanctions on Venezuela*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/politics/venezuela-embargo-sanctions.html> [https://perma.cc/2WNH-GVSF].

22. See Press Release, *supra* note 8.

23. See *id.*

that Maduro is “an illegitimate ruler” and “a tyrant who brutalizes his people” and promised that Maduro’s “grip on tyranny will be smashed and broken.”<sup>24</sup> Then, just months later, government officials in Cabo Verde detained Alex Nain Saab Morán, a Colombian businessman and key dealmaker for Maduro’s regime in Venezuela.<sup>25</sup> U.S. authorities indicted Saab on money laundering charges, alleging that Saab had funneled more than \$350 million to offshore accounts and disguised the transaction as a program for helping starving Venezuelans.<sup>26</sup> On June 29, 2020, the United States formally requested the extradition of Saab, despite the fact that no extradition treaty exists between the United States and Cabo Verde.<sup>27</sup>

What role is criminal justice playing here? Some commentators believe that indictments were an integral part of the Trump administration’s “maximum pressure” campaign to cabin Maduro, a campaign that includes the aforementioned sanctions and political recognition of Guaidó.<sup>28</sup> By contrast, others believe this case to be a natural consequence of years of investigation, which began during the Obama administration.<sup>29</sup>

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24. William K. Rashbaum et al., *Venezuelan Leader Maduro Is Charged in the U.S. with Drug Trafficking*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/03/26/nyregion/venezuela-president-drug-trafficking-nicolas-maduro.html> [https://perma.cc/2NXM-VQRY]. Despite these accusations, President Trump announced in June that he would consider meeting with Maduro, though he later appeared to walk back his comments. See Anne Gearan et al., *Trump Backtracks on a Meeting with Venezuela’s Maduro after Chorus of Criticism*, WASH. POST (June 22, 2020), [https://www.washingtonpost.com/politics/trump-backtracks-on-a-meeting-with-venezuelas-maduro-after-chorus-of-criticism/2020/06/22/8f25d598-b491-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-backtracks-on-a-meeting-with-venezuelas-maduro-after-chorus-of-criticism/2020/06/22/8f25d598-b491-11ea-aca5-ebb63d27e1ff_story.html) [https://perma.cc/JY7N-HDDC]. Maduro has disparaged the charges, accusing the United States and Colombia of inciting more violence in Venezuela and has taken retaliatory steps by seeking the extradition of Jordan Goudreau, who helped organize the failed incursion of Venezuela, from the United States. See Brian Ellsworth, *Venezuela’s Maduro to Seek U.S. Extradition of Security Contractor*, REUTERS (May 6, 2020, 2:21 PM), <https://www.reuters.com/article/us-venezuela-security-extradition/venezuelas-maduro-to-seek-u-s-extradition-of-security-contractor-idUSKBN22I2TH> [https://perma.cc/89SW-B4MP].

25. Patricia Laya, *Maduro’s U.S.-Charged Dealmaker Alex Saab Detained in Cabo Verde*, BLOOMBERG NEWS (June 13, 2020), <https://www.bnnbloomberg.ca/maduro-s-u-s-charged-dealmaker-alex-saab-detained-in-cabo-verde-1.1449942> [https://perma.cc/97UX-QRAH].

26. See Michael Smith & Ethan Bronner, *U.S. Seeks Extradition of Maduro’s Alleged Dealmaker Alex Saab*, BLOOMBERG NEWS (June 29, 2020), <https://www.bnnbloomberg.ca/u-s-seeks-extradition-of-maduro-s-alleged-dealmaker-alex-saab-1.1458171> [https://perma.cc/4TCP-B4EM].

27. *Id.*; *Cape Verde May Send Suspect to US Without Extradition Treaty*, ABC NEWS (June 15, 2020, 9:02 AM), <https://abcnews.go.com/International/wireStory/cape-verde-send-suspect-us-extradition-treaty-71254504> [https://perma.cc/H2M3-9MRH].

28. Anthony Faiola et al., *U.S. Indicts Venezuela’s Maduro on Narcoterrorism Charges, Offers \$15 Million Reward for His Capture*, WASH. POST (Mar. 26, 2020), [https://www.washingtonpost.com/world/the-americas/the-united-states-indicts-venezuelas-maduro-on-narco-terrorism-charges/2020/03/26/a5a64122-6f68-11ea-a156-0048b62cdb51\\_story.html](https://www.washingtonpost.com/world/the-americas/the-united-states-indicts-venezuelas-maduro-on-narco-terrorism-charges/2020/03/26/a5a64122-6f68-11ea-a156-0048b62cdb51_story.html) [https://perma.cc/8CZH-Y9N3].

29. It is certainly plausible that U.S. officials are correct when they state that the timing and nature of the charges (namely, narcoterrorism, corruption, and drug trafficking) had more to do with the DOJ’s investigations—specifically, the timing of grand juries weighing the matter in New York and Florida—than any change of position within the administration.



## 2. China: The China Initiative and Case of Meng Wanzhou

The twenty-first century geopolitical dynamic between the United States and China presents another helpful illustration of foreign relations criminalization. Over the last one hundred years, geopolitics evolved from a multipolar world to—in the wake of the Cold War—an era of American global hegemony.<sup>30</sup> Now, China's rise ensures that the twenty-first century will be a largely bipolar world, balanced between the world's two largest economies.<sup>31</sup> The U.S. government thus manages this critical relationship by deploying all six foreign policy modalities, each heavily discussed in popular and academic commentary.<sup>32</sup> In particular, the Trump administration leaned more heavily on trade tariffs to manage the relationship between the United States and China.<sup>33</sup>

However, in recent years, an additional force has emerged in U.S.-China relations: criminal justice. In 2018, under Attorney General Jeff Sessions, the DOJ launched a "China Initiative," designed to "reflect[] the strategic priority of countering Chinese national security threats and reinforce[] the President's overall national security strategy."<sup>34</sup> The head of the DOJ National Security Division spearheads this group, which is also run by various U.S. Attorneys around the country.<sup>35</sup> The multifaceted initiative emphasizes trade secret theft cases and involves proactive information sharing and threat identification with individual U.S. Attorneys offices.<sup>36</sup> Since 2018, there have been eighty-four prosecutions.<sup>37</sup>

To illustrate the function of U.S. ELEP in U.S.-China relations, consider the ongoing criminal case of Meng Wanzhou, the CFO of the Chinese telecommunications technology company Huawei.<sup>38</sup> The press has described the Meng case as an "earthquake moment in US-China ties" and

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Federal criminal investigations, especially large cross-border investigations, take many years to develop; thus, the investigations could have begun during the Obama administration. For example, the charges in this case were "a decade' in the making." *Id.*

30. See *The Chinese Century Is Well Under Way*, ECONOMIST (Oct. 27, 2018), <https://www.economist.com/graphic-detail/2018/10/27/the-chinese-century-is-well-under-way> [<https://perma.cc/S2GG-69FS>].

31. See *id.*

32. See generally HENRY KISSINGER, ON CHINA (2011); THOMAS J. WRIGHT, ALL MEASURES SHORT OF WAR: THE CONTEST FOR THE 21ST CENTURY AND THE FUTURE OF AMERICAN POWER (2017).

33. See Ana Swanson & Alan Rappeport, *Trump Signs China Trade Deal, Putting Economic Conflict on Pause*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/01/15/business/economy/china-trade-deal.html> [<https://perma.cc/H2ZX-YS6M>].

34. See *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP'T OF JUST. (June 14, 2021), <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related> [<https://perma.cc/46KD-J582>].

35. *Id.*

36. *Id.*

37. *Id.*

38. Ian Young, *Canadian Ruling That Could Set Huawei's Meng Wanzhou Free Is Complicated by Coronavirus Pandemic*, S. CHINA MORNING POST (Apr. 27, 2020, 11:09 PM), <https://www.scmp.com/news/china/society/article/3081820/canadian-ruling-could-set-huawei-executive-meng-wanzhou-free> [<https://perma.cc/7P8P-FHDN>].

one sending “Canada’s relationship with Beijing plummeting to new depths.”<sup>39</sup> In particular, the Meng case has added greater fuel to the fire of the yearslong U.S. pressure campaign on Huawei and its 5G network. Huawei’s 5G network is widely seen as the next chapter in mobile technology—one that forecasters expect China to lead and that President Trump aimed to curtail globally during his presidency.<sup>40</sup>

First, the Meng case exemplifies lawful domestic U.S. law enforcement investigation and indictment. On January 28, 2019, the U.S. Attorney for the Eastern District of New York indicted Meng on fraud charges related to violation of U.S. sanctions against Iran.<sup>41</sup> The indictment charged that Meng and other Huawei employees misrepresented Huawei’s relationship with Skycom—an Iranian subsidiary—and falsely claimed that Huawei had only limited operations in Iran.<sup>42</sup> In late 2018, the United States then proceeded

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39. *Id.*

40. *America Does Not Want China to Dominate 5G Mobile Networks*, ECONOMIST (Apr. 8, 2020), <https://www.economist.com/business/2020/04/08/america-does-not-want-china-to-dominate-5g-mobile-networks> [<https://perma.cc/APF7-EVJZ>]. In 2012, Congress issued a report that warned of Huawei’s relationship with the Chinese Communist Party and provided “credible evidence” that the company failed to comply with U.S. laws. See MIKE ROGERS & DUTCH RUPPERSBERGER, INVESTIGATIVE REPORT ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE: A REPORT at 12 (2012), [https://stacks.stanford.edu/file/druid:rm226yb7473/Huawei-ZTE%20Investigative%20Report%20\(FINAL\).pdf](https://stacks.stanford.edu/file/druid:rm226yb7473/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf) [<https://perma.cc/H7BW-G52K>]. Then, in 2018, the Pentagon banned sales of Huawei phones on U.S. military bases. Stu Woo & Gordon Lubold, *Pentagon Orders Stores on Military Bases to Remove Huawei, ZTE Phones*, WALL ST. J. (May 2, 2018, 8:16 AM), <https://www.wsj.com/articles/pentagon-asking-military-bases-to-remove-huawei-zte-phones-1525262076> [<https://perma.cc/4BAD-Z46B>].

41. See Press Release, U.S. Dep’t of Just., Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Financial Fraud (Jan. 28, 2019), <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial> [<https://perma.cc/KKH3-GPUL>]. The United States codified bank fraud, wire fraud, money laundering, and obstruction of justice as crimes in 1984, 1952, 1986, and 1982, respectively. See 18 U.S.C. §§ 1343–1344, 1956, 1512(c). Further, in 1977, the United States passed the International Emergency Economic Powers Act, which empowers the president to address unusual and extraordinary threats to the national security, foreign policy, or economy of the United States. See 50 U.S.C. § 1701(a).

42. See Superseding Indictment at 5–8, *United States v. Huawei Tech. Co.*, No. 18-cr-457 (E.D.N.Y. Jan. 24, 2019). According to the indictment, Huawei represented to both its global banking partners and U.S. officials that it had sold its interests in Skycom in 2007 and that Skycom was merely Huawei’s local Iranian business partner. *Id.* Instead, Huawei allegedly controlled Skycom, and Meng sat on its board of directors. *Id.* The indictment further alleged that Meng and other Huawei representatives attempted to obstruct the U.S. government’s investigation by destroying and concealing evidence and by relocating several U.S.-based Huawei employees with knowledge of the company’s Iranian operations to China. *Id.*

to request that Canada arrest Meng in Vancouver, where she resided at the time.<sup>43</sup> Meng's formal extradition proceedings began in January 2020.<sup>44</sup>

Second, the Meng case sparked condemnation from the Chinese government, leading to retaliatory prosecutorial and foreign policy measures. In response to the indictment, Hua Chunying, a spokeswoman for the Ministry of Foreign Affairs of the People's Republic of China, called the charges "a serious mistake" and "urge[d] the U.S. to immediately correct its mistake."<sup>45</sup> Meanwhile, Canada maintained that its courts "would make decisions based purely on legal considerations and not on politics."<sup>46</sup> China responded by punishing Canada, and not the United States, by arresting two Canadians: Michael Kovrig and Michael Spavor.<sup>47</sup> In December 2018,

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43. See Jacqueline Thomsen & Olivia Beavers, *US Files Criminal Charges Against Chinese Firm Huawei*, HILL (Jan. 28, 2019, 4:46 PM), <https://thehill.com/policy/cybersecurity/427325-us-announces-criminal-charges-against-chinas-huawei> [<https://perma.cc/TUE9-H835>]. At some point prior to Meng's arrest, the United States requested that Canada provisionally arrest Meng. See Press Release, *supra* note 41. In doing so, U.S. officials provided required information—such as a description of the person sought and a statement of the existence of a warrant—under the U.S.-Canada extradition treaty in cases of emergency. See Treaty on Extradition Between the Government of Canada and the Government of the United States of America, Can.-U.S., art. 11, Dec. 3, 1971, 27 U.S.T. 983. In 1971, the United States entered into its first bilateral treaty with Canada; the most recent Canada-U.S. extradition treaty entered into force in 2003. 18 U.S.C. § 3181 at 205; Treaty on Extradition Between the Government of Canada and the Government of the United States of America, *supra*; Second Protocol Amending the Treaty on Extradition, Can.-U.S., Jan. 12, 2001, T.I.A.S. No. 107-11. In December 2018, Canadian law enforcement arrested Meng. See *In a Row Between China and America, Canada Gets Trampled*, ECONOMIST (Dec. 22, 2018), <https://www.economist.com/the-americas/2018/12/22/in-a-row-between-china-and-america-canada-gets-trampled> [<https://perma.cc/Y3EL-JCHD>] [hereinafter *In a Row Between China and America*]. In late January 2019, the United States formally requested Meng's extradition from Canada, within forty-five days, as required by the Canada-U.S. extradition treaty. See Michael Burke, *US Formally Requests Extradition of Huawei Executive from Canada*, HILL (Jan. 29, 2019, 6:55 PM), <https://thehill.com/policy/technology/427564-us-formally-requests-extradition-of-huawei-executive-from-canada> [<https://perma.cc/MC3N-WHMT>]; Treaty on Extradition Between the Government of Canada and the Government of the United States of America, *supra*, art. 9–11 (listing the requirements for a full extradition request, including a description of the person sought, a statement of the facts of the case, the text of the relevant laws, and an arrest warrant). Further, in late January 2019, two separate grand juries in the United States returned indictments against Huawei affiliates, subsidiaries, and executives. Thomsen & Beavers, *supra*.

44. Ian Young, *Huawei's Meng Wanzhou Back in Canadian Court for First Time Since Reports About Talks to Let Her Go Home to China*, S. CHINA MORNING POST (Dec. 8, 2020, 2:34 AM), <https://www.scmp.com/news/china/diplomacy/article/3112949/huaweis-meng-wanzhou-back-canadian-court-first-time-reports> [<https://perma.cc/T3YM-27WH>]. On December 8, 2020, Meng appeared in Canadian court for the first time in months to hear testimony from witnesses involved in her arrest back in 2018. *Id.*

45. Edward Wong et al., *U.S. Will Ask Canada to Extradite Huawei Executive*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/meng-wanzhou-extradition.html> [<https://perma.cc/YS9S-6AGT>].

46. *Id.* Canadian foreign minister Chrystia Freeland "stressed [this] approach after Mr. Trump told Reuters in an interview in December that he could stop the extradition of Ms. Meng if China offered sufficient concessions in continuing negotiations aimed at ending a costly trade war between the United States and China." *Id.*

47. *Id.* Such retaliatory arrest has occurred at least once before. See Dan Levin, *Couple Held in China Are Free, but 'Even Now We Live Under a Cloud,'* N.Y. TIMES (Jan. 1, 2017),

China arrested Kovrig, a diplomat, and Spavor, a Canadian businessman, citing national security concerns, and China is currently detaining the two under harsh living conditions.<sup>48</sup> Then, just days later, a Chinese court sentenced a Canadian, Robert Lloyd Schellenberg, to death in an unrelated drug smuggling case.<sup>49</sup> The sentence came after a one-day retrial on drug smuggling charges.<sup>50</sup> Canadian Prime Minister Justin Trudeau reacted by declaring that China had “arbitrarily appl[ied the] death penalty.”<sup>51</sup> The Ministry of Foreign Affairs of the People’s Republic of China denied that the arrests of Kovrig or Spavor, or Schellenberg’s sentencing, were related to Meng’s arrest.<sup>52</sup> As this process unfolded, so did the mutual public recriminations between Canada and China. Prime Minister Trudeau asked for the resignation of John McCallum, the Canadian ambassador to China, on January 27, 2019, after McCallum expressed his belief that it would be “great for Canada” if the United States dropped its extradition request.<sup>53</sup> Furthermore, in response to Meng Wanzhou’s arrest, China described the charges against Meng as “politically motivated.”<sup>54</sup> The Meng case was complicated by repeated assertions then-President Trump made that “criminal charges against Chinese telecom giant Huawei and [Meng] could be used as a bargaining chip in his administration’s ongoing trade

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<https://www.nytimes.com/2017/01/01/world/canada/canadian-couple-china-detention.html> [https://perma.cc/NSC7-W28P].

48. Javier C. Hernández & Dan Bilefsky, *For Canadians Held in China, Two Years of Isolation and Uncertainty*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2020/12/09/world/asia/china-canada-michael-kovrig-spavor.html> [https://perma.cc/77QS-K35U]; see also *In a Row Between China and America*, supra note 43 (“According to a person familiar with the situation, Mr. Kovrig is being questioned ‘morning, afternoon and evening’ and is not allowed to turn the lights off when he sleeps.”). As will be discussed further in Part II, then-President Trump further politicized the arrest, saying that he “would intervene in the Meng case if . . . ‘it’s good for the country,’” specifically referring to a potential trade deal with China. *Interactive Timeline: The Extradition Case of Huawei CFO Meng Wanzhou*, BUS. IN VANCOUVER (Apr. 13, 2020, 1:19 PM), <https://biv.com/article/2020/04/interactive-timeline-extradition-case-huawei-cfo-meng-wanzhou> [https://perma.cc/5LRB-H4RV].

