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EXTRADITION IN POST-*ROE* AMERICA

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† Authors Yveka Pierre and Michelle McGrath both bring years of experience as public defenders fighting extradition cases on behalf of people accused of crimes in other states. They know each bureaucratic step along the process of extradition and will root their analysis of any proposed interventions with this proximate experience. They each also bring nuanced perspectives of extradition in the context of abortion—Pierre went from being a public defender to fighting against criminalization of pregnant people at If/When/How: Lawyering for Reproductive Justice. If/When/How is an organization that seeks to "transform the law and policy landscape through advocacy, support, and organizing so all people have the power to determine if, when, and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms." McGrath, a nine-year public defender in New York City, brings five years of experience working on state habeas hearings, both in a unit focused on pre-trial detention hearings as well as a unit focused on post-conviction habeas hearings for people on parole under New York's recent Less is More statute. Alejandra Caraballo is a Clinical Instructor at Harvard Law School's Cyberlaw Clinic where she focuses on the intersection of gender and technology, particularly on the ways that technology impacts gender minorities. Prior to joining the clinic, Prof. Caraballo was a staff attorney at the Transgender Legal Defense and Education Fund and focused on civil rights litigation around the access to gender-affirming health care as well as advancing the civil rights of LGBTQ people in a variety of civil legal contexts such as immigration, and family law. Aarons, a researcher with Prof. Caraballo, is a 3L at Harvard Law School with experience in the reproductive justice field at an advocacy think tank. Conti-Cook also practiced civil rights litigation in New York City for more than a decade, including five years at the Legal Aid Society, with a focus on police misconduct. She is now a researcher at the Ford Foundation analyzing how new surveillance and forensic technologies impact movements for justice, including decarceration, immigration, and reproductive justice. The views and opinions expressed herein are solely those of the author and do not reflect and are not attributable in any way to those of the Ford Foundation.

I. INTRODUCTION

As the *Dobbs v. Jackson Women's Health Organization* decision by the United States Supreme Court triggers half the United States to criminalize abortion and the other half to embed abortion protections in state constitutions and statutes, our country sits on the brink of once again being formally and violently divided by significant discord between states. Without intervention, anti-abortion states may weaponize extradition and its operating principle of interstate comity. States that criminalize abortion may tacitly deploy the constitutional power of extradition to obligate other states to arrest and detain pregnant people and the people that support them. Unless changes are made, this will likely be equally true for safe harbor states like Connecticut and New York that have made legislative attempts to limit their interstate obligations to states

criminalizing abortion. This Article's analysis is that abortion is the first, but not the last, previously protected liberty interest to be restricted under the majority's new construct of "ordered liberty."[1] Not since the pre-Civil War era has the United States landscape of legal protections for human rights and criminal penal codes been torn so far asunder. As interstate comity and complex systems of commercial and national data sharing currently operate, there is no such thing as a safe harbor. However, there is precedent, both in United States history and in international law, for invoking dual criminality protections against extradition when human rights are at stake.

The history of the Extradition Clause in the United States Constitution is inextricably entangled with the country's history of chattel slavery—"[the] idea of returning fugitive slaves to their owners originated at the Constitutional Convention in 1787."[2] In examining how extradition may operate in the future, we must explore the importance of extradition history during slavery. This exploration does not mean we equate the generational trauma and widespread horrors of state-sanctioned slavery with what pregnant people subject to anti-abortion laws will be facing post-*Dobbs*, nor those that will suffer future restrictions to rights based in liberty interests under the majority's new paradigm of "ordered liberty"—it is simply the only prior era in U.S. history when extradition played the type of central role it may play again.

The recent efforts in safe harbor states to resist abortion criminalization has precedent in the lead-up to the U.S. Civil War as northern states sought to defend the rights to freedom of escaped enslaved persons. In 1850, "[s]even Northern states decided to resist the Fugitive Slave Law by passing 'personal liberty laws,' which granted accused fugitive slaves certain protections and due process of law."[3] These protections often included legal representation for the accused, due process review of claims made by "slave owners," prohibiting the use of local jails, and one "personal liberty law granted an accused fugitive slave the right of habeas corpus."[4] It was understood that these efforts were mere harm mitigation but nevertheless necessary. "The strategy of state resistance to the Fugitive Slave Law increased the costs of slavecatching, stopped some kidnapping, and slowed the commission-hearing process."[5] Similarly, the states must also meet the fallout from the *Dobbs* decision and the attacks on gender-affirming care with the same re-

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

[2] Const. Rts. Found., *The Fugitive Slave Law of 1850*, BILL RTS. ACTION, Winter 2019, at 5, https://perma.cc/4TSN-ZTJK.