49. Chris Buckley, *China Sentences a Canadian, Robert Lloyd Schellenberg, to Death*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/world/asia/china-canada-schellenberg-retrial.html> [https://perma.cc/LBF6-VS66].

50. *Id.*

51. *Id.*

52. *Id.* Canada intends to intercede in the case as the decision is pending examination and ratification by China’s highest court. *Id.*

53. *Trudeau Fires Canada’s Ambassador to China amid Huawei Controversy*, BBC NEWS (Jan. 27, 2019), <https://www.bbc.com/news/world-us-canada-47015700> [https://perma.cc/E6KR-BB22]. Prime Minister Trudeau’s comments followed his earlier remarks “that Meng had some ‘strong arguments’ for avoiding extradition to the US and that Meng’s extradition ‘would not be a happy outcome.’” Isobel Asher Hamilton, *Canada Fired Its Chinese Ambassador After His ‘Mind-Boggling’ Remarks on the Arrest of Huawei’s CFO*, BUS. INSIDER (Jan. 28, 2019, 6:27 AM), <https://www.businessinsider.com/justin-trudeau-fired-china-ambassador-over-comments-about-meng-wanzhou-2019-1> [https://perma.cc/7XEZ-7Z7W].

54. See Hamilton, supra note 53.

negotiations with China,”<sup>55</sup> contravening warnings from his staff about the ramifications of politicizing the case.<sup>56</sup> Meanwhile, academics, diplomats, and policymakers have been deeply critical of China’s behavior in these cases. In late January 2019, over one hundred such individuals signed an open letter calling for the release of Kovrig and Spavor.<sup>57</sup> In June 2020, China indicted the two on espionage charges; in August 2021, Spavor was convicted and sentenced to eleven years in prison.<sup>58</sup> Finally, just before publication of this Article, DOJ announced that it had entered into a deferred prosecution with Meng in which she admitted to engaging in the alleged fraudulent misrepresentations. This event sent into effect a rapid chain of de-escalation in September 2021: the United States agreed to withdraw its extradition request from Canada; Meng returned to China; and China returned Spavor and Kovrig to Canada, where they were personally greeted at the airport by Prime Minister Trudeau.<sup>59</sup>

Third, and finally, while the acute multilateral tension of the Meng case has subsided, its aftershocks are now folded into the broader, complex foreign relations between the United States, China, and Canada. Canadian unfavorable perceptions of China are near historic highs, influenced in part by the Meng events and also by COVID-19.<sup>60</sup> Meanwhile, Chinese state media barely covered the release of Spavor and Kovrig, leaving the impression on the Chinese public that Beijing gave nothing away for their

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55. Steven Overly, *Trump Says Huawei Charges on the Table in China Trade Talks*, POLITICO (Feb. 22, 2019, 6:43 PM), <https://www.politico.com/story/2019/02/22/trump-huawei-china-trade-talks-1206627> [<https://perma.cc/69DG-WY5P>]. Meng’s lawyers have recently used such arguments in Canadian court to challenge her extraditability. See Ian Young, *Huawei Executive’s Extradition Is No “Garden-Variety” Case Because of Donald Trump*, Her Lawyer Says, S. CHINA MORNING POST (Oct. 1, 2020, 12:11 AM), <https://www.scmp.com/news/china/society/article/3103763/huawei-executives-extradition-no-garden-variety-case-because> [<https://perma.cc/V8L5-KFKV>].

56. See Horowitz, *supra* note 7.

57. Mr. Xi, *Release These Two Canadian Citizens*, GLOBE & MAIL (Jan. 21, 2019), <https://www.theglobeandmail.com/opinion/article-mr-xi-release-these-two-canadian-citizens/> [<https://perma.cc/2PWL-QBXX>]. The signatories claimed China’s retaliatory detentions would have a chilling effect on the flow of ideas with Chinese academics and officials. *Id.* The letter was signed by two former American ambassadors to Beijing, as well as six former Canadian ambassadors to Beijing, among others. *Id.*

58. Javier C. Hernández & Catherine Porter, *China Indicts 2 Canadians on Spying Charges, Escalating Dispute*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/world/asia/china-canada-kovrig-spavor.html> [<https://perma.cc/3YKL-AVFE>]; Suranjana Tewari, *Michael Spavor: Canadian Jailed for 11 Years in China on Spying Charges*, BBC (Aug. 11, 2021), <https://www.bbc.com/news/world-asia-china-58168587> [<https://perma.cc/4CSG-RA5E>].

59. David E. Sanger et al., *U.S. Agrees to Release Huawei Executive in Case That Strained Ties with China*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/09/24/us/politics/huawei-meng-wanzhou.html> [<https://perma.cc/KDH6-PUQE>]; Aruna Viswanatha et al., *Huawei CFO Meng Wanzhou Reaches Deal with Justice Department*, WALL. ST. J. (Sept. 25, 2021, 7:15 AM), <https://www.wsj.com/articles/justice-department-reaches-deal-with-huawei-executive-11632494001> [<https://perma.cc/G4CY-V5GW>].

60. Laura Silver, *Large Majorities Say China Does Not Respect the Personal Freedoms of Its People*, PEW. RSCH. CTR. (June 30, 2021), <https://www.pewresearch.org/global/2021/06/30/large-majorities-say-china-does-not-respect-the-personal-freedoms-of-its-people/> [<https://perma.cc/5QAA-3D3M>].

release.<sup>61</sup> And in America, the China Initiative is ongoing, thus aggravating bilateral relations. The most recent development in the China Initiative was the arrest of multiple Chinese scholars in the United States. In August 2020, Chinese researcher Juan Tang pled not guilty after being indicted in the Northern District of California on visa fraud charges; the case is one of twenty-five in which Chinese researchers in the United States are alleged to have ties to the Chinese military.<sup>62</sup> In response to such DOJ prosecutions of Chinese military-affiliated scholars, in October 2020, China warned that it may begin detaining U.S. nationals in China.<sup>63</sup> Just a month earlier, the U.S. Department of State (“State Department”) issued a travel advisory recommending that Americans avoid visiting China in part because the Chinese government detains foreign nationals “to gain bargaining leverage over foreign governments.”<sup>64</sup> In January 2021, a joint letter signed by groups, including the Brennan Center for Justice at New York University School of Law, called for the Biden administration to end the China Initiative.<sup>65</sup>

The Meng case and China Initiative present similar questions as those presented by the Maduro case: How did this case come about? What role should criminal justice play in U.S.-China relations and in U.S. foreign relations more generally? To what degree is the White House directing U.S. ELEP and individual foreign affairs prosecutions,<sup>66</sup> and is that problematic? How are prosecutors and legislators fostering this criminalization? This Article will address these questions in turn.

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61. Chris Buckley & Katie Brenner, *To Get Back Arrested Executive, China Uses a Hardball Tactic: Seizing Foreigners*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/09/25/world/asia/meng-wanzhou-china.html> [<https://perma.cc/4R6W-9YNC>].

62. See, e.g., Clare Roth, *Chinese Researcher Who Hid in U.S. Consulate Pleads Not Guilty*, BLOOMBERG (Aug. 10, 2020, 5:36 PM), <https://www.bloomberg.com/news/articles/2020-08-10/chinese-researcher-who-hid-in-u-s-consulate-pleads-not-guilty> [<https://perma.cc/35JT-SXB7>].

63. Kate O’Keeffe & Aruna Viswanatha, *China Warns U.S. It May Detain Americans in Response to Prosecutions of Chinese Scholars*, WALL ST. J. (Oct. 17, 2020, 3:37 PM), <https://www.wsj.com/articles/china-warns-u-s-it-may-detain-americans-in-response-to-prosecutions-of-chinese-scholars-11602960959> [<https://perma.cc/84N6-N6AY>].

64. David Shepardson & Andrea Shalal, *China Warns U.S. It May Detain Americans Over Prosecutions*: WSJ, REUTERS (Oct. 17, 2020, 6:24 PM), <https://www.reuters.com/article/us-usa-china/china-warns-u-s-it-may-detain-americans-over-prosecutions-wsj-idUSKBN2720XL> [<https://perma.cc/4YWN-2SU7>].

65. Elizabeth Redden, *Groups Call on Biden to End DOJ ‘China Initiative,’* INSIDE HIGHER ED (Jan. 6, 2021), <https://www.insidehighered.com/quicktakes/2021/01/06/groups-call-biden-end-doj-china-initiative> [<https://perma.cc/498N-A8XA>].

66. This Article uses “White House” and “president” interchangeably. Both mean the Office of the President itself, as opposed to other parts of the executive branch—especially the DOJ. As will be discussed, there is a well-known debate as to how “unitary” the executive branch is and should be. See *infra* note 199 and accompanying text. For present purposes, as a descriptive matter, this Article distinguishes between the White House and the DOJ regarding their knowledge of criminal cases and decision-making regarding such cases.

*B. The Setting and Stakes of U.S. Extraterritorial Law Enforcement*

The Maduro and Meng cases exemplify the rise of contemporary U.S. ELEP in our foreign relations. Such rise risks the outbreak of a global arrest game.

1. Criminal Justice in Foreign Relations

As I have demonstrated previously, while it is difficult to precisely quantify, foreign affairs prosecutions have risen dramatically in recent decades.<sup>67</sup> In previous eras, for example, criminal investigations across borders were slow due to the snail-like pace of letters rogatory; today, it is hastened by the post-1970s advent of mutual legal assistance and the post-2018 creation of rapid electronic information sharing.<sup>68</sup> Similarly, whereas arrest and extradition of fugitives used to be slower and more time consuming, today it is hastened by the global INTERPOL Red Notice system, which creates a global network of apprehension for individuals who

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67. While no scholar has ever undertaken a systematic historical study of the intersection between criminal justice and foreign policy, the two have long made for uneasy bedfellows. The Framers had relatively little to say about the substance or role of the federal government in criminal justice or foreign relations matters, but prosecution has complicated foreign relations since even before our nation's founding and, certainly, since that time. *Compare* RICHMAN ET AL., *DEFINING FEDERAL CRIMES* 23 (2d ed. 2018) (“While the Bill of Rights gave considerable attention to the procedural safeguards that would apply in federal prosecutions, the range of prosecutions envisioned was thus quite small, and few were brought.”), *with* CURTIS A. BRADLEY ET AL., *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 22 (7th ed. 2020) (noting that “constitutional text” may be “silent about the locus of a foreign relations power”), *and* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67 (1990) (“One cannot read the Constitution without being struck by its astonishing brevity regarding the allocation of foreign affairs authority among the branches.”). For example, the 1770 Boston Massacre trials of British soldiers were a lightning rod for revolutionary sentiment just before the American Revolution, while the *Amistad* trials in the 1840s engulfed the United States, Portugal, Britain, and Spain in contentious debates about the international slave trade. *See generally* DAN ABRAMS & DAVID FISHER, *JOHN ADAMS UNDER FIRE: THE FOUNDING FATHER’S FIGHT FOR JUSTICE IN THE BOSTON MASSACRE MURDER TRIAL* (2020); *Amistad Case*, HIST. (Sept. 23, 2019), <https://www.history.com/topics/abolitionist-movement/amistad-case> [<https://perma.cc/8SN3-ELM2>]. The twentieth century abounded with examples as well, particularly involving espionage cases during World War I, World War II, and the Cold War. These espionage cases included the prosecution of eight Nazi saboteurs in 1942, the Julius and Ethel Rosenberg espionage trial at the height of McCarthyism in 1951, and the Imelda Marcos trial in 1988. *See, e.g., Black Tom 1916 Bombing*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/famous-cases/black-tom-1916-bombing> [<https://perma.cc/VE8R-785C>] (last visited Sept. 17, 2021) (describing how German agents destroyed two million tons of war materials in a bid to prevent U.S. shippers from supplying English forces, thereby provoking the United States to declare war on Germany). Following the Black Tom Bombing of 1916, Congress passed the Espionage Act, which outlawed numerous crimes associated with German agents. *Id.*

68. *See* Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program*, 71 N.Y.U. ANN. SURV. AM. L. 687, 691–703 (2016); *see also* Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251, 268–70 (2020) (reviewing the CLOUD Act legislation and considering its potential for cross-border criminal procedure).

themselves are readily traveling via airplane.<sup>69</sup> This trend is generalizable across many facets of U.S. criminal justice today. Since the 1970s, a growing transnational system of statutes, bilateral and multilateral treaties, and institutional capacity has facilitated cooperation between countries with mutual interest in enforcing their criminal laws.<sup>70</sup> Legislatively, the United States has, with each successive decade, passed more federal statutes proscribing extraterritorial conduct and, recently, extraterritorial amendments to the Federal Rules of Criminal Procedure.<sup>71</sup> And the DOJ has otherwise built out its international and national security infrastructure. In particular, post-9/11, U.S. law enforcement agencies have pushed toward global investigation, including strengthening the presence abroad of federal law enforcement “attachés”—agents embedded in U.S. embassies abroad who are tasked with advancing the law enforcement mandates of their respective agencies.<sup>72</sup> The sum total of such changes means that our foreign relations have become more criminalized; in other words, criminal justice

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69. See *Red Notices*, INTERPOL, <https://www.interpol.int/en/How-we-work/Notices/Red-Notices> [<https://perma.cc/YHN7-36RY>] (last visited Sept. 17, 2021).

70. For example, Kevin Davis has described the OECD Paradigm of regulating transnational bribery as one wherein “every little bit helps.” KEVIN E. DAVIS, *BETWEEN IMPUNITY AND IMPERIALISM* 5 (2019). Critical questions defining regulation regard: (1) the targeted conduct, (2) the complicit actors, (3) the sanctions imposed, and (4) the benefits and burdens of imposing such sanctions. See *id.* at 5–6, 43–44 (describing the patchwork of multilateral treaties and regional enforcement mechanisms that regulate corruption). While the system is not perfect—in particular, with some inevitable risk to defendant interests and foreign policy—it provides accountability for serious crimes by providing a lawful basis for investigation, apprehension, and prosecution of individuals in cases with some nexus to a foreign country. See generally Koh, *supra* note 6, at 352–53.

71. Koh, *supra* note 6, at 359. Such changes often occur after the DOJ has called for them. *Id.*

72. The growth in federal law enforcement abroad began in earnest in the 1970s, in response to issues like the development of the transnational drug trade in the 1960s and 1970s. KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 158–61 (2009). By 1995, about 1600 law enforcement personnel were operating abroad. *Id.* at 161. Though the Federal Bureau of Investigation (FBI) has had an international presence since World War II, the 1990s witnessed a true globalization of the FBI: between 1993 and 2001, the FBI’s offices in U.S. embassies abroad doubled, with offices opening in locations such as Pakistan, Egypt, Israel, Jordan, Turkey, South Korea, and Saudi Arabia. *International Operations*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/international-operations> [<https://perma.cc/5JY4-9QC7>] (last visited Sept. 17, 2021). Currently, the FBI has more than 250 special agents and other staff in over sixty overseas offices. *Id.* The core mission of these attachés includes the advancement of international FBI investigations through established liaison and exchange of information with foreign law enforcement and intelligence and security services. See Thomas V. Fuentes, *Statement Before the Subcommittee on Border, Maritime, and Global Counterterrorism House Homeland Security Committee*, FED. BUREAU OF INVESTIGATION (Oct. 4, 2007), <https://www.fbi.gov/news/testimony/the-fbi2019s-legal-attache-program> [<https://perma.cc/6L8X-YS8X>]; *FBI Information Sharing and Safeguarding Report 2012*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/stats-services/publications/national-information-sharing-strategy-1/fbi-information-sharing-and-safeguarding-report-2012-2> [<https://perma.cc/SC4W-YJR9>] (last visited Sept. 17, 2021). FBI attachés’ duties include coordinating requests for FBI or host country assistance overseas, conducting investigations in coordination with the host government, and sharing investigative leads and information. See Fuentes, *supra*.



presents itself as a modality of U.S. global power in a way previously unavailable, by historical standards. This growth of foreign affairs prosecutions capability has given rise to the prospect of U.S. ELEP as a foreign relations tool. In other words, along with the six foreign policy modalities, the United States can invoke a seventh: its extraterritorial criminal authority.

The criminalization of foreign relations creates a precarious dynamic for contemporary U.S. law enforcement and, thus, a need for greater scholarly attention on how U.S. ELEP functions in our foreign relations. Until now, scholars exploring the various substantive aspects of this phenomenon have considered the fight against corruption through the FCPA,<sup>73</sup> prosecution of foreign corporations,<sup>74</sup> and the prosecution of banks.<sup>75</sup> Others have considered procedural aspects, such as the contours of personal jurisdiction<sup>76</sup> or the applicability of criminal procedural rights.<sup>77</sup> And scholarship on foreign affairs prosecutions has focused largely on the individual case, particularly on defendant rights and on how such cases differ procedurally from traditional U.S. criminal cases.<sup>78</sup>

This Article builds on this scholarship in three ways. First, it more explicitly links U.S. ELEP to domestic criminalization and crime control. Second, it shifts the analysis from an exclusively criminal legal posture to contextualizing U.S. ELEP as an alternative mode of U.S. global power and one that is potentially *supplanting* foreign policy.<sup>79</sup> Previous scholarship on foreign affairs prosecutions has focused primarily on issues *within* the United States, such as judicial deference, only lightly touching on the rich *global* question of whether the United States “might . . . be ‘criminalizing’ foreign policy,” and the function such cases may play in U.S. foreign relations.<sup>80</sup> Finally, this Article ties together various scholarship with a more discrete focus, addressing one substantive offense (e.g., FCPA), one category of

73. See, e.g., DAVIS, *supra* note 70, at 37–38.

74. See, e.g., BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 218–49 (2016) (reviewing prosecution of foreign corporations).

75. See, e.g., PIERRE-HUGUES VERDIER, GLOBAL BANKS ON TRIAL: U.S. PROSECUTIONS AND THE REMAKING OF INTERNATIONAL FINANCE 2 (2020).

76. See, e.g., Farbiarz, *supra* note 12, at 627.

77. See, e.g., Koh, *supra* note 68, at 257.

78. See generally Farbiarz, *supra* note 12; Koh, *supra* note 6.

79. At the international level, some worry about the criminalization of transitional justice and human rights. See, e.g., Engle, *supra* note 15, at 1119–27 (questioning the criminal turn in the human rights movement).

80. See Koh, *supra* note 6, at 391. Previously, I briefly considered the foreign policy implications of foreign affairs prosecutions. See *id.* For a brief discussion of the policy implications of U.S. criminal cases with a foreign nexus, see *id.* at 385–90 (considering domestic criminal cases and asking how the U.S. criminal justice system is becoming more internationalized). This Article, by contrast, takes a global approach, asking how the entire network of U.S. ELEP squares with the U.S. administration of foreign relations, the distinctive and expressive function U.S. ELEP plays in such broader policy, and how politicization and overcriminalization threaten such function.

defendant (e.g., banks), or one aspect of transnational criminal legal process (e.g., jurisdiction).<sup>81</sup>

Cumulatively, then, the broad paradigm of extraterritorial policing and regulation in the postwar era constitutes an “overlooked” aspect of American global power.<sup>82</sup> In particular, commentators have systematically addressed neither the normative question—what role U.S. ELEP should play abroad given the other foreign policy options of U.S. global power—nor the causal question—what forces propel the expansion of U.S. ELEP in U.S. foreign relations? This Article answers both questions in Parts II and III.

## 2. The Global Arrest Game

What are the stakes of foreign relations criminalization? The central specter is the possibility of a global arrest game, in which countries worldwide engage in retaliatory arrest and/or extrajudicial killing. Indeed, countries are often intertwined with their domestic corporations and nationals, leading to various collateral consequences when U.S. criminal justice impacts one or both.<sup>83</sup> The global arrest game is particularly a risk given that the United States is currently at the forefront of extraterritorial investigation and prosecution<sup>84</sup>—it remains to be seen how and whether other countries will develop in this regard.

At the same time, such countries may also engage in one or more of the six foreign policy modalities. Turkey is a helpful example here. While Turkey is party to a bilateral extradition treaty with the United States,<sup>85</sup> the United States turned down requests for the extradition of Fetullah Gülen—the Turkish cleric residing in Pennsylvania who allegedly orchestrated the failed 2016 Turkish coup attempt—on the ground that the Turkish government had failed to present evidence supported by probable cause that Gülen orchestrated the attacks.<sup>86</sup> The Turkish government then explored with Michael Flynn and, likely, Rudolph Giuliani, the possibility of kidnapping Gülen.<sup>87</sup> In addition to these tactics, Turkish authorities have

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81. See, e.g., DAVIS, *supra* note 70; GARRETT, *supra* note 74, at 218–49 (reviewing prosecution of foreign corporations); VERDIER, *supra* note 75.

82. RAUSTIALA, *supra* note 72, at 180.

83. DAVIS, *supra* note 70, at 149–51 (noting the collateral consequences of transnational corporate prosecutions on certain third parties, such as investors).

84. GARRETT, *supra* note 74, at 223, 246 (noting that the United States is one of a few countries with a broad standard for corporate criminal liability).

85. Extradition and Mutual Assistance in Criminal Matters, Turkey-U.S., June 7, 1979, T.I.A.S. No. 9891.

86. See generally Devlin Barrett & Adam Entous, *U.S. Not Persuaded to Extradite Imam Over Turkey Coup*, WALL ST. J. (Aug. 4, 2016, 8:39 PM), <https://www.wsj.com/articles/u-s-not-persuaded-to-extradite-imam-over-turkey-coup-1470357556> [<https://perma.cc/VZ2X-Q3C3>].

87. Julian Borger, *Ex-Trump Aide Flynn Investigated over Plot to Kidnap Turkish Dissident—Report*, GUARDIAN (Nov. 10, 2017, 12:49 PM), <https://www.theguardian.com/us-news/2017/nov/10/michael-flynn-trump-turkish-dissident-cleric-plot> [<https://perma.cc/AXU9-6RTE>] (noting that Flynn reportedly discussed with the Turkish government the possibility of having Gülen kidnapped and sent to Turkey in exchange for fifteen million dollars); Carol D. Leonnig et al., *Giuliani Pressed Trump to Eject Muslim*

resorted to pressuring the United States to extradite Gülen by arresting U.S. citizens in Turkey, such as NASA scientist Serkan Golge, who was detained after an anonymous tip linked him to the 2016 coup attempt.<sup>88</sup> American officials, including President Trump, demanded Turkey release Golge from solitary confinement, given the lack of incriminating evidence against him, and eventually succeeded in securing his return to the United States in June 2020.<sup>89</sup> Such foreign nations' responses are often inevitable: every country makes meaning of the world through a unique historical, linguistic, and cultural frame.<sup>90</sup> Given the multidimensional nature of this interpretive act, a disjunct inevitably emerges when one country prosecutes a foreign national and another nation interprets such action. This represents the critical tension for criminal justice on the global stage: foreign perceptions of a politicized “David and Goliath” case, wherein a lone foreign national is caught in the gears of the omnivorous U.S. criminal justice machine. Foreign actors may decry such action as wholly “political,” flattening U.S. government decision-making from the reality—one that is decentralized, multifaceted, and complex<sup>91</sup>—to a caricature of a monolithic government actor with a singular motivation. Globalization and technology hasten this dynamic. Through both traditional and social media, foreign citizens can easily view, shortly thereafter, the law enforcement action taken in another country, sparking condemnation both from a foreign government and from its citizens.

## II. THE PROMISE: A PRINCIPLED PROSECUTORIAL FUNCTION

This part now explains what role U.S. ELEP *should* play in foreign relations. Consider the following hypothetical. The White House is considering the best option to curb Chinese theft of COVID-19 vaccine research.<sup>92</sup> What is the menu of policy options? According to orthodox foreign relations strategy, one would likely default to the six foreign policy modalities (again: diplomacy, cooperation agreements, trade, economic

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*Cleric from U.S., A Top Priority of Turkish President, Former Officials Say*, WASH. POST (Oct. 15, 2019), [https://www.washingtonpost.com/politics/giuliani-pressed-trump-to-eject-muslim-cleric-from-us-a-top-priority-of-turkish-president-former-officials-say/2019/10/15/bf43d1ec-ef68-11e9-b648-76bcf86eb67e\\_story.html](https://www.washingtonpost.com/politics/giuliani-pressed-trump-to-eject-muslim-cleric-from-us-a-top-priority-of-turkish-president-former-officials-say/2019/10/15/bf43d1ec-ef68-11e9-b648-76bcf86eb67e_story.html) [<https://perma.cc/W7Q3-A8N5>] (“Rudolph W. Giuliani privately urged President Trump in 2017 to extradite a Turkish cleric living in exile in the United States . . .”).

88. Carlotta Gall, *NASA Scientist Jailed in Turkey for 3 Years Recounts His Ordeal*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/09/world/europe/turkey-erdogan-nasa-scientist-golge.html> [<https://perma.cc/BN7Y-MQEE>].

89. *Id.*

90. Steven Arrigg Koh, *Polarization and The Criminal Trial 14* (June 4, 2021) (unpublished manuscript) (on file with author).

91. In the most common scenario, the United States decides—collectively, through the complex interaction between state and federal prosecutorial bodies, grand juries or judicial charging, and domestic arrest or arrest abroad—to arrest and prosecute a foreign national.

92. *See China Hackers Sought to Steal Coronavirus Vaccine Research, Says US*, GUARDIAN (July 21, 2020, 8:36 PM), <https://www.theguardian.com/world/2020/jul/22/china-hackers-sought-to-steal-coronavirus-vaccine-research-says-us> [<https://perma.cc/B7BH-6QPb>] [hereinafter *China Hackers*].

sanctions, military force, and foreign aid).<sup>93</sup> The staffer could advise the president to diplomatically engage Chinese President Xi Jinping; more coercively, wield the power of trade tariffs; or engage in individualized or national economic sanctions. Adjacent to this set of policy options, however, lies the U.S. criminal justice system. Perhaps the best approach is to let Federal Bureau of Investigation (FBI) investigators and DOJ prosecutors open cases against individual Chinese nationals.

Thus, this part will identify the desirable comparative advantage of criminal prosecution in the broader context of foreign policy options. Domestic criminalization literature partially helps us answer this question. Such scholarship clarifies criminal law as one available mode of regulation, albeit one that may “crowd out” sensible forms of policy regulation.<sup>94</sup> Indeed, scholars have criticized overcriminalization of public health policy,<sup>95</sup> immigration policy,<sup>96</sup> poverty,<sup>97</sup> homelessness,<sup>98</sup> and women’s health,<sup>99</sup> not to mention areas that should not be subject to regulation at all, such as race<sup>100</sup>

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93. See Apodaca, *supra* note 3, at 2.

94. See SIMON, *supra* note 1, at 259–66 (discussing the mix of war and cancer metaphors that have been applied to poverty, crime, and terrorism); see also *supra* note 1.

95. See, e.g., Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1350 (2013) (“More than half of US jurisdictions have laws criminalizing knowing exposure to or transmission of HIV, yet little evidence supports these laws’ effectiveness in reducing HIV incidence. These laws may undermine prevention efforts outlined in the US National HIV/AIDS Strategy, in which the United States has invested substantial federal funds.”); J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 435 (1994).

96. See, e.g., Rubén G. Rumbaut et al., *Immigration and Crime and the Criminalization of Immigration*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF MIGRATION STUDIES 472, 476 (Steven J. Gold & Stephanie J. Nawyn eds.); Liam Brennan, *Sessions Is Criminalizing Immigration Violations. That Upends Centuries of History.*, WASH. POST (May 10, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/05/10/sessions-is-criminalizing-immigration-violations-that-upends-centuries-of-history/> [<https://perma.cc/T4PM-QHM9>].

97. See, e.g., Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114, 114 (2020); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 644–46 (2009) (mapping the criminalization of welfare).

98. See, e.g., ALLARD K. LOWENSTEIN INT’L HUM. RTS. CLINIC, “FORCED INTO BREAKING THE LAW”: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 2 (2016), [https://law.yale.edu/sites/default/files/area/center/schell/criminalization\\_of\\_homelessness\\_report\\_for\\_web\\_full\\_report.pdf](https://law.yale.edu/sites/default/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf) [<https://perma.cc/VC6V-DSDC>] (“Laws that restrict behaviors in which people experiencing homelessness must engage to survive, as well as the practices used to enforce these laws, constitute what this report refers to as ‘making homelessness a crime’ or ‘the criminalization of homelessness.’”).

99. See, e.g., William Wan, *Amid New Talk of Criminalizing Abortion, Research Shows the Dangers of Making It Illegal for Women*, WASH. POST (Apr. 5, 2018), <https://www.washingtonpost.com/news/to-your-health/wp/2018/04/05/amid-new-talk-of-criminalizing-abortion-research-shows-dangers-for-women/> [<https://perma.cc/5RKQ-6WCC>] (surveying recent state attempts to criminalize abortion).

100. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 6–12 (2012); Angela Y. Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, in THE HOUSE THAT RACE BUILT 264, 264–65 (Wahneema Lubiano ed., 1997) (discussing the structural character of racism in the U.S. criminal justice system).

and sexual orientation.<sup>101</sup> Relatedly, scholars also bemoan overcriminalization of drug possession, wherein draconian sentencing laws have led to mass incarceration<sup>102</sup> and, recently, triggered reform proposals.<sup>103</sup> But after offering its descriptive insight, criminalization literature less often advances an affirmative case for what *should* be the proper role of criminal justice. U.S. ELEP does not function in a vacuum; it may be used instead of, or alongside, other foreign policy options. This reality forces us to make an affirmative case for what criminal justice does and does not best serve. And it provides a baseline from which to measure the overcriminalization of foreign relations.

The U.S. government best engages U.S. ELEP in instances that engage criminal justice's *distinctiveness* and *expressivism*. Consider the former. First, criminal justice is *individualized*: it targets foreign nationals one at a time, as opposed to, for example, foreign aid.<sup>104</sup> The question is always one of individual criminal responsibility.<sup>105</sup> Second, it is *retrospective*, an ex post intervention in order to promote accountability for past actions, in contrast to negotiations of prospective bilateral agreements. In criminal cases, finders of fact determine what occurred, as opposed to prognosticating

101. See, e.g., Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806–07 (1993) (criticizing a case in which the U.S. Supreme Court upheld the constitutionality of a Georgia “sodomy” law); see also William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 643–46 (same).

102. See Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1388 (2018) (“The U.S. criminal justice system is a colossus, its reach unprecedented by both global and historical measures.”); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962) (“One kind of systematic nonenforcement by the police is produced by criminal statutes which seem deliberately to over-criminalize, in the sense of encompassing conduct not the target of legislative concern, in order to assure that suitable suspects will be prevented from escaping through legal loopholes as the result of the inability of the prosecution to prove acts which bring the defendants within the scope of the prohibited conduct.”).

103. See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://perma.cc/5WP4-2JU5>] (discussing the First Step Act).

104. To be clear, the basket of traits described below are what make U.S. ELEP distinctive. Any individual trait is shared with at least one of the other modalities. For example, the trend toward individualization exists regarding sanctions and drone strikes. See generally Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063 (2020). Furthermore, a decision to prosecute an individual corporate officer may amount to prosecution of the government itself in instances where the company itself is a public-private hybrid. Even when a company is completely private, governments and the general public may perceive that company as having quasi-citizen qualities. Cf. Kelly Couturier, *How Europe Is Going After Apple, Google and Other U.S. Tech Giants*, N.Y. TIMES (Dec. 20, 2016), <https://www.nytimes.com/interactive/2015/04/13/technology/how-europe-is-going-after-us-tech-giants.html> [<https://perma.cc/A7ZG-HD27>]; *Trump Slams EU Over \$5 Billion Fine on Google*, REUTERS (July 19, 2018, 9:30 AM), <https://www.reuters.com/article/us-cu-google-antitrust-trump/trump-slams-eu-over-5-billion-fine-on-google-idUSKBN1K91YC> [<https://perma.cc/PQ8L-SHH9>] (describing criticism by President Trump of the European Union’s fining of Google for antitrust violations).

105. See CHARLES DOYLE, CONG. RSCH. SERV., R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 10–11 (2020); 109. *Rico Charges*, U.S. DEP’T OF JUST. (Jan. 22, 2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-109-rico-charges> [<https://perma.cc/K5NH-QNJW>].

what will occur in the future. Third, it involves a *high degree of process*. In contrast to the six foreign policy modalities like military force, a criminal case must wind through domestic criminal legal process—indictment by a grand jury, review by judges, conviction, appeals, etc.—and sometimes through transnational criminal legal process, such as extradition. Finally, it results in incarceration or execution, meaning that it implicates the *deprivation of liberty*. Such sanction is the ultimate hallmark of criminal justice domestically. When compared to foreign policy, it is more overtly punitive than diplomatic negotiations but less coercive than use of broader military force.

The case of Joaquín Archivaldo Guzmán Loera (“El Chapo”) is particularly illustrative of such distinctiveness. On January 19, 2017, the eve of President Trump’s inauguration, Mexico extradited El Chapo to the United States on charges of operating a continuing criminal enterprise and other drug-related charges.<sup>106</sup> El Chapo, a Mexican national and head of the Sinaloa Cartel, had escaped from Mexican custody twice, leading the Mexican government to decide to extradite him to the United States.<sup>107</sup> In February 2019, after a three-month trial, El Chapo was found guilty on all counts.<sup>108</sup> In sum, the case exemplifies U.S. ELEP at its best: the United States deploying its criminal justice system to prosecute an individual, nonstate actor wanted both in the United States and Mexico, who had engaged in past criminal conduct that both governments could prove beyond a reasonable doubt, thus warranting deprivation of liberty. By engaging in prosecution in this manner, the United States was able to strengthen its foreign relations with Mexico.

In addition to distinctiveness, U.S. ELEP harnesses criminal justice’s *expressivism*. At its best, criminal justice expresses U.S. commitment to accountability for serious crimes, adjudicated before a neutral branch of government in adherence to a broader rule of law.<sup>109</sup> Again, this insight highlights a normative ambiguity: while criminal legal scholars rightly criticize the pathologies of U.S. criminal justice, foreign relations and international criminal legal scholars also correctly view criminal prosecutions as, at times, preferable to more destructive and/or less process-oriented foreign policy alternatives. This was a central argument in the debates around the forum in which to prosecute Khalid Sheikh Mohammed, the architect of the 9/11 attacks. While the U.S. government cared about holding him morally culpable and deterring his and others’ conduct,<sup>110</sup> the critical debate regarding forum included expressive aspects: either in the U.S. District Court for the Southern District of New York

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106. Koh, *supra* note 6, at 350.

107. *Id.* at 350–51.

108. *Id.* at 351.

109. This differentiates U.S. ELEP from domestic criminal prosecutions, which may express a collective judgment of retribution or deterrence.

110. Retribution and deterrence are of course integral to all criminal prosecutions. But the expressiveness of the U.S. prosecution—projecting certain norms and values outside of the U.S. borders—has a greater impact on U.S. foreign policy.