[3] *Id.* at 8.

[4] *Id.*

[5] *Id.*

sistance. States must meet a delicate balance, however, in enacting protections that resist extradition without misleading their residents and people seeking safe-harbor within their borders about the extent to which they may seek health care safely.

This Article is grounded in practitioners' perspectives that will illustrate how tenuous these safe harbor limits on extradition will be in practice. Together we bring the perspective of how extradition, and the safe harbor statutes that attempt to address it, are translated into practice under realistic conditions, including current policing technologies. We know how difficult it is to disrupt the muscle memory of system actors.[6]

This Article first lays out the history of abortion criminalization and policing,[7] including an analysis of the *Dobbs* decision.[8] It then shifts into the current (although changing) divided landscape of abortion criminalization and abortion safe harbor laws, in some cases overlapping with laws protecting seekers of gender-affirming care as well. We then discuss how system actors still have discretion within the strongest safe harbors to subvert the safety of pregnant people and people supporting them despite the lawmakers' intentions.[9]

We then look to extradition, both internationally and interstate, for lessons about how states have previously intervened against probable human rights abuses by demanding jurisdictions with a "dual criminality" analysis.[10] Whether a dual criminality analysis may extend to interstate extradition under the U.S. Constitution has not been examined

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[6] We use "system actor" throughout to refer not just to police, immigration law enforcement, and prosecutors, but also social workers, case workers, health care professionals, public school teachers, and all other mandated reporters deputized by the state to surveil people in public, in courts, in schools, in hospitals, and in their homes.

[7] When describing relevant periods of history, we chose to describe "post-*Roe*" as the period between 1973-2022 and "post-*Dobbs*" as the period we are entering now.

[8] *See* Section II(B) *infra.*

[9] Our shared language throughout this Article hopes to center the humanity of each person involved in the consequences of abortion criminalization, regardless of their role in it. To start, we refer to people whose bodily autonomy is directly impacted by the *Dobbs* decision as "women," "pregnant people," and "people capable of becoming pregnant" to be specific and inclusive of anyone who is not a woman but still needs to navigate pregnancy and abortion. In some sections, we reference historical material that excluded consideration of experiences of transgender or other gender non-conforming people. As a result, some quotes or references incorrectly describe the experiences of pregnancy and abortion from the narrow perspective of people who identified as "women," We use "medication abortion" to describe the use of misoprostol and mifepristone to end a pregnancy, and "self-managed abortion" to describe ending one's pregnancy through whatever means, including with medication, outside of the formal medical system. *See* Melissa J. Chen & Mitchell D. Creinin, *Mifepristone with Buccal Misoprostol for Medical Abortion: A Systematic Review*, 126 OBSTETRICS & GYNECOLOGY 12, 12-13 (2015).

[10] Dual criminality is the type of fact-finding that a country or a state may do to determine whether human rights protections prohibit extradition. See Section IV(B) *infra*.

since the pre-Civil War era.[11] This Article recommends revisiting dual criminality in the context of interstate extradition to understand what additional layers of protection states may deploy to protect their residents' human rights and liberty interests.

Finally, we offer a set of incentives to state-based system actors who may balk at not cooperating with their peers across state borders. This includes a state cause of action in a safer harbor state against any state actor who, contrary to safe harbor law, uses state agency resources to enforce another state's criminalization of pregnant people and their supporters for abortion-related conduct. It also includes a requirement that states demand that extradition warrants include factual descriptions of the criminalized conduct, automatic jury hearings that produce a factual record about dual criminality, i.e., what conduct the demanding state considers criminal, whether it is a crime in the asylum state, and whether extradition would violate foundational principles of human rights law. These provisions should also include mandatory use of release pending extradition and automatic assignment of counsel upon determination that the conduct of the charged crime by the demanding state is not a crime in the asylum state.

Through this Article, we offer practical interventions that may disrupt the mechanics of extradition by incentivizing system actors in safe harbor states to protect pregnant people, their supporters, and whoever next loses existing liberty interests.