(demonstrating America’s commitment to submitting even our most serious foes to criminal process in Article III federal courts) or in special military commissions in Guantanamo Bay (undermining such commitment).<sup>111</sup> A similar impulse contributed to the U.S.-led establishment of the Nuremberg and Tokyo tribunals. Instead of summarily executing the Nazis or the imperial Japanese, the United States expressed that it, in the words of Supreme Court Justice Robert Jackson, “stay the hand of vengeance” and submit enemy combatants to “the judgment of the law,” constituting “one of the most significant tributes that Power has ever paid to Reason.”<sup>112</sup> Similarly, the subsequent U.S.-backed<sup>113</sup> international criminal tribunals—like the U.N. International Criminal Tribunal for the former Yugoslavia (ICTY) and the U.N. International Criminal Tribunal for Rwanda—were designed to express that individuals, not a whole people, were accountable for atrocity crimes.<sup>114</sup> As Professors David Luban and Antony Duff have noted, international criminal trials are effective in norm projection: trials are not “politics by other means” but instead constitute expressive acts that telegraph to the world that mass atrocities are heinous crimes.<sup>115</sup> U.S. ELEP does the same, for example, by conveying that suspected terrorists prosecuted in U.S. federal court should be held criminally responsible within our systems of criminal law and procedure.<sup>116</sup>

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111. See CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* 87–88 (2015) (detailing the policy debates among the DOJ and the State Department regarding venue in the case).

112. Robert H. Jackson, Chief of Counsel for the U.S., Opening Statement Before the International Military Tribunal (Nov. 21, 1945); Koh, *supra* note 15, at 527.

113. See Koh, *supra* note 15, at 528.

114. Vincenzo Militello, *The Personal Nature of Individual Criminal Responsibility and the ICC Statute*, 5 J. INT’L CRIM. JUST. 941, 944 (2007). For this reason, only 199 defendants were tried at Nuremberg; the ICTY only indicted 161 people. *About the ICTY*, UNITED NATIONS: INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/about> [<https://perma.cc/WG4V-EAAJ>] (last visited Sept. 17, 2021); *Nuremberg Trials*, U.S. HOLOCAUST MEM’L MUSEUM (Jan. 5, 2018), <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-trials> [<https://perma.cc/7M5R-V8UG>]. But again, these numbers belie the expressive potential of these cases, which targeted high-level offenders and sent a strong message of criminal accountability globally.

115. See Antony Duff, *Authority and Responsibility in International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 589, 593 (Samantha Besson & John Tasioulas eds., 2010); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 575–76 (Samantha Besson & John Tasioulas eds., 2010). In this way, international trials take on a different valence than pure domestic criminal law, which emphasizes punishment. Duff, *supra*, at 593; Luban, *supra*, at 575–76.

116. President Trump’s call to Ukrainian President Volodymyr Zelensky occurred on July 25, 2019, also highlights the same effect but inverted: foreign criminal justice may impact domestic U.S. policy. Ayesha Rascoe, *Who Was on the Trump-Ukraine Call?*, NPR (Nov. 7, 2019, 5:01 AM), <https://www.npr.org/2019/11/07/775456663/who-was-on-the-trump-ukraine-call> [<https://perma.cc/A7XE-6AE7>]. In pressuring the Ukrainian president to investigate Hunter Biden, President Trump knew that an international headline reading “Hunter Biden Indicted in Kiev” would express something particularly wrongful about Biden’s actions, regardless of the retribution or deterrence for Biden personally.

To better apprehend the distinctive and expressive nature of U.S. ELEP, this Article now answers the thought experiment described above regarding Chinese theft of COVID-19 vaccine research.<sup>117</sup> Such theory clarifies that prosecution is particularly desirable if isolated individuals perpetrated the theft but is less so if the theft is government-sponsored and systematic. Given that prosecution is individualized, retrospective, and process-heavy and results in incarceration, prosecution is best deployed if certain “lone wolves” are stealing research. These individuals may be identified through federal investigation and, if prosecuted, subjected to U.S. process that properly distinguishes them from the Chinese government or Chinese people more generally. Prosecution also expresses U.S. condemnation of such actions globally, to dissuade other actors from engaging in such conduct. However, if the theft is the product of a broader Chinese governmental enterprise of intellectual property theft—as could be the case for both China and Russia<sup>118</sup>—a few criminal cases are a drop in a much larger geopolitical strategic bucket. The slow, individualized approach in criminal cases is ill-suited to guard against a broader immediate Chinese geopolitical strategy of vaccine-related intellectual property theft. And the expressiveness of such cases is compromised, given it signals the blameworthiness of individuals when the Chinese government is more properly responsible. In other words, if such theft is in fact government-sponsored, then it recasts prosecution—like the July 2020 indictment, in the Eastern District of Washington, of Chinese nationals who hacked U.S. COVID-19 vaccine researchers<sup>119</sup>—as wrongly occupying the lead in foreign relations when other foreign policy tools, such as diplomacy, agreements, or sanctions,<sup>120</sup> are more preferable to curtail the Chinese government’s intervention.

This expressivism recasts commonly held scholarly conceptions of criminal justice as a policy option. Professor George Fletcher once argued that criminal law should serve as a power that the state wields as a last resort, only when less drastic remedies have been exhausted.<sup>121</sup> In a more realist way, Professor Dan Richman has noted that fundamental constitutional rights constitute “expensive appurtenances” that come along with criminal law, meaning that it may constitute a less appealing option than others available to the state; however, various institutional and political factors may combine to make criminal prosecutions the “sweet spot” for both those favoring

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117. *China Hackers*, *supra* note 92.

118. Julian E. Barnes & Michael Venutolo-Mantovani, *Race for Coronavirus Vaccine Pits Spy Against Spy*, N.Y. TIMES (Sept. 5, 2020), <https://www.nytimes.com/2020/09/05/us/politics/coronavirus-vaccine-espionage.html> [<https://perma.cc/C6LB-6EKH>].

119. Indictment at 1–4, *United States v. Xiaoyu*, No. 4:20-CR-6019 (E.D. Wash. July 7, 2020).

120. *Cf.* Julian E. Barnes, *Russia Is Trying to Steal Virus Vaccine Data, Western Nations Say*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/07/16/us/politics/vaccine-hacking-russia.html> [<https://perma.cc/ZV2P-CFB7>]; Barnes, *supra* note 11.

121. George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CALIF. L. REV. 687, 700 (2000).



maximal and those favoring minimal government action.<sup>122</sup> In the domestic context this makes sense, but in the foreign policy context it does not. When alternatives to criminal prosecution include measures like military force, criminal prosecutions function as a *less* coercive tool of foreign policy than they do in domestic policy.

The sum of this distinctiveness and expressivism immediately conjures three insights: one institutional, one normative, and one cautionary. The institutional insight reveals an intra-executive tension. Foreign policy is a bread-and-butter, executive-driven function that falls squarely within the discretion of the U.S. president. Meanwhile, criminal law enforcement turns on an autonomous U.S. DOJ that—while falling under presidential appointees—is supposed to be largely free of political, and particularly presidential, control.<sup>123</sup> In this sense, it is beneficial for a president to publicly affirm that he lacks the power to withdraw indictment in certain cases: the United States is signaling to the world that it is prosecuting not due to overt political antagonism but due to the considered, independent determination of its prosecutors under a statutory framework previously laid out by the political branches, affirming essential principles like notice and legality. This is why, for example, in 2014, President Barack Obama publicly resisted calls to end DOJ investigations into French bank BNP Paribas, despite pressure from then-French President François Hollande to do so.<sup>124</sup> It is also evident in the Meng case, when Prime Minister Trudeau—in contrast to President Trump—stated that he could not interfere with the extradition process playing out in Canadian courts.<sup>125</sup> These are not hollow statements but rather affirm the distinctiveness and expressivism of U.S. criminal justice globally.

The normative insight is that U.S. ELEM may be positive for U.S. foreign relations. At a high level of generality, all national governments have an interest in promoting criminal accountability, and states working together to promote criminal justice ends may be beneficial to both such governments and their nationals.<sup>126</sup> The FIFA case, for example, earned high praise

122. Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 64, 66 (Michael Klarman et al. eds., 2012).

123. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 823 (2017).

124. Karen Freifeld & Yann Le Guernigou, *Obama Deflects French Pressure to Intervene in BNP Dispute*, REUTERS (June 5, 2014, 6:10 AM), <https://www.reuters.com/article/us-bnpparibas-usa/obama-deflects-french-pressure-to-intervene-in-bnp-dispute-idUSKBN0EG15420140605> [<https://perma.cc/K3WU-V62P>].

125. Andy Blatchford, *Trudeau Rejects Calls to End Huawei Exec's Extradition to U.S., Even If It Would Free Jailed Canadians in China*, POLITICO (June 25, 2020, 1:10 PM), <https://www.politico.com/news/2020/06/25/justin-trudeau-huawei-executive-extradition-339851> [<https://perma.cc/X6Z3-W86V>]; see Young, *supra* note 38.

126. This may include two countries working together to prosecute a national of one of the two countries. For example, Mexico wanted El Chapo—a Mexican national—extradited to the United States for prosecution as much as the U.S. government did. See Joshua Partlow & Matt Zapotosky, *Mexican Drug Lord Joaquín "El Chapo" Guzmán Extradited to U.S.*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/world/the\\_americas/mexican-drug-](https://www.washingtonpost.com/world/the_americas/mexican-drug-)

globally from nations around the world, which saw the United States as holding accountable a deeply corrupt world soccer organization.<sup>127</sup> Or, as another example, the United States and China promoted their mutual interest in combating the fentanyl scourge via the arrest of Liu Yong by Drug Enforcement Agency officials in New Orleans, which in turn led to an international investigation into Liu's network of manufacturing and shipping fentanyl to American users.<sup>128</sup> And the joint investigations into the world's largest child pornography website,<sup>129</sup> the Panama Papers,<sup>130</sup> 1Malaysia Development Berhad,<sup>131</sup> and the "Elder Fraud Sweep"<sup>132</sup> were mutually beneficial for all countries involved, promoting accountability for crimes, such as the distribution of child pornography, willful failure to file a Report of Foreign Bank and Financial Accounts (FBAR), conspiracy to violate the FCPA, and money laundering.

The cautionary insight returns us to the aforementioned global arrest game. U.S. ELEP's distinctive qualities characterize its limitations: it targets individuals when broader state-oriented foreign policy engagement is more appropriate, and it introduces autonomous actors—such as grand juries, prosecutors, defense attorneys, and judges—into a policy space better suited

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lord-joaquin-el-chapo-guzman-extradited-to-us/2017/01/19/7e08ee38-de9a-11e6-918c-99ede3c8cafa\_story.html [https://perma.cc/CSW4-VNTM]. In the FCPA context, this has been coined a "coordination rationale" and a "bolstering logic." Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409, 410 (2014) (defining "coordination" as the concept that actions of U.S. law enforcement are influenced by those of foreign regulators); Elizabeth Acorn, *Prosecutorial Imperialism or Pragmatism?* 11 (May 27, 2021) (unpublished manuscript) (on file with author); see also GARRETT, *supra* note 74, at 246–47 ("Prosecutors increasingly collaborate on international work, assisted by treaties cementing norms against corruption and fraud.").

127. See M.V., *How America Is Pursuing FIFA*, ECONOMIST (June 1, 2015), <https://www.economist.com/the-economist-explains/2015/06/01/how-america-is-pursuing-fifa> [https://perma.cc/5P4M-525E]; Ben Wright, *Fifa Is About to Learn a Stern Lesson About the Vigour of American Prosecution*, TELEGRAPH (May 27, 2015, 1:15 PM), <https://www.telegraph.co.uk/sport/football/international/11632230/Fifa-about-to-learn-a-stern-lesson-about-the-vigour-of-American-prosecution.html> [https://perma.cc/4T3J-8M44].

128. Steven Lee Myers, *China Sentences Man to Death for Trafficking Fentanyl to the U.S.*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/world/asia/china-fentanyl-death-penalty.html> [https://perma.cc/T83M-JJG4].

129. See Press Release, U.S. Dep't of Just., South Korean National and Hundreds of Others Charged Worldwide in the Takedown of the Largest Darknet Child Pornography Website, Which Was Funded by Bitcoin (Oct. 16, 2019), <https://www.justice.gov/opa/pr/south-korean-national-and-hundreds-of-others-charged-worldwide-takedown-largest-darknet-child> [https://perma.cc/XNG2-KPK4].

130. See *Panama Papers Q&A: What Is the Scandal About?*, BBC NEWS (Apr. 6, 2016), <https://www.bbc.com/news/world-35954224> [https://perma.cc/UQK3-57YT].

131. See Press Release, U.S. Dep't of Just., United States Reaches Settlement to Recover More Than \$700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund (Oct. 30, 2019), <https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable> [https://perma.cc/TST2-UMSF].

132. See Press Release, U.S. Dep't of Just., Justice Department Coordinates Largest-Ever Nationwide Elder Fraud Sweep (Mar. 7, 2019), <https://www.justice.gov/opa/pr/justice-department-coordinates-largest-ever-nationwide-elder-fraud-sweep-0> [https://perma.cc/QG6G-TUGF].

for wholly political direction. And the expressive quality of criminal justice may be distorted given “tagging,” or the tendency of a given nation to attach variegated interpretive meanings to U.S. criminal prosecutions. Some of the highest-profile cases are replete with such examples of tagging. In the Meng case, this was obvious when Meng Wanzhou’s father and Huawei’s founder, Ren Zhengfei, initially stated his belief that “the legal systems of Canada and the United States are open, just and fair, and [would] reach a just conclusion.”<sup>133</sup> However, in mid-February, Ren reversed course, calling the charges against Meng “politically motivated.”<sup>134</sup> And the case led to *The American Trap*, a book written by a French national who was convicted for an FCPA violation and who sensationally accuses the United States of “war” on foreign companies.<sup>135</sup> Heeding this cautionary note, this Article must thus consider the twin forces propelling expansion of U.S. ELEP. This, in turn, helps to prescribe reforms to assure its principled function in foreign relations.

### III. THE FEAR: EXTRATERRITORIAL EXPANSION IN AN ERA OF MASS INCARCERATION

Having described the reality and promise of U.S. ELEP, this Article now probes the fear: Which forces may push U.S. ELEP past its distinctive and expressive function, thus risking the overcriminalization of foreign relations?

Contemporary scholarship helpfully identifies the twin forces driving contemporary criminalization.<sup>136</sup> First, *criminalization through enforcement*: prosecutors and law enforcement aggressively marshal

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133. Raymond Zhong, *Huawei Founder Slams U.S. Charges as ‘Politically Motivated,’* N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/technology/huawei-ren-zhengfei-bbc.html> [<https://perma.cc/JRB5-8BPW>].

134. *Id.*

135. Adam Taylor & Liu Yang, *An Unlikely Winner in the China-U.S. Trade War? A French Businessman’s Book About His Battle With the DOJ*, WASH. POST (June 8, 2019), <https://www.washingtonpost.com/world/2019/06/07/an-unlikely-winner-china-us-trade-war-french-businessmans-book-about-his-battle-with-doj/> [<https://perma.cc/5SSE-7FZ3>]. See generally FRÉDÉRIC PIERUCCI, *THE AMERICAN TRAP: MY BATTLE TO EXPOSE AMERICA’S SECRET ECONOMIC WAR AGAINST THE REST OF THE WORLD* (2019). This also applies to the U.S. inaction in cross-border cases. For example, the United States has been clear that it will not extradite Fetullah Gülen because the evidence it has provided is not supported by probable cause; nonetheless, both President Erdogan and the Turkish public see this as politically motivated and obstructed by the Central Intelligence Agency. See Tim Arango & Ceylan Yeginsu, *Turks Can Agree on One Thing: U.S. Was Behind Failed Coup*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/world/europe/turkey-coup-erdogan-fethullah-gulen-united-states.html> [<https://perma.cc/B95J-XUYG>]; Barrett & Entous, *supra* note 86.

136. A third—criminalization through adjudication—is explored more robustly in my previous scholarship. See Koh, *supra* note 6, at 365–83. The judicial impulse for perpetrator punishment also drives foreign affairs prosecutions. See *id.* at 369–70. One factor exacerbating this effect may be the nationality of defendants in such cases. See *id.* at 349. As is well known, minority defendants are disproportionately indicted, convicted, and sentenced in U.S. criminal cases. See BUTLER, *supra* note 1, at 70. This is also likely in play in foreign affairs prosecutions: not only are such defendants potentially ethnic minorities, but they are also not even U.S. citizens. See Koh, *supra* note 6, at 349.

existing criminal laws.<sup>137</sup> The prosecutor's office—as opposed to the courtroom or the criminal code—is where criminal law is fully fleshed out, particularly as new prosecutorial tools routinely become accepted parts of the opaque prosecutorial arsenal.<sup>138</sup> Second, *criminalization through legislation*: the political branches ratchet up ever-higher levels of sanctions for undesirable conduct, obviating the need for more thoughtful, considered policymaking.<sup>139</sup> Once such regulation tips into criminal enforcement, it rarely moves back in the other direction.<sup>140</sup>

This part argues that such twin forces contribute to the growth of foreign relations criminalization. And, in particular, it shows a third cause of such expansionism: presidential politicization, under the guise of the president's foreign affairs authority.<sup>141</sup>

### A. Prosecutorial and Legislative Criminalization

Most scholars view prosecutors as a primary driver of overcriminalization.<sup>142</sup> In this conception, our criminal justice system is too vast because of unchecked prosecutorial authority.<sup>143</sup> Virtually no positive law governs how criminal justice must proceed institutionally because the Constitution broadly delegates law enforcement policy to the executive branch.<sup>144</sup> The DOJ is part of the executive branch, and any new presidential

137. See, e.g., Strader, *supra* note 95, at 437–38.

138. Richman, *supra* note 122, at 71–77.

139. RICHMAN ET AL., *supra* note 67, at 22–27.

140. *Id.* Indeed, from the time of the United States's founding to today, there has been an increase from three federal crimes to over 4500, plus 300,000 regulations enforceable by criminal sanctions. *Id.*; see also William N. Clark & Artem M. Joukov, *The Criminalization of America*, 76 ALA. LAW. 225, 225 (2015).

141. See also Koh, *supra* note 6, at 362–72.

142. Cf. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172–73 (2019); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125 (1998) (noting that “prosecutor[s] ha[ve] the unilateral authority to decide what to investigate”).

143. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505–07 (2001) (“The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system’s real lawmakers.”); VERDIER, *supra* note 75, at 23 (noting that scholars identify political accountability, personal ambition, and a preference to advance the public interest as prosecutors’ primary motivations and incentives).

144. RICHMAN ET AL., *supra* note 67, at 22–24. As a formal constitutional and administrative law matter, enforcement is at the core of the president’s duty to “take Care” that laws be faithfully executed, but “remarkably little analysis” exists regarding the president’s role in enforcement. Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1033–34 (2013). By contrast, a great deal of attention has been devoted to presidential regulatory activity. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001) (asserting that presidential control over regulatory activity in executive branch agencies complies with legal standards, fosters administrative responsibility, and advances regulatory effectiveness). In *Morrison v. Olson*, the Supreme Court recognized that federal criminal prosecution is an executive function under Article II of the Constitution. 487 U.S. 654, 696 (1988) (“The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. . . . Notwithstanding the fact that the counsel is to some degree ‘independent’ and free from

administration installs dozens of political appointees, confirmed by the Senate.<sup>145</sup> Otherwise, prosecutors are unrestrained in making investigative and charging decisions; unlike civil law countries, prosecutors make decisions regarding investigation and charging that are unchecked by the judiciary or other authorities.<sup>146</sup> One of many symptoms of such authority is the rate of plea bargains, which is the result of approximately 90 to 95 percent of all federal and state court matters.<sup>147</sup>

Applied to U.S. ELEP, prosecutors may also drive the criminalization of foreign relations in two ways.<sup>148</sup> First, the broad discretion that prosecutors enjoy may lead to a disproportionate impact on people, particularly people of color,<sup>149</sup> lower-income individuals,<sup>150</sup> and foreign nationals.<sup>151</sup> This leads to the “othering” of foreign defendants, which exploits the targeting of foreign defendants in order to promote domestic solidarity.<sup>152</sup> Second, prosecutorial discretion may also drive the expansion of the scope of substantive offenses and their sanctions. Prosecutors freely deploy a mix of charges in a given case, some of which reflect ex ante political branch consideration of foreign policy concerns but some of which do not. As I have shown previously, the judiciary is particularly deferential to prosecutors in foreign affairs prosecutions, construing statutes and rules to give more executive extraterritorial authority.<sup>153</sup> Other scholars have attributed the

executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”). Similarly, in *United States v. Nixon*, the Court did not rule on whether the president has the inherent authority to direct a prosecutor to act, such as withdrawing a subpoena. See 418 U.S. 683, 702 (1974); Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 21 (2018).

145. *About DOJ*, U.S. DEP’T OF JUST., <https://www.justice.gov/about> [<https://perma.cc/23BB-DXF2>] (last visited Sept. 17, 2021); *About Nominations*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> [<https://perma.cc/PDY7-8NW3>] (last visited Sept. 17, 2021).

146. Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1217 (2017).

147. Matt Clarke, *Dramatic Increase in Percentage of Criminal Cases Being Plea Bargained*, PRISON LEGAL NEWS (Jan. 15, 2013), <https://www.prisonlegalnews.org/news/2013/jan/15/dramatic-increase-in-percentage-of-criminal-cases-being-plea-bargained/> [<https://perma.cc/7LGZ-6TWP>]; LINDSEY DEVERS, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/U9AK-Y9KL>].

148. See also VERDIER, *supra* note 75, at viii (“[T]he expanding role of U.S. criminal prosecutors marks a fundamental shift in how international finance is overseen and regulated.”).

149. See *supra* note 100 and accompanying text.

150. See *supra* note 97 and accompanying text.

151. See *supra* note 96 and accompanying text.

152. See generally Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L.J. ONLINE 161, 165 (2021); see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 (1988) (“Racism helps create an illusion of unity through the oppositional force of a symbolic ‘other.’ The establishment of an ‘other’ creates a bond, a burgeoning common identity of all non-stigmatized parties—whose identity and interests are defined in opposition to the other.”).

153. See Koh, *supra* note 6, at 365–72.

expansion of global bank prosecutions,<sup>154</sup> corporate prosecutions,<sup>155</sup> and FCPA cases<sup>156</sup> to prosecutors. The most egregious example is the DOJ's aggressive position on the FCPA, wherein it maintains that it has jurisdiction over any foreign transaction denominated in U.S. dollars.<sup>157</sup>

Criminalization literature also points to legislative criminalization as a second causal factor.<sup>158</sup> Like prosecutorial criminalization, this is due in part to the fact that little positive law governs how criminal law or foreign policy should evolve substantively. While the Constitution rigorously imposes criminal *procedural* rights,<sup>159</sup> it provides little guidance on substantive criminal law, with the exception of certain offenses enumerated in Article I, Section 8 of the Constitution.<sup>160</sup> As a result, Congress is free to use federal criminal law creatively because much of federal criminal law is optional (state criminal law exists alongside it), as long as it is formally tied to some express constitutional grant of lawmaking power.<sup>161</sup> And while much ink has been spilled regarding Congress's commerce power and, relatedly, the growth of federal criminal law more generally, comparatively little has been written on Congress's foreign commerce clause power and general authority to criminalize extraterritorial conduct.<sup>162</sup> Given this, there exists "an inexhaustible supply of criminal law in the United States—a supply largely unrestrained by the Constitution."<sup>163</sup> The political question and justiciability

154. See, e.g., VERDIER, *supra* note 75, at 179.

155. See, e.g., GARRETT, *supra* note 74, at 218–22, 230.

156. See, e.g., DAVIS, *supra* note 70, at 11 (describing prosecutors as taking advantage of broadly worded prohibitions in order to target cases of suspected bribery).

157. FCPA PROFESSOR, *supra* note 6 (describing how several FCPA enforcement actions have alleged jurisdiction because the transactions were denominated in U.S. dollars).

158. See Richman, *supra* note 122, at 66 (“[T]he ‘revolution in criminal procedure’ spearheaded by the Warren Court gave state and federal legislators good reason to devise civil avenues for attacking ‘what might be more plausibly classified as criminal conduct.’” (quoting Carol S. Steiker, *Punishment and Procedure: Punishment Theory and The Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 780 (1997))); Stuntz, *supra* note 143, at 528, 532, 576.

159. See, e.g., U.S. Const. art. III, § 2 (providing that trials for all crimes in the United States, except in the case of impeachment, shall be conducted before a jury); U.S. CONST. amend. IV–VI (including the right against unreasonable searches and seizures, protection from double jeopardy, the right to a speedy and public trial, and the right to trial by an impartial jury).

160. U.S. Const. art. I, § 8. To some degree this is no surprise: the Framers almost certainly expected substantive criminal law to unfold at the state level, with narrow federal exceptions. As Professors—Dan Richman and Bill Stuntz have noted, “our Constitution has a lot to say about how criminal law should be enforced but little about what criminal law should be.” Richman, *supra* note 122, at 68.

161. RICHMAN ET AL., *supra* note 67, at 24–25.

162. *Id.* at 64. Congress may also derive its authority to pass legislation regulating foreign conduct from the Define and Punish Clause, as well as broad authority under the Necessary and Proper Clause to enact legislation to implement treaties. BRADLEY ET AL., *supra* note 67, at 574.

163. Richman, *supra* note 122, at 71. Similarly, as noted above, scholars have hotly debated how the Constitution gives foreign relations power to the president of the United States; the Constitution says nothing about what foreign policy the president should undertake. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001). Compare GERHARD CASPER, *SEPARATING POWER* 68 (1997), and EDWARD S. CORWIN, *THE PRESIDENT 1787–1984*, at 177 (1984) (Randall Bland et

doctrines only underscore and reinforce this on separation-of-powers grounds.<sup>164</sup> Furthermore, each nation has the jurisdiction to prescribe the laws—including those criminalizing extraterritorial conduct—based on the principles of territory, nationality, passive personality, the protective principle, and universality.<sup>165</sup> As such, the positive legal framework is sufficiently capacious to provide the United States with broad leeway to engage in robust extraterritorial criminal law enforcement.

Since the modern codification of the federal criminal code in 1948, at least 140 extraterritorial statutes have been passed into law. The statutes break down into the categories of: (1) special maritime & territorial jurisdiction; (2) special aircraft jurisdiction; (3) treaty-related; and (4) others.<sup>166</sup> Each of these pieces of legislation is supported by a combination of political branches' incentives for criminalization and prosecutorial overreach—including statements from legislators that the United States be “tough on crime” abroad. The Mann Act<sup>167</sup> is the best example here, given it has been progressively amended to encompass human trafficking, child pornography, and extraterritorial sexual misconduct.<sup>168</sup> This is ongoing. As recently as 2015, senators sponsored a bill to allow for state prosecutors (in addition to federal prosecutors) to be able to prosecute such offenses.<sup>169</sup> In a statement on the U.S. Senate floor, Senator Dan Sullivan declared that doing so would “enable the resources and cooperation between state and federal prosecutors to ensure all cases of human trafficking are pursued and victims have justice.”<sup>170</sup> Another general example of this view is Chapter 45 of Title 18 of the U.S. Code—containing the most explicit extraterritorial criminal statutory language—which is entitled “Foreign Relations” and encompasses crimes like possession of property in aid of a foreign government and enlistment in foreign service.<sup>171</sup> Additionally, a brief glance at the

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al. eds., 5th ed. 1984), and Bruce Stein, *Notes on Presidential Foreign Policy Powers: The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 511 (1982), with ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 52–80 (1991), and Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 171 (1988), and Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 206–10 (1998). See also SIMON, *supra* note 1, at 45–46 (discussing how the DOJ has grown in importance as U.S. presidents have become more invested in the crime control function).

164. BRADLEY ET AL., *supra* note 67, at 45–71.

165. See generally RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 402 (AM. L. INST. 2017).

166. See CHARLES DOYLE, CONG. RSCH. SERV., R94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 42–51 (2016).

167. White-Slave Traffic Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended in scattered sections of 8 and 18 U.S.C.).

168. See Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 2 CORNELL J.L. & PUB. POL'Y 99, 99–100, 116–17 (1996).

169. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 114(1), 129 Stat. 227, 241–42; Liz Ruskin, *Sullivan Wins Amendment to Let States Prosecute Mann Act*, ALASKA PUB. MEDIA (Apr. 22, 2015), <https://www.alaskapublic.org/2015/04/22/sen-sullivan-wins-amendment-to-let-states-prosecute-mann-act/> [<https://perma.cc/DB5L-N7QK>].

170. Ruskin, *supra* note 169.

171. See 18 U.S.C. §§ 951–970.

highest-profile cases reveals that foreigners are indicted for fairly standard offenses—mail, bank, and wire fraud; money laundering; and conspiracy.<sup>172</sup> Meng and Huawei, for example, were indicted for specific violations of the International Emergency Economic Powers Act<sup>173</sup> (IEEPA) but also on more commonplace counts of bank fraud and wire fraud.<sup>174</sup>

### B. Presidential Politicization

Criminalization literature does not always focus on the role of the president of the United States, largely because the vast majority of criminal justice occurs at the state or local level.<sup>175</sup> But in the particular context of U.S. ELEP, the president may also drive criminalization through presidential politicization, given that the president may install pliant DOJ leadership and/or personally direct criminal cases under the banner of diplomatic authority. At the extreme, the president may violate a longstanding and valuable norm of DOJ autonomy that, while not codified, is desirable both in affirming prosecutorial process and in achieving better prosecutorial outcomes.<sup>176</sup>

As a matter of positive law, the president has relatively free rein both in foreign affairs and criminal prosecution. No formal law mandates how, when, or in what manner the White House may interfere with the activities of the DOJ and, in turn, the administration of criminal justice.<sup>177</sup> Similarly, the Constitution gives the president relatively free rein institutionally with regard to foreign affairs—though scholars have hotly debated how the

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172. See, e.g., Memorandum & Order Denying Severance, *United States v. Hawit*, No. 15-cr-252 (E.D.N.Y. May 22, 2017) (listing the charges against defendants to include racketeering conspiracy, wire fraud, money laundering conspiracy, and money laundering); Superseding Indictment, *United States v. Halkbank*, No. 15-cr-867 (S.D.N.Y. Oct. 15, 2019) (listing the charges against the defendant to include conspiracy to defraud the United States, bank fraud, conspiracy to commit bank fraud, money laundering, and conspiracy to commit money laundering); Sealed Indictment, *United States v. Owens*, No. 18-cr-693 (S.D.N.Y. Sept. 27, 2018) (listing the charges against the defendants to include: conspiracy to defraud the United States, conspiracy to commit wire fraud, conspiracy to commit tax evasion, wire fraud, money laundering conspiracy, willful failure to file an FBAR, and false statements).

173. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended in scattered sections of 50 U.S.C.).

174. Superseding Indictment, *supra* note 42 (listing the charges against defendants Meng and Huawei to include: conspiracy to commit wire fraud, conspiracy to commit bank fraud, bank fraud, wire fraud, conspiracy to defraud the United States, conspiracy to violate IEEPA, violations of the IEEPA, money laundering conspiracy, and conspiracy to obstruct justice).

175. See, e.g., SIMON, *supra* note 1, at 34–37 (discussing how the U.S. president and other state and local executives drive the expansion of governance through crime).

176. The core norm is that presidents exercise policy control over the DOJ by appointing political DOJ leadership but then refrain from personally involving themselves in specific criminal investigations. SUSAN HENNESSEY & BENJAMIN WITTES, UNMAKING THE PRESIDENCY: DONALD TRUMP'S WAR ON THE WORLD'S MOST POWERFUL OFFICE 178–79 (2020).

177. See Green & Roiphe, *supra* note 144, at 7, 9, 34, 65; HENNESSEY & WITTES, *supra* note 176, at 174 (“The Justice Department has institutional defenses against [presidential interference], but they are notably and perhaps surprisingly weaker and less formal”). This is due to the fact that the Framers did not envision a robust federal government role in law enforcement. RICHMAN ET AL., *supra* note 67, at 27.



Constitution gives foreign relations power to the president.<sup>178</sup> As a result, presidential engagement with U.S. ELEP is a double-edged sword. On one hand, the president may sagely table prosecution in the name of quieting foreign relations turmoil. On the other hand, the president may politicize prosecutorial decision-making.

To illustrate this, consider the following. Would it be proper for President Joe Biden to walk into a trade negotiation with Chinese President Xi Jinping and say, “if you do not stop stealing intellectual property (IP), I will direct the DOJ to aggressively prosecute your nationals for IP theft”? Alternatively, can he say, “if you stop stealing IP, I will order the DOJ to withdraw indictments against many of your nationals”? Or finally, would it be proper for him to say, “if you do not stop stealing IP, I will order the DOJ to find any federal charge possible against any Chinese national and prosecute them all”?

While the President Biden scenario is a hypothetical, President Trump’s actions while in office exposed this perilous reality, evidenced by his relationship with DOJ leadership. President Trump consistently demonstrated disrespect for DOJ autonomy by pressuring the DOJ and/or firing its leadership. During the earliest days of his administration, he fired Acting Attorney General Sally Yates for opposing the litigation of the “Muslim ban,” which she believed was unlawful.<sup>179</sup> He then fired FBI Director James Comey over the Russia investigation, despite the FBI director’s ten-year term and the FBI’s historical freedom from White House interference.<sup>180</sup> In 2018, President Trump fired Attorney General Jeff Sessions, largely due to Sessions’s recusal from the Russia investigation.<sup>181</sup> And in 2020, President Trump fired Geoffrey S. Berman, the United States Attorney for the Southern District of New York, whose office had prosecuted and launched investigations into Trump and his allies.<sup>182</sup> In their stead,

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178. See *supra* note 164 and accompanying text; HENNESSEY & WITTES, *supra* note 176, at 232 (“Foreign policy is particularly vulnerable to the expressive presidency because it is where the presidency is least constrained by and cumbersome regulatory schemes and where bureaucratic processes are most easily waved away.”).

179. David Smith et al., *Sally Yates Fired by Trump After Acting US Attorney General Defied Travel Ban*, GUARDIAN (Jan. 31, 2017, 7:45 AM), <https://www.theguardian.com/us-news/2017/jan/30/justice-department-trump-immigration-acting-attorney-general-sally-yates> [<https://perma.cc/X3LW-4VME>].

180. Ali Vitali & Corky Siemaszko, *Trump Interview with Lester Holt: President Asked Comey If He Was Under Investigation*, NBC NEWS (May 11, 2017, 6:48 PM), <https://www.nbcnews.com/news/us-news/trump-reveals-he-asked-comey-whether-he-was-under-investigation-n757821> [<https://perma.cc/J3P8-HA2B>]; see Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927, 1975, 1984 (2019); HENNESSEY & WITTES, *supra* note 176, at 55 (noting that President Trump’s campaign against the norm of investigative and prosecutorial autonomy began with him summoning former FBI Director James Comey to the White House and requesting a loyalty pledge).

181. HENNESSEY & WITTES, *supra* note 176, at 168; Peter Baker et al., *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html> [<https://perma.cc/X3US-SL4T>].