II. HISTORY OF CRIMINALIZATION AND POLICING

A. Criminalization Pre-Roe v. Wade

1. Until the nineteenth century, state statutes and common law generally did not criminalize abortion care.

The need to end a pregnancy was generally understood as an "open secret" in the United States.[12] At its founding, the nascent United States

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[11] Consider all of the criminal defense law firm websites in a simple Google search for "extradition warrant" that similarly explain how most people waive extradition except for very limited circumstances or this explanation from the Texas District & County Attorney's Association: "However, the biggest reason [why "we don't see" extradition hearings more often] is that most defendants elect to waive extradition and voluntarily return to whatever state is demanding their return." Zack Wavrusa, *5 Questions You've Been Meaning to Ask About Interstate Extraditions*, TEX. DIST. & CNTY. ATT'YS ASS'N (Jan.-Feb. 2022), https://perma.cc/53BX-S762.

[12] LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 21, 44 (2d ed. 2022). ("The historical record clearly shows that generations of women desired abortions.").

had no laws regulating abortion, let alone criminalizing the common practice. In the absence of any laws, regulating the act looked to English common law, which did not prohibit abortions until "quickening."[13] Even as the English passed laws criminalizing abortion before "quickening," the United States common law[14] and subsequent legislation[15] diverted from English law, preventing criminalization of all abortions. The principle that pregnant people could not be charged with a crime in relation to their own fetuses is grounded in "centuries-old principles of common law."[16] While the founders may not have included explicit reference to abortion and other methods of contraception in the Constitution, reproductive health care and treatments including abortion have a history as long as humans have been giving birth.[17] The larger failure of the founders, of course, was to initially exclude women, people capable of becoming pregnant, and anyone who was not white or owned property from the protections of the U.S. Constitution. It was not because the need for rights and protections was not known to them--Abigail Adams' plea to John Adams to "remember the ladies" famously asked for broader consideration of at least her constituency.[18]

2. Despite the law, people who had abortions were criminalized.

As other scholars have explained, the newly professionalized practitioners of medicine—primarily men—led the efforts to criminalize abortion care.[19] Chief among these physicians was Horatio Storer, a racist and misogynist[20] who led the American Medical Association's ("AMA") crusade to criminalize abortion.[21] Storer also sought to force white Protestant women to birth babies as a response to an increase in

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[13] JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 3 (1978).

[14] *Id.* at 5.

[15] *Id.* at 23.

[16] State v. Ashley, 701 So.2d 338, 342 (Fla. 1997); *see also* State v. Carey, 56 A. 632, 636 (Conn. 1904).

[17] Contrary to the extremely narrow focus of *Dobbs* on only male jurists in seventeen through nineteenth century common law, history is rich with references to abortion and means of doing so. *See* BARBARA EHRENREICH & DEIRDRE ENGLISH, WITCHES, MIDWIVES, AND NURSES: A HISTORY OF WOMEN HEALERS 24, 28 (2d ed. 2010); MARY FRANCES BERRY, THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE, EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT, 155 ("[P]oor women gained some access to contraceptives and sometimes aborted successfully with folk remedies.").

[18] Abigail Adams, *Abigail Adams to John Adams, 31 March 1776, reprinted in* NATIONAL ARCHIVES: FOUNDERS ONLINE (Mar. 31, 1776), https://perma.cc/E8UE-YNVR.

[19] MOHR, *supra* note 13, at 149.

[20] REAGAN, *supra* note 12, at 11.

[21] MOHR, *supra* note 13, at 147-70.

the immigrant population, asking if "civilization" would be "filled by our own children or by those of aliens" and "upon their loins depends the future destiny of this nation."[22] Storer was not alone; other white male physicians joined him under the banner of the AMA to monopolize abortion and obstetrics, and keep women out of the profession.[23]

This campaign of professional self-interest capitalized on misogyny, racism, and xenophobia to persuade the public and politicians that abortion should be criminalized.[24] By the end of the nineteenth century, the United States had shifted from a nation without abortion laws to one that criminalized abortion in nearly every state.[25] Yet, even then, "the general consensus was that the pregnant person was not a criminal."[26] During this period, even as people were criminalized for providing abortion care, the consensus that "women seeking abortions were victims" of crime, and not criminals, persisted.[27]

Early prosecutions targeted midwife networks, and so did the police. For example, in New York City, "from 1913, white policewomen led the regulation of abortion in New York City primarily through plainclothes investigations in which they used language, clothing, and narrative to pose as women with untenable pregnancies in order to target midwives from central, southern, and eastern Europe."[28] To secure convictions against midwives and others, however, prosecutors began to jointly charge women who secured successful abortions to force their cooperation as witnesses.[29]

For example, in 1959, an appellate court in Pennsylvania upheld the contempt conviction of Barbara Ann Snyder for refusing to testify against the doctor who performed her abortion, possibly out of fear that she would be charged as an accomplice.[30] Upholding her conviction, the court dismissed her concern despite similar precedent four years earlier

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[22] REAGAN, *supra* note 12.