182. Alan Feuer et al., *Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle*, N.Y. TIMES (Mar. 23, 2021), <https://www.nytimes.com/2020/06/20/>

President Trump appointed DOJ officials with a diminished commitment to DOJ autonomy. Attorney General William Barr is the most salient example, having manifested a disregard for DOJ autonomy when failing to recuse himself from overseeing the Russia investigation and eventually recasting the Mueller report findings in his own public summary; suggesting that political bias existed behind the initiation of the Mueller investigation; and defying a congressional subpoena to explain the origin of the proposed citizenship question on the 2020 Census.<sup>183</sup> Additionally, President Trump's handpicked Deputy Attorney General Jeffrey Rosen—who was the head of the DOJ until the beginning of the Biden administration—lacked any prosecutorial experience whatsoever.<sup>184</sup>

Compromised DOJ leadership highlights a second, worrying aspect of presidential politicization: White House control over the administration of individual cases. While President Trump overtly called for the indictment of President Obama and then-former Vice President Biden,<sup>185</sup> the Roger Stone case best exemplifies this fear. On February 10, 2020, prosecutors submitted a sentencing memorandum recommending that Stone, who was a vocal supporter of President Trump and who had been convicted of seven counts of obstructing and lying to Congress as well as witness tampering, receive a sentence within the U.S. Sentencing Guidelines range of seven to nine years.<sup>186</sup> In the early hours of February 11, 2020, President Trump expressed his disapproval of the recommendation over Twitter, calling it “a horrible and very unfair situation.”<sup>187</sup> Later that day, shortly after a DOJ official told reporters that the DOJ considered the recommendation “extreme and excessive and grossly disproportionate,” the DOJ filed an amended sentencing memorandum, which insisted that its previous recommendation

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nyregion/trump-geoffrey-berman-fired-sdny.html [https://perma.cc/B6GU-5UAB]. Although Attorney General William Barr released a statement that he had formally asked Trump to remove Berman from his position, after Berman refused to resign, Trump claimed that he was not involved in the decision. Jerry Lambe, *Barr and Trump Can't Get Their Stories Straight About Who Wanted U.S. Attorney Geoffrey Berman Fired*, LAW & CRIME (June 20, 2020, 7:14 PM), <https://lawandcrime.com/high-profile/barr-and-trump-cant-get-their-stories-straight-about-who-wanted-u-s-attorney-geoffrey-berman-fired/> [https://perma.cc/FNR3-ZV4B].

183. See Kyle Cheney, *Dems Ratchet Up Pressure on Barr over Mueller Probe*, POLITICO (Apr. 4, 2019, 9:35 AM), <https://www.politico.com/story/2019/04/04/mueller-report-barr-summary-democrats-1255454> [https://perma.cc/L2J8-UMXF]; Nicholas Fandos, *House Holds Barr and Ross in Contempt over Census Dispute*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/us/politics/barr-ross-contempt-vote.html> [https://perma.cc/U2SF-HWXX].

184. Sarah N. Lynch & Andy Sullivan, *U.S. Senate Confirms Jeffrey Rosen as No. 2 Justice Department Official*, REUTERS (May 16, 2019, 2:30 PM), <https://www.reuters.com/article/us-usa-senate-rosen-idUSKCN1SM2CS> [https://perma.cc/SV4A-A2ZQ].

185. David E. Sanger, *Taking Page from Authoritarians, Trump Turns Power of State Against Political Rivals*, N.Y. TIMES (Oct. 10, 2020), <https://www.nytimes.com/2020/10/10/us/politics/trump-barr-pompeo.html> [https://perma.cc/6BD5-CVVN].

186. Lucien Bruggeman & Soo Rin Kim, *A Timeline of the Extraordinary Turn of Events in the Roger Stone Case*, ABC NEWS (Feb. 14, 2020, 10:21 AM), <https://abcnews.go.com/Politics/timeline-extraordinary-turn-events-roger-stone-case/story?id=68921601> [https://perma.cc/X5NB-WBEJ].

187. *Id.*

“would not be appropriate,” instead “defer[ring] to the court as to what specific sentence is appropriate.”<sup>188</sup> That same afternoon, all four prosecutors responsible for the initial recommendation announced their withdrawal from the case and, for one, from the DOJ entirely.<sup>189</sup> Ultimately, President Trump commuted Stone’s sentence, to widespread criticism.<sup>190</sup> On December 23, 2020, President Trump granted clemency to Roger Stone, as well as two other close allies of the president.<sup>191</sup>

Applied to U.S. ELEP, this presidential direction of leadership and case management leads to worrying results. Take the recent case of General Salvador Cienfuegos Zepeda, the former Mexican Secretary of National Defense. On October 15, 2020, U.S. authorities arrested Cienfuegos at Los Angeles International Airport on federal charges of money laundering and conspiracy to manufacture, import, and distribute narcotics in the United States.<sup>192</sup> Then, in November 2020, the DOJ made an about-face, moving to dismiss the indictment because “[t]he United States . . . determined that sensitive and important foreign policy considerations outweigh the government’s interest in pursuing the prosecution of the defendant . . . and therefore require dismissal of the case.”<sup>193</sup> Some public commentary rightly called this an “eyebrow raiser”; U.S. District Judge Carol B. Amon, the presiding judge over the case, felt similarly, calling the acting U.S. Attorney

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188. *Id.*

189. *Id.*

190. Peter Baker, *In Commuting Stone’s Sentence, Trump Goes Where Nixon Would Not*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/us/politics/trump-roger-stone-nixon.html> [<https://perma.cc/2D4G-LLD6>]. In an interview on February 13, 2020, Attorney General Barr remarked that although the president “has never asked me to to [sic] anything in a criminal case,” “I think it’s time to stop the tweeting about Department of Justice criminal cases,” which “make[s] it impossible for me to do my job.” Kevin Johnson, *AG Barr: Trump’s Tweets Make It ‘Impossible for Me To Do My Job’*, USA TODAY (Feb. 13, 2020, 9:20 AM), <https://www.usatoday.com/story/news/politics/2020/02/13/ag-barr-president-trump-never-asked-me-do-anything-stone-case/4753732002/> [<https://perma.cc/6V89-4UX7>]. Stone eventually received a sentence of just over three years. Ashraf Khalil et al., *Trump Ally Roger Stone Sentenced to Over 3 Years in Prison*, ASSOCIATED PRESS (Feb. 20, 2020), <https://apnews.com/3f25972591780e9750d6fc17bcff506b> [<https://perma.cc/MS3C-X6MS>]. Although President Trump denied interfering in the case, he asserted that he “would be able to do it if [he] wanted” and that he has “the absolute right to do it.” Aaron Blake, *Trump Just Made the DOJ’s Roger Stone Intervention Look Even Worse*, WASH. POST (Feb. 12, 2020), <https://www.washingtonpost.com/politics/2020/02/12/trump-implicates-barr-directly-controversial-roger-stone-decision/> [<https://perma.cc/4Z7M-F9A8>].

191. Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone and Charles Kushner*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html> [<https://perma.cc/3R7H-WYLL>].

192. Press Release, U.S. Dep’t of Just., Joint Statement by Attorney General of the United States William P. Barr and Fiscalia General of Mexico Alejandro Gertz Manero (Nov. 17, 2020), <https://www.justice.gov/opa/pr/joint-statement-attorney-general-united-states-william-p-barr-and-fiscal-general-mexico> [<https://perma.cc/E975-GM9H>].

193. Michael S. Schmidt & Natalie Kitroeff, *U.S. to Drop Case Against Mexican Ex-Official to Allow Inquiry in Mexico*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/world/americas/mexico-general-cienfuegos-case.html> [<https://perma.cc/69H7-HBYW>].

to court to personally address why the DOJ had so moved.<sup>194</sup> Some speculated that this change owes to President Trump “paying back” President Andrés Manuel López Obrador of Mexico, who had not recognized then-President-elect Biden’s victory in the 2020 election.<sup>195</sup> While the United States has said it will cooperate with the Mexican prosecution of the case, it is an open question whether the Mexican government even has capacity to resolve such crimes.<sup>196</sup> This case thus demonstrates the threat of presidential politicization: the specter of direct White House case management, delivered by pliant DOJ leadership.<sup>197</sup>

#### IV. THE FUTURE OF CRIMINAL JUSTICE IN FOREIGN RELATIONS

This part proposes reforms to guard against the overcriminalization of foreign relations and fortify U.S. ELEP’s distinctive and expressive function.<sup>198</sup> To do so, this part grapples with two long-standing normative ambiguities. First, with regard to the executive, this part considers the president’s role in criminal prosecutions. Second, with regard to the legislature, this part considers the normative basis for criminalizing human conduct. Ultimately, this part proposes three reforms: presidential distancing, prosecutorial integration, and legislative de-escalation.

##### *A. Executive Reforms: The White House, DOJ, and Line Prosecutor*

Regarding the executive branch, the necessary structural reform requires presidential distancing—thickening the layer between the White House and DOJ and *prosecutorial integration*—thinning out the layer between Main Justice and the United States Attorney’s Offices (USAOs).

As a threshold matter, the president’s role must be clarified in such cases. Scholars have lightly touched on the nature and extent of DOJ autonomy as part of a “classic debate” about the executive branch’s unitary nature.<sup>199</sup> And

194. *Id.*

195. *Id.*

196. *Id.* (“Impunity rates are extraordinarily high for even common crimes—more than 90 percent of homicides go unsolved nationwide.”).

197. While, in this case, presidential involvement led to the *cessation* of criminal prosecution, the broader point is the same: if the president has the ability to directly control federal prosecutions, this ability is another essential factor when considering how foreign relations may be criminalized. As noted above, a president who can easily call for the end of a prosecution may easily call for the initiation of one.

198. *Cf.* PFAFF, *supra* note 4, at 216 (“The ultimate solution . . . is significant culture change: a move away from insisting that the costs of crime consistently trump any costs associated with enforcement, and away from an assumption that all crimes require a punitive response.”).

199. The “classic debate” is between those arguing for a strongly “unitary” executive—in which all executive power be vested in the president—and those who argue that the president may only oversee agencies’ decision-making processes unless otherwise charged with decision-making authority by Congress. *See* Andrias, *supra* note 144 at 1108–09; Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 594–96 (1994); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. CHI. L. REV.* 123, 123–24 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 *DUKE L.J.* 963,

scholars have focused less on presidential enforcement authority, despite its centrality in the president's constitutional duty to "take Care" that the laws be faithfully executed.<sup>200</sup>

While such academic debates play out, the view shared by most in government—including myself as a former federal prosecutor—is that three layers of separation do and should exist between the White House and DOJ.<sup>201</sup> First, in practice, a norm has long existed of DOJ autonomy from direct White House control.<sup>202</sup> On the "front end," a long-standing norm exists against the president ordering a prosecution, reducing risk of politicized prosecutions.<sup>203</sup> On the "back end," a norm prohibits the president from ordering the cessation of an investigation or prosecution, for similar reasons.<sup>204</sup> Yet nowhere are these norms clearly defined.<sup>205</sup> In contrast to other agencies like the Federal Trade Commission and Federal Election Commission (FEC),<sup>206</sup> no legislation makes DOJ independent of the

966 (2001); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579, 581 (1984). These questions arose with particular urgency during Watergate. See Green & Roiphe, *supra* note 144, at 17–22.

200. See, e.g., Andrias, *supra* note 144, at 1033–34 ("[S]cholars have extensively debated presidential involvement in rulemaking, but they have undertaken remarkably little analysis of the President's role in agency enforcement." (footnote omitted)); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 805–06, 846–49 (2015) ("There is now a vigorous debate about where the President's duty under the Take Care Clause ends and legitimate enforcement discretion given limited resources begins."); see also U.S. CONST. art. II, § 3; Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1292–93 (2021); Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 845–55 (2019).

201. See Green & Roiphe, *supra* note 144, at 22 ("Attorney General nominees since Watergate have endorsed the principle of prosecutorial independence from the President, and Senators have regarded a commitment to independence from the President as an essential qualification for the position. DOJ officials assume that prosecutorial decisions should not be influenced by partisan political considerations that may motivate the White House. Internal DOJ policy likewise presupposes that prosecutors should be independent." (footnotes omitted)).

202. Obama, *supra* note 123, at 823 ("[W]ithin the executive branch, the President's direct influence is subject to constraints designed to safeguard the fair enforcement of the law."). Attorney General nominees since Watergate have also endorsed this autonomy principle. Green & Roiphe, *supra* note 144, at 19.

203. Green & Roiphe, *supra* note 144, at 16 ("But, presidents do not, as a general matter, tell the FBI when to initiate or terminate particular investigations. Nor do they direct federal prosecutors whether charges against an individual should be presented to the grand jury or how pending charges should be prosecuted."); Obama, *supra* note 123, at 823 ("For good reason, particular criminal matters are not directed by the President personally but are handled by career prosecutors and law enforcement officials who are dedicated to serving the public and promoting public safety. The President does not and should not decide who or what to investigate or prosecute or when an investigation or prosecution should happen." (footnote omitted)).

204. See, e.g., *infra* note 216 and accompanying text.

205. See HENNESSEY & WITTES, *supra* note 176, at 180–85 (describing various historical U.S. presidential interventions in law enforcement policy and, in some instances, criminal cases).

206. Federal Trade Commission Act, 15 U.S.C. §§ 41–58; Federal Election Campaign Act Amendments, Pub. L. No. 93-443, 88 Stat. 1263 (1974); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 770–71 (2013) (surveying the enabling statutes of independent and executive agencies to

president,<sup>207</sup> leaving it to the DOJ and White House to delineate this line.<sup>208</sup> Likewise, no federal statute ever explicitly authorized the president to make decisions in federal criminal matters; it is Congress's role to determine the scope of the president's authority over criminal justice, and Congress has acquiesced in the norm of DOJ autonomy.<sup>209</sup> A second layer of prosecutorial autonomy insulates USAOs from Main Justice oversight in Washington, D.C. As is now relatively well settled as an institutional matter,<sup>210</sup> each of

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demonstrate that there is no singular characteristic common to all independent agencies). Of course, scholars have noted that no one structural component necessarily unites all independent agencies. *See id.* at 770–71. Having said that, independent agencies do vary in their degree of autonomy from presidential control. *See id.*

207. Green & Roiphe, *supra* note 144, at 37 (“[L]egislation does not explicitly make the Attorney General and the DOJ independent of the President, as it has done with some other executive agencies and officials.”).

208. *See, e.g.*, Memorandum from the Attorney General for Heads of Department Components, All United States Attorneys 1 (May 11, 2009), [https://www.justice.gov/oip/foia-library/communications\\_with\\_the\\_white\\_house\\_and\\_congress\\_2009.pdf/download](https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download) [https://perma.cc/JN9L-AUPZ] (regulating the manner and content of communications between the DOJ and the White House).

209. Green & Roiphe, *supra* note 144, at 4. In addition, scholars argue that DOJ autonomy follows from prosecutors' ethical obligations as lawyers, which would be compromised if the president directed the DOJ to pursue matters based on the president's political motivations. *Id.* at 64. Further, they maintain that presidential control over prosecutorial decision-making may lead to grave separation-of-powers concerns. Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817, 1819 (2019). According to Professors Green and Roiphe, because courts depend on prosecutors to provide them with reliable facts, an absence of DOJ autonomy implies an absence of judicial independence. *Id.* at 1842. Of course, the White House does have some limited control over prosecutorial priorities when a new administration installs its political appointees. For example, when Loretta Lynch became Attorney General in 2015, she issued a memo committing the DOJ to prosecuting individuals for certain corporate misconduct related to the financial crisis. *New Justice Dept. Guidelines*, N.Y. TIMES (Sep. 9, 2015), <https://www.nytimes.com/interactive/2015/09/09/us/politics/document-justice-dept-memo-on-corporate-wrongdoing.html>

[https://perma.cc/9TSE-V8NY]. Note that it is unclear if this was solely her initiative, the White House's priority, or a mix of both. This represented a break from Attorney General Holder and possibly represented an expression of President Obama's priorities later in his administration. As another example, the DOJ Civil Rights Division under the Bush administration was less active in enforcement of employment or voting rights, triggering criticism regarding politicization and lack of transparency. Andrias, *supra* note 144, at 1063. The president may always fire DOJ political appointees and name new ones if he perceives that the department is investigating and prosecuting in an undesirable manner. *See* Green & Roiphe, *supra* note 144, at 4–5. And many of these cases are unfolding “in the shadow of” political control. Political appointees know that they may be fired at any time due to their actions. Alberto Gonzalez, Opinion, *US Attorneys Must Serve at the Pleasure of the President*, HILL (Mar. 13, 2017, 6:20 PM), <https://thehill.com/blogs/pundits-blog/the-administration/323769-it-is-the-duty-of-us-attorneys-to-serve-at-the-pleasure> [https://perma.cc/X7PB-N7ST] (discussing the president's “virtually unlimited authority and discretion” to fire political appointees). At the same time, they also know that their positions are “stickier” than others in a presidential administration, due to the norm of DOJ autonomy. *See id.*

210. *See* Green & Roiphe, *supra* note 144, at 37 (“If the division of authority between the Attorney General and subordinate DOJ lawyers is relatively settled, particularly to the satisfaction of the DOJ and its lawyers, the division of authority between the President and the Attorney General with regard to criminal prosecutions is not.”).

the ninety-three USAOs constitutes a largely autonomous nerve center of control for its given territorial jurisdiction. In the vast majority of cases, USAOs make independent decisions regarding which cases to investigate and prosecute, without any clearance by Main Justice. Such localized discretion has been made possible, in part, by the steady growth of the federal caseload.<sup>211</sup> Moreover, the transformation of federal prosecution into a largely administrative system in the latter part of the twentieth century, facilitated by the rise of plea negotiations and the concomitant decline of judicial oversight, has steadily expanded the role and authority of USAOs.<sup>212</sup> Third and finally, individual line prosecutors—the front-line federal prosecutors at the DOJ—maintain a large amount of discretion in individual cases under their charge. Individual prosecutors are, for example, making a large number of decisions regarding their dockets, including investigations, plea agreements, and motion practice. Most often, prosecutors work under the direction of a criminal division chief or deputy chief and also alongside a variety of other teams. In general, Main Justice commits only few resources to local USAO prosecutions, focusing instead on broad policy initiatives and cases presenting “visible or controversial political questions.”<sup>213</sup>

This descriptive, three-layered picture undermines a tempting but incorrect suspicion about DOJ prosecution: that it is politically directed “all the way down.” In fact, prosecutorial decision-making falls into an ambiguous zone that, while not immune from political control, is somewhat insulated from it. This is desirable. Criminal prosecution must be largely independent to avoid outright politicization, and yet it must be democratically responsive to the broader electorate to ensure a just set of prosecutorial priorities. Applied to U.S. ELEP, this means that U.S. criminal cases with foreign policy *ramifications* are not always U.S. criminal cases with foreign policy *motivations* and, more often than is recognized, the White House is in the dark regarding extraterritorial criminal law enforcement.

The Meng case is a good example. Does the Canadian arrest of a high-level Chinese business executive constitute an explicit White House

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211. See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM L. 369, 406 (2009).

212. See *id.* Once again, exceptions exist to this rule. Main Justice reserves certain subject matter expertise on issues such as civil rights prosecutions, narcotics and dangerous drugs, and computer crimes. See *Computer Crime and Intellectual Property Section*, DEP’T OF JUST., <https://www.justice.gov/criminal-ccips> [<https://perma.cc/WF63-Q8N7>] (last visited Sept. 17, 2021); *Criminal Section*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/criminal-section> [<https://perma.cc/5ZZL-WSGV>] (last visited Sept. 17, 2021); *Narcotics and Dangerous Drugs Section (NDDS)*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal/ndds> [<https://perma.cc/H3VQ-D2W6>] (last visited Sept. 17, 2021). The Office of Enforcement Operations must clear certain law enforcement measures, such as electronic and video surveillance, witness protection, witness immunity requests, and attorney subpoenas. *Office of Enforcement Operations (OEO)*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-oeo> [<https://perma.cc/8KY2-J7SH>] (last visited Sept. 17, 2021); see also U.S. Dep’t of Just., Just. Manual §§ 9-7.110, 9-2.112 (2020). And U.S. Attorneys—political appointees—govern the administration of cases within a given USAO. Beale, *supra* note 211, at 406.

213. Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 201 (2008).

attempt to leverage the U.S. criminal justice system in order to gain an advantage in bilateral trade negotiations? It is a tempting theory, given contemporary U.S. policy toward China. The Trump administration perceived China as a geopolitical threat and has engaged in a trade war as retribution for, among other things, its alleged theft of intellectual property.<sup>214</sup> But both President Trump and Prime Minister Trudeau stated that they had no advance knowledge of the arrest, and this is likely true: under standard norms of prosecutorial autonomy and standard procedure in federal extradition cases,<sup>215</sup> prosecutors are under no obligation to and do not inform the chief executive of imminent arrests.<sup>216</sup>

This laudable, triple-layered DOJ autonomy clarifies why presidential politicization is so problematic: it unsettles the mixed political-apolitical nature of prosecutorial decision-making. Professors Bruce A. Green and Rebecca Roiphe have advanced a “hypothetical foreign-policy scenario” in which the president directs DOJ attorneys to make decisions in a criminal case.<sup>217</sup> Unfortunately, this scenario is no longer so hypothetical. While Canada maintained that Meng’s arrest was apolitical, Trump further politicized the arrest, saying that “he would intervene if that would help secure a good trade deal with China,”<sup>218</sup> against the advice of his top advisers.<sup>219</sup>

### 1. Presidential Distancing

Presidential politicization accommodates the distinctiveness of U.S. ELEP but undermines its expressive potential. On one hand, presidential control of DOJ prosecutions means, in theory, a better opportunity for a president to deploy criminal prosecution judiciously, balancing it against other foreign policy tools and priorities. At the same time, however, the unfortunate reality is that, under the direct political control of the White House, the expressivism of criminal prosecutions is severely compromised.

This compromised expressivism deleteriously affects other U.S. law enforcement activity and triggers the burgeoning global arrest game. For

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214. *A Quick Guide to the US-China Trade War*, BBC NEWS (Jan. 16, 2020), <https://www.bbc.com/news/business-45899310> [<https://perma.cc/A5M5-X8NX>].

215. As will be seen *infra*, such traditional norms were increasingly imperiled during the Trump administration.

216. Memorandum, *supra* note 208. And though President Trump initially claimed that he might intervene to release Meng, his administration later walked back this claim. Vivian Salama & Sadie Gurman, *Trump Aides Warn Him Against Intervening in Huawei Case*, WALL ST. J. (Dec. 3, 2018, 10:32 AM), <https://www.wsj.com/articles/trump-aides-warn-him-against-intervening-in-huawei-case-11544710475> [<https://perma.cc/QDC2-JC27>]. Indeed, from Trump’s perspective, the case arose at an inopportune diplomatic time, just after a seeming détente between the United States and China in their trade dispute. *See, e.g.*, Steven Arrigg Koh, *The Huawei Arrest: How It Likely Happened and What Comes Next*, JUST SEC. (Dec. 10, 2018), <https://www.justsecurity.org/61799/huawei-arrest-happened/> [<https://perma.cc/6VZH-X3FD>].

217. Green & Roiphe, *supra* note 209, at 1834.

218. *See In A Row Between China and America*, *supra* note 43.

219. Salama & Gurman, *supra* note 216.



example, in September 2019, a Spanish court took the highly unusual step of denying a U.S. request for the extradition of Hugo Carvajal, former intelligence chief of Venezuela.<sup>220</sup> The Spanish court ruled that the charges against Carvajal were too “abstract” and, worryingly, tagged the case as “within the American political strategy toward Venezuela.”<sup>221</sup> The Spanish appellate division later reversed—ruling in favor of the Spanish government and the U.S. request for extradition.<sup>222</sup> However, by the time the court rendered its decision, Carvajal had been released from detention.<sup>223</sup> He has since gone missing, though he is allegedly in talks with the United States about surrendering since being indicted alongside President Maduro.<sup>224</sup>

Thus, *presidential distancing* is required so that the president may not directly order or otherwise interfere with foreign affairs prosecutions. The most permanent means of assuring this is the most intuitive: the political branches could pass legislation to insulate the DOJ in its prosecutorial mission. A classic proposal, at times echoed by other scholars and mooted especially in the wake of Watergate, is that the DOJ be converted into an independent agency, wherein the Attorney General may act highly autonomously and only be removed “for cause.”<sup>225</sup> In February 2020, Professor Cass Sunstein publicly revived this proposal in the mainstream press.<sup>226</sup> However, this proposal has three critical flaws. First and most importantly, this legislative option is likely foreclosed due to the Supreme Court’s 2020 decision in *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>227</sup> which held it unconstitutional for an independent agency to have one single director who the president may only remove “for cause.”<sup>228</sup>

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220. Raphael Minder, *Spanish Court Calls U.S. Extradition Request Politically Motivated*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/world/americas/spain-venezuela-extradition.html> [<https://perma.cc/T5PU-3C8F>].

221. *Id.*

222. See Raphael Minder, *Venezuela’s Ex-Spy Chief, Wanted in U.S., Is Missing in Spain*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/13/world/europe/venezuela-spain-hugo-carvajal.html> [<https://perma.cc/3CXX-WLCB>].

223. *See id.*

224. *See id.*; see also *Ex-Venezuelan Spy Chief Hugo Carvajal May Surrender to U.S.*, JAPAN TIMES (Mar. 29, 2020), <https://www.japantimes.co.jp/news/2020/03/29/world/crime-legal-world/venezuela-spy-chief-hugo-carvajal-surrender-us/> [<https://perma.cc/KF73-EZT5>].

225. *Ervin Says Justice Agency Should Be Independent Unit*, N.Y. TIMES (Dec. 13, 1973), <https://www.nytimes.com/1973/12/13/archives/erwin-says-justice-agency-should-be-independent-unit.html> [<https://perma.cc/N2C4-JRFJ>]. Such division is common at the state level, where many state attorneys general are independent of the governor. See William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453–61 (2006). Forty-eight states have some variation on this structure. *Id.*

226. See Cass R. Sunstein, *Opinion, Imagine That Donald Trump Has Almost No Control over Justice*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/opinion/sunday/trump-barr-justice-department.html> [<https://perma.cc/H6NS-DJPC>].

227. 140 S. Ct. 2183 (2020).

228. *Id.* at 2197–99. Previously, the Court had recognized that executive power may be severed from presidential control, and Professor Sunstein’s proposal was written based on that assumption. See *Morrison v. Olson*, 487 U.S. 654, 665–68 (1988) (declining to hold that a president possesses complete executive power, including federal prosecutorial power); Green & Roiphe, *supra* note 144, at 30.

Second—assuming a narrow reading of *Seila Law*—DOJ leadership could be converted from a lone attorney general into a group of commissioners, similar to the way in which the FEC is structured.<sup>229</sup> While such a change would arguably pass constitutional muster, it represents such a dramatic institutional reform that it necessitates tremendous additional scholarly analysis before implementation.<sup>230</sup> Third, DOJ-related legislation is politically unlikely due to contemporary political gridlock in Washington, D.C.<sup>231</sup>

Given these unlikely statutory prospects, this section now turns to more achievable intra-executive reforms. The Biden administration must publicly commit itself to greater transparency regarding its norms of DOJ autonomy, as then-Attorney General Eric Holder did in his 2009 memorandum on White House communication and as the Bush administration ultimately did in a 2007 memorandum in the wake of the firing of Attorney General Alberto Gonzalez—but as the Trump administration failed to do.<sup>232</sup> Such an explicit policy affirms that such norms are, and have always been, integral to

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229. By contrast, a broad reading of *Seila Law* would prohibit independent agencies altogether, reaffirming a unitary executive from a constitutional perspective. See Leah Litman, *The Supreme Court Chips Away at the CFPB's Independence*, SLATE (June 29, 2020, 12:01 PM), <https://slate.com/news-and-politics/2020/06/supreme-court-seila-law-v-cfpb.html> [<https://perma.cc/YJY5-NUT4>]. This is an open question, going forward, for the Supreme Court.

230. Both history and institutional design suggest that such a change would be dramatic. The attorney general role was established by the Judiciary Act of 1789—the same early, landmark legislation that established the U.S. federal judiciary—and has led the DOJ since 1870. *About the Office*, U.S. DEP'T OF JUST. (Mar. 12, 2021), <https://www.justice.gov/ag/about-office> [<https://perma.cc/M8CR-6DLM>]. While such history by no means prohibits meaningful institutional reform, it begs numerous questions: How would the commissioners be selected? What would their incentives be, and how would such incentives differ from that of a singular attorney general?

231. It is possible that both parties will find persuasive the argument for greater DOJ independence. The Republican Party is currently concerned with allegations that President Obama directed the FBI to “spy” on the Trump campaign in 2016 using wiretaps and informants. See Arit John, *From Birtherism to ‘Treason’: Trump’s False Allegations Against Obama*, L.A. TIMES (June 23, 2020, 10:37 AM), <https://www.latimes.com/politics/story/2020-06-23/trump-obamagate-birtherism-false-allegations> [<https://perma.cc/QN9L-MM6F>]. Meanwhile, the Democrats, for example, were concerned with President Trump’s involvement in the Roger Stone and Michael Flynn cases discussed earlier. Jordain Carney, *Democrats Ask for Investigation of DOJ Decisions to Drop Flynn Case*, HILL (May 8, 2020, 2:04 PM), <https://thehill.com/homenews/senate/496831-democrats-ask-for-investigation-of-doj-decision-to-drop-flynn-case> [<https://perma.cc/5UGP-4LGS>]; see also *supra* Parts I.B.1, III.B (analyzing the Michael Flynn and Roger Stone cases, respectively).

232. As noted above, President Obama largely upheld the norm, while the Bush administration controversy regarding the firing of seven U.S. Attorneys led to recognition that a president acts illegitimately when he fires such appointees “midstream” during a presidential term. See Memorandum, *supra* note 208, at 1; Memorandum from the Attorney General for Heads of Department Components and United States Attorneys 1 (Dec. 19, 2007), <https://www.justice.gov/sites/default/files/ag/legacy/2008/04/15/ag-121907.pdf> [<https://perma.cc/CGJ9-R6NZ>]. The only guidance from the Trump administration regarding White House-DOJ contact was a memorandum to White House staff in 2017. See Memorandum from Donald F. McGahn II, Counsel to the President, to All White House Staff (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000> [<https://perma.cc/N5CM-VFX9>].

presidential and executive structure.<sup>233</sup> This public standard not only fortifies autonomy between the White House and DOJ but also bolsters the integrity of individual USAOs and AUSAs. The ethical rules and norms regulating prosecutors' professional conduct, such as disinterestedness, are vital to preserving their function before the judiciary; presidential involvement in criminal prosecutions impedes such function.<sup>234</sup> Importantly, when prosecutors are pressured to violate certain norms, they may withdraw from the cases or resign.<sup>235</sup>

This policy also finds the sweet spot wherein the president does not control criminal cases "all the way down" but is still apprised of forthcoming criminal cases. The president can still install political appointees to lead the DOJ. Even the most independent agencies—think the Federal Reserve or National Labor Relations Board—rightly have a political nexus to installation of leadership that share presidential priorities.<sup>236</sup> But at the same time, political appointees' general guidance regarding overall prosecutorial priorities does not mean presidential or even political appointee control of granular case management. Such appointees could still alert the White House about imminent arrests. As noted above, it is very likely that both President Trump and Prime Minister Trudeau were unaware of Meng's arrest in Canada. While this is appropriate, it is also similarly appropriate for the DOJ to alert the president about certain law enforcement activities.<sup>237</sup>

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233. See generally Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

234. Green & Roiphe, *supra* note 209, at 1845.

235. A recent example involves Aaron Zelinsky, a prosecutor in the Roger Stone case. Zelinsky withdrew from the case and then testified before the House Judiciary Committee on political interference. See Felicia Sonmez et al., *Prosecutor Testifies on Alleged Politicization Inside Barr's Justice Department*, WASH. POST (June 24, 2020), <https://www.washingtonpost.com/national-security/2020/06/24/barr-roger-stone-mueller-doj/> [<https://perma.cc/BVE3-Q9VS>].

236. For example, the Obama administration's shift to deprioritizing the prosecution of nonviolent drug offenders was widely praised as an appropriate method to counteract mass incarceration. Obama, *supra* note 123, at 823–25; Andrias, *supra* note 144, at 1066–67. But see David Cole, *Why Hasn't Obama's Clemency Initiative Helped More Nonviolent Drug Offenders?*, NEW YORKER (July 4, 2016), <https://www.newyorker.com/news/news-desk/why-hasnt-obamas-clemency-initiative-helped-more-nonviolent-drug-offenders> [<https://perma.cc/8REP-ATDL>].

237. See Memorandum, *supra* note 208, at 1 (stating that limited disclosure to the White House is appropriate in circumstances involving national security matters and criminal or civil investigations or cases that implicate the president's duties). Furthermore, the State Department's involvement is "baked into" the extradition statutory regime itself: the Secretary of State is the one who must ultimately sign off on the extradition package and send it through diplomatic channels to another country. See 18 U.S.C. § 3184. Again, in the context of Meng's case, this means that diplomats are ultimately aware of law enforcement activity abroad. Time will tell whether this process constitutes a "back door" to White House control of foreign law enforcement activity abroad. Nonetheless, the State Department should not be completely removed from foreign law enforcement activity. Extradition has a hybrid nature and thus necessitates both DOJ and State Department involvement in order to safeguard both law enforcement diplomatic priorities.

## 2. Prosecutorial Integration

A more autonomous DOJ still presents the problem of prosecutorial overcriminalization. In other words, the fact that the United States has a stronger, brighter *institutional* line between criminal justice and foreign policy does not immunize against the pathologies of too much substantive criminal law and related enforcement. Greater insulation of the DOJ upholds prosecutorial integrity, and thus expressivism, abroad but simultaneously opens the door to the aforementioned clumsy prosecutorial decision-making that may undermine distinctiveness. The necessary structural reform is *prosecutorial integration*—i.e., thinning out the layer between Main Justice and the USAOs. Until now, the mainstream prosecutorial attitude has been, in a sense: “we’re going to enforce the law and if it creates foreign policy issues, then so be it.” DOJ must attend to this collective institutional perception.

At the second layer—the space between Main Justice in Washington, D.C., and the USAOs—prosecutorial integration requires that Main Justice be clear on foreign affairs prosecutions. Main Justice is part of the National Security Council, is engaged on a daily basis with the Legal Adviser’s Office at the State Department (specifically the Office of Law Enforcement and Security), and is comparatively more hardwired into the executive-branch-wide coordination around international affairs.<sup>238</sup> Such procedures would not be as much of a power grab as they may seem. Routinely, various law enforcement techniques and prosecutorial decisions are made by Main Justice due to their sensitive nature. For example, the Office of Enforcement Operations must clear wiretaps, video surveillance, and other forms of federal electronic surveillance.<sup>239</sup> Specifically, every one of the ninety-three offices should develop a more robust expertise around international issues, given that, as the Obama administration’s DOJ Criminal Division head once stated, international and cyber offenses constitute the two most critical emerging fronts in federal criminal justice today.<sup>240</sup> To do so, it should bolster the knowledge and function of the national and international security coordinators in each USAO. Such coordinators—AUSAs trained by the Office of International Affairs in the Criminal Division of Main Justice in

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238. *Office of the Legal Adviser for Law Enforcement and Intelligence*, U.S. DEP’T OF STATE, <https://www.state.gov/bureaus-offices/bureaus-and-offices-reporting-directly-to-the-secretary/office-of-the-legal-adviser/office-of-the-legal-adviser-for-law-enforcement-and-intelligence/> [<https://perma.cc/CK3F-N2UF>] (last visited Sept. 17, 2021). Such coordination already happens in an ad hoc fashion and will not be a matter of State Department clearance as much as it is coordination. Koh, *supra* note 6, at 391.

239. U.S. Dep’t of Just., Just. Manual § 9-7.000 (2020).

240. See Leslie R. Caldwell, Assistant Attorney General, Remarks at the CCIPS-CSIS Cybercrime Symposium 2016: Cooperation and Electronic Evidence Gathering Across Borders (June 6, 2016), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-ccips-csis-cybercrime-symposium-2016> [<https://perma.cc/9GJG-UQN5>] (“[T]wo emerging challenges to public safety and national security [are] the challenge posed when criminals use new technologies to victimize innocent people and avoid accountability [and] when criminal schemes cross international borders and legitimate law enforcement efforts . . . require international cooperation to be successful.”).

transnational and international issues arising in U.S. federal criminal prosecution—currently serve as the initial point of contact for every USAO “on matters relating to foreign relations, intelligence, and national defense.”<sup>241</sup> Their expertise and connection to Main Justice should be strengthened through a more concerted DOJ-wide effort to coordinate the investigation, charging, and prosecution of cases with international dimensions.<sup>242</sup>

At the third layer, the AUSAs themselves, prosecutorial integration requires that DOJ charging policy be amended to include a consideration of foreign consequences, alongside the other traditional factors that govern when to charge a defendant for an offense. As discussed earlier, criminal justice is expressive, but the expressive benefits of criminal justice are compromised when the U.S. criminal system clumsily projects itself abroad, triggering tagging and fostering the global arrest game.<sup>243</sup> Prosecutorial decision-making must grapple with this reality; it is poised to do so given capacious prosecutorial discretion.<sup>244</sup> As of now, the Justice Manual entry on initiation of prosecution—the authoritative DOJ-wide guidance on whether and how to charge an individual with a crime—lists as one of its nine factors “federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities.”<sup>245</sup> The DOJ’s guidance should be amended to include language, such as: “the effects of such prosecutions on federal interests and foreign relations.” Such additional guidance increases the likelihood that USAOs and AUSAs will consider the broader communicative dynamics of their decision-making in foreign relations. Such an amendment is very plausible; the Justice Manual already recognizes that charging decisions may vary when another jurisdiction, including a foreign jurisdiction, is already subjecting a person to foreign prosecution.<sup>246</sup> The Justice Manual also recognizes special policy concerns around corporate prosecution.<sup>247</sup>

### B. Legislative Reform: Legislative De-escalation & the Search for Normative Foundations

Moving from the executive to the legislative branch, the third necessary reform is for the political branches to engage in *legislative de-escalation*, or the ratcheting down of criminal sanctions for certain criminal conduct. To do so, the branches should not engage in a relative approach, claiming merely

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241. U.S. Dep’t of Just., Just. Manual § 9-90.050 (2020).

242. *See id.*

243. *See supra* Part II.

244. *See generally* Bellin, *supra* note 142, at 176–81.

245. U.S. Dep’t of Just., U.S. Att’y’s Manual § 9-27.230 (2020).

246. *Id.* § 9-27.240.

247. *Id.* § 9-28.400 (“[C]orporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, tax, and criminal law enforcement policies. In applying these Principles, prosecutors must consider the practices and policies of the appropriate Division of the Department and must comply with those policies to the extent required by the facts presented.”).

“we need fewer extraterritorial criminal statutes.” A more rigorous, effective path is a principled one stating that “extraterritorial criminal statutes are only appropriate for certain types of undesirable human conduct.” Thus, this section grapples with the following question: What human conduct should be criminalized? Given the vast scope of this topic, this section presents a few different approaches, accounting for the development of research in this area. Scholars can be divided into two broad schools of thought: the mainstream realist school and the nascent normative school.

The realist school dominates as the governing paradigm in criminal legal scholarship. According to this approach, U.S. criminal law evolved to be only “what criminal justice actors did, nothing more.”<sup>248</sup> From this perspective, there has been a “creep” of criminalization since the nation’s founding and particularly over the last few decades.<sup>249</sup> As Professors Dan Richman and Bill Stuntz have persuasively argued, no principled line has animated substantive criminalization; instead, our current political moment is one wherein legislators have publicly positioned themselves to voters as “tough” on crime<sup>250</sup> and wherein judicial articulation of greater criminal procedural protection has triggered an expansive criminal legislative response.<sup>251</sup> The realist school rightly observes that a rigorous principle for criminalizing conduct would readily guard against overcriminalization, given that it would “anchor our decisions about when criminal sanctions should be used as a tool of government power at the border between ‘mere’ regulation and prosecution.”<sup>252</sup> The realist school also recognizes that a failure to articulate a viable account of criminalization has led to “intellectual chaos,” due in part to the Anglo-American conflation of law and police power.<sup>253</sup> In fact, it recognizes that “[t]he absence of a viable account of criminalization constitutes the single most glaring failure of penal theory as it has developed on both sides of the Atlantic.”<sup>254</sup> However, the realist school acknowledges the reality that no principle can be drawn at the dividing lines between civil

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248. See Richman, *supra* note 122, at 69. This is due to the relative weakness of the U.S. state and the lack of institutional and regulatory actors beyond police, prosecutors, and judges. *Id.*

249. See Richman, *supra* note 122, at 69–71 (recounting the growth of criminal law as a form of regulation since the founding of the republic); see also Darryl K. Brown, Yick Wo and the Constitutional Regulation of Criminal Law, 2008 U. ILL. L. REV. 1405, 1407 (same). Of course, just in the last few years, our “current political moment” may have evolved to be more self-reflective about criminal justice reform, though much work still needs to be done. See, e.g., FIRST STEP Act, H.R. 5682, 115th Cong. (2018).

250. Stuntz, *supra* note 143, at 510 (describing the political economy of overcriminalization); Jain, *supra* note 102, at 1391 (surveying the political and legislative barriers to criminal justice reform).

251. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) (“As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs.”).

252. Richman, *supra* note 122, at 67.

253. *Id.* at 67 (citing MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005)).

254. HUSAK, *supra* note 1, at 58.

and criminal sanction, nor in those between federal, state, and local criminal justice.<sup>255</sup>

The smaller, normative school agrees with this realist portrait of the U.S. criminal justice system's exponential growth. But it goes a step further in asking the following question: As a normative matter, what should be the principle for criminalizing human conduct? The normative school observes that this question is rarely asked and is thus largely unanswered because the starting point for criminal theory is instead the justification of punishment.<sup>256</sup> As a result, every first-year law student is introduced to criminal law through its philosophical justifications: retribution, deterrence, incapacitation, rehabilitation, and others.<sup>257</sup> But such classic questions turn on justifications for the nature of criminal punishment and say less about what conduct should trigger such punishment.

Fortunately, the normative school has spawned a recent "flurry" of scholarship on the question of criminalization.<sup>258</sup> Scholars such as Professors Michael Moore and Douglas Husak have considered this question in the past, while Professors Antony Duff and Joshua Kleinfeld have provided a strong reconstructivist take on this question.<sup>259</sup> Promising work is also being done on the development of a normative core for international

255. As Professor Dan Richman has recognized, it is troubling when a society over-criminalizes and over-punishes, though the metric for both is unspecified. Richman, *supra* note 122, at 66.

256. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* xix (2000) ("[Criminal law's] central question is justifying the use of the state's coercive power against free and autonomous persons."); Duff, *supra* note 115, at 593 ("[T]he 'foundational question about criminal law is what justifies punishment.'") (quoting Luban, *supra* note 115, at 575); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1497 (2016); Michael S. Moore, *A Theory of Criminal Law Theories*, 10 TEL AVIV U. STUD. L. 115, 140 (1990) ("The first question of a theory of the criminal law is the question of why we punish."). This likely stems from the mainstream scholarly view of criminal law's definition, which is defined not in terms of substantive offenses but in terms of its sanction, the deprivation of liberty. *Id.* at 134 ("Such a view finds criminal law's essence in a feature of its [structure]—namely, in its remedy.").

257. *See, e.g.*, JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 33–91 (8th ed. 2019); SANFORD H. KADISH, STEPHEN J. SCHULHOFER, RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 40–106 (10th ed. 2016); JENS DAVID OHLIN, *CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE* 25–55 (2d ed. 2018).

258. Kleinfeld, *supra* note 256, at 1501. Very few scholars tackled these questions previously. For example, Henry Hart once asserted that the purposes of criminal law are one of multivalued rather than single-valued thinking. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 401 (1958). Additionally, what distinguishes a crime from a civil wrong may be thought of as conduct triggering "a formal and solemn pronouncement of the moral condemnation of the community." *Id.* at 405.

259. *See, e.g.*, ANTONY DUFF ET AL., *THE TRIAL ON TRIAL: TRUTH AND DUE PROCESS* 3 (2007); *THE BOUNDARIES OF THE CRIMINAL LAW* (R.A. Duff et al. eds., 2010); *THE CONSTITUTION OF THE CRIMINAL LAW* (R.A. Duff et al. eds., 2013); *CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW* (R.A. Duff et al. eds., 2014); *THE STRUCTURES OF THE CRIMINAL LAW* (R.A. Duff et al. eds., 2011); Kleinfeld, *supra* note 256, at 1501. *See generally* R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 125 (R.A. Duff & Stuart P. Green eds., 2011); R.A. Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217 (2014).

crimes.<sup>260</sup> But it is “striking . . . how late this interest comes in the maturation of the field and how small it is relative to the massive attention given to punishment.”<sup>261</sup> Indeed, “the theory of criminal wrongdoing is a pinprick relative to the theory of punishment.”<sup>262</sup>

How do the realist and normative schools apply to U.S. ELEP? The realist school undoubtedly helps us apprehend the descriptive picture of rising criminalization of foreign relations.<sup>263</sup> But the normative school potentially arms us with tools to prescribe principled legislative reform.

While a full exposition of such theories is beyond the scope of this Article, let us briefly consider two related theories of criminalization as examples of what this project might look like.<sup>264</sup> First, one may focus on Professor Duff’s theory of crimes as moral wrongs that concern the public—all members of a given polity—by virtue of their shared membership.<sup>265</sup> In his conception, a court may legitimately try a defendant if the alleged conduct is the proper concern of the political community to which the defendant belongs and, thus, the members to whom he must answer for violations of shared public values.<sup>266</sup> Relatedly, Professor Kleinfeld asserts a reconstructivist account of criminal law, which serves a distinctive role by reconstructing the moral basis of its social order in the wake of an attack on its ethical life.<sup>267</sup> From his viewpoint, crime is a communicative attack on social solidarity, and prosecution is normative reconstruction.<sup>268</sup> Professor Duff and Kleinfeld’s theories would thus encourage us not to ask whether punishment of foreign nationals for certain conduct serves retributive ends justifying punishment based on moral desert.<sup>269</sup> Instead, their theories might encourage us to focus on the moral wrongs that have infringed upon the relevant political and moral community and thus whether the expressive value of the prosecution of such conduct themselves may repair the broken ethical life of such community.

Therefore, the central question—whether in domestic, transnational, or international criminal law—would be identifying the relevant public to whom the defendant is answerable. For instance, when the U.S. criminalizes and then prosecutes five Chinese hackers for computer hacking, economic espionage, and other offenses directed at U.S. corporations, the U.S. polity

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260. See generally, e.g., Ryan Liss, *Crimes Against the Sovereign Order: Rethinking International Criminal Justice*, 113 AM. J. INT’L L. 727 (2019).

261. Kleinfeld, *supra* note 256, at 1501–02; see also HUSAK, *supra* note 1, at 58–60 (“[T]he lack of scholarly interest in the topic of criminalization [is] baffling . . . [N]o contemporary theorist in the United States or Great Britain is closely associated with a theory of criminalization.”).

262. Kleinfeld, *supra* note 256, at 1502.

263. See *supra* Part III.

264. For a discussion of how the works of Kleinfeld and Duff interrelate, see Kleinfeld, *supra* note 256, at 1501 n.40 (“There is no question that Duff is in the reconstructive family.”).

265. Duff, *supra* note 115, at 595; Liss, *supra* note 260, at 743.

266. Duff, *supra* note 115, at 596.

267. Kleinfeld, *supra* note 256, at 1489.

268. *Id.* at 1488–97.

269. *Id.* at 1533 (“Reconstructivism makes unusually central use of expressivism’s insight that punishment carries expressive properties, and indeed extends it: not only is punishment expressive, but crime is too.”).



presumably perceives this to be a wrong. But Professors Duff and Kleinfeld potentially help us to better see that U.S. ELEP is communicative not just for the American public but for the Chinese public; after all, the reconstructivist would say that the focus of criminalization is ultimately on ordinary people, not on the person being punished.<sup>270</sup>

In doing so, then, the criminalization of certain conduct may make a U.S. community whole but may at the same time infringe upon foreign policy and, thus, tear at foreign relations. Prosecution is inherently alienating,<sup>271</sup> especially from a transnational perspective. Most of the time, a foreign nation's citizenry will identify with a fellow national whom the U.S. is prosecuting. Given this identification, U.S. ELEP can express to the foreign nation an imperialist America weaponizing its criminal justice system for political ends. For both Professors Duff and Kleinfeld, criminalization, prosecution, and punishment should be *communicative*, such as negating the message of the human conduct.<sup>272</sup> In this sense, U.S. ELEP's effect is the opposite of what Duff has argued for: the prosecution appears not as a legitimate act of criminalization and prosecution by a political community, but instead as a hollow, instrumental demand that the individual be punished. Another way of phrasing this is from a Kleinfeldian perspective: to say that the United States has a shared moral culture is one thing; it is much harder to find a shared moral culture globally.<sup>273</sup> This is possibly why the Meng case unfolded the way it did. From a U.S. political community's perspective, defiance of U.S.-government-mandated sanctions represents a violation of our collective order, leading to indictment in the U.S. District Court for the Eastern District of New York and subsequent steps to apprehend Meng in Canada. And yet the communicative aspect of this prosecution broke down in China, leading to retaliatory Chinese government action.<sup>274</sup>

Would this mean that the United States should not criminalize or prosecute certain extraterritorial conduct out of fear of being badly viewed abroad? No. But what it does mean is that the architecture of legislation animating U.S. ELEP should be deliberately designed and then implemented. If one believes that the "pathological politics" of criminal law are already impeding the democratic and thus reconstructivist aims of criminal justice domestically, then one must attend to the effects of the problematic communicative aspects of such prosecutions abroad.

Thus, legislative de-escalation could mean that the U.S. political branches narrow the universe of extraterritorial offenses to the most serious human conduct, crimes that will likely not be as "lost in translation" when communicated globally. For example, Congress has given tremendous guidance regarding the extraterritoriality of child pornography statutes,

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270. *Id.* at 1516.

271. *Id.* at 1494–95; Koh, *supra* note 90.

272. Kleinfeld, *supra* note 256, at 1504, 1525 n.112; R.A. Duff, *Punishment, Communication, and Community*, in *STUDIES IN CRIME AND PUBLIC POLICY* 79 (Michael Tonry & Norval Morris eds., 2000).

273. *Id.* at 1501–04.

274. *See supra* note 47 and accompanying text.

which address inherently cross-border and cyber-related issues. Specifically, one of the statutes criminalizes individuals who are “outside the United States.”<sup>275</sup> This legislation is proper, since it criminalizes conduct that is universally condemned; this legislation, therefore, minimizes the risk of foreign relations complications. On August 9, 2018, South Korean national Jong Woo Son was indicted by a federal grand jury in the federal district court for the District of Columbia for operating the world’s largest darknet site for child sexual exploitation—with no foreign relations pushback.<sup>276</sup> On the other hand, the broadly construed conspiracy to defraud the United States, as was charged in the Meng case, is more amorphous both substantively and as a mode of liability; it is more likely to be perceived as a posture of American protectionism.

The political branches could also cabin the specific cases for which individuals may be extradited from abroad. A modern innovation in extradition law has been a “dual criminality” requirement, wherein an offense is extraditable so long as it is criminally codified in both the United States and in a foreign country.<sup>277</sup> The dual criminality standard is desirable because it allows criminal justice systems to stay aligned over time. But such treaties also have a gravity threshold—typically one year of imprisonment—necessary to trigger the extradition process.<sup>278</sup> The gravity threshold could be increased to five or more years.

But this is just a sketch of what a reimagined statutory framework would look like. So much in this space turns on the underlying normative theory of criminalization and should be a focus of further research. A harm-based conception of criminalization, for example, could lead not to an emphasis on the communicative aspects of an offense but instead on the harm perpetrated domestically regardless of the international communicative ramifications. Future research must develop such normative foundations and then apply them to U.S. ELEP.

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275. 18 U.S.C. § 2260(b).

276. Press Release, *supra* note 129. Son was also charged and convicted in South Korea and recently completing an eighteen-month sentence in April for running the child pornography site. Choe Sang-Hun, *South Korea Denies U.S. Request to Extradite Operator of Child Pornography Site*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/world/asia/south-korea-child-pornography-extradition.html> [<https://perma.cc/TR2S-VP53>]. On July 6, 2020, the Seoul High Court rejected the DOJ’s extradition request for Son, stating that having him in South Korea was critical to the country’s efforts to track down users of the site. *Id.* The court’s decision drew significant backlash from South Korean anti-child pornography groups that had anticipated Son’s extradition to the United States as a rebuke of sexual crimes in South Korea. *Id.*

277. RONALD J. HEDGES, INTERNATIONAL EXTRADITION: A GUIDE FOR JUDGES 20–22 (2017), <https://www.fjc.gov/sites/default/files/2014/International-Extradition-Guide-Hedges-FJC-2014.pdf> [<https://perma.cc/WWK4-2HLG>].

278. *See, e.g.*, Extradition Treaty with the United Kingdom, U.K.-U.S., art. 2(1), Mar. 31, 2003, T.I.A.S. No. 07-426 (defining an extraditable offense as one punishable by a year or more of imprisonment); Extradition Treaty with the Philippines, Phil.-U.S., art. 2(1), Nov. 13, 1994, T.I.A.S. No. 96-1122 (same).

## CONCLUSION

U.S. criminal justice today stretches beyond our borders and risks overcriminalizing our foreign relations. The two forces driving criminalization at home—overzealous prosecutors and overinclusive legislators—are combining with overreaching presidential authority to propel U.S. law enforcement abroad. This Article calls for a principled role for U.S. extraterritorial law enforcement policy, one that upholds its distinctiveness and expressivism compared to six other foreign policy modalities. Presidential distancing and prosecutorial integration will help the president, DOJ, and individual attorneys uphold these comparative advantages, while a richer normative theory of criminalization may facilitate the necessary legislative de-escalation.