[23] MICHELE GOODWIN, POLICING THE WOMB, WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 56 (2020) ("American hospitals zealously and faithfully practiced segregation, barring the admission of African Americans both to practice and to patients.").

[24] REAGAN, *supra* note 12, at 12-14.

[25] MOHR, *supra* note 13, at 226; Leslie J. Reagan, *The First Time Abortion Was a Crime*, SLATE (June 1, 2022, 12:32 PM), https://perma.cc/9D2Q-KVET.

[26] NAT'L INST. FOR REPRODUCTIVE HEALTH, WHEN SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK 1 (2017), https://perma.cc/6FZR-6HBT.

[27] BERRY, *supra* note 17, at 157 (1999).

[28] Elizabeth Evens, *Plainclothes Policewomen on the Trail: NYPD Undercover Investigations of Abortionists and Queer Women, 1913-1926*. 4 MOD. AM. HIST., 49-66 (2021), https://perma.cc/KXD2-CYAN.

[29] Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735 (2018).

[30] *Id*.

where another Pennsylvania court refused to dismiss a similar charge against a woman for her own abortion.[31] Snyder's case was ultimately reversed on appeal in the Supreme Court of Pennsylvania, holding that "the action of the trial court in committing her to jail because she availed herself of what the Constitution guaranteed her was an act of judicial usurpation without warrant, without law, and without excuse."[32] The Court found that Snyder was clearly a "victim" as a woman could not be "legally convicted of conspiracy to commit an abortion on herself,"[33] but regardless of her status as victim or accomplice she was still indicted for the legally impossible crime of conspiracy along with her doctor.[34] Snyder's case clearly demonstrates that people who had abortions were at risk of criminalization even when the law clearly prohibited their prosecution.

Comparatively, people charged with abortion crimes faced reduced sentences, lower rates of conviction, and higher rates of having convictions overturned on appeal. For example, between 1925 and 1950, almost half of the 111 convictions in New York City resulted in probation.[35] In Chicago, juries only found nine people guilty of abortion between 1940-1950.[36] While there may have been a low conviction rate, non-carceral sentences, and a few convictions reversed by the appellate courts, it is worth emphasizing that the process of arrest and prosecution are profoundly destabilizing, dehumanizing, and often lead to, among many other harms, serious physical, sexual, psychological, and emotional pain for the criminalized person, for generations of their families, and for their community networks.

Relatively speaking, these numbers reflected low rates of policing abortions in relation to how many abortions occur, at least according to some estimates.[37] "By the early 1960s, police experts called abortion the third most extensive criminal activity in the country, surpassed only by narcotics and gambling."[38] Historians attribute this to how similar miscarriages and abortions presented medically, to the challenge of finding witnesses who would testify, and "[practically], abortion occurred in physical spaces and social networks beyond regulators' reach."[39] Most

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[31] *Id.* at 745-46; *see* Commonwealth v. Hauze, 4 Pa. D. & C.2d 61, 62-65 (Ct. Quarter Sess. of Peace of Pa. Luzerne Cnty. 1955).

[32] Snyder Appeal, 157 A.2d 207 (Pa. 1960).

[33] *Id.* at 246.

[34] *Id*.

[35] BERRY, *supra* note 17, at 157.

[36] *Id*.

[37] *Id*. at 157-59.

[38] *Id.* at 159.

[39] Evens, *supra* note 28, at 54.

low-income people who got an abortion in New York City in the 1960s, for example, reported attempting a self-induced procedure "with only 2% saying that a physician had been involved in any way."[40]

For patients with successful abortions, police threatened them with reputational damage and social shame.[41] The dual impact of criminalization, both blocking safe access to health care and doing additional untold carceral damage to individuals, their families, and their communities contributed to the momentum that resulted in *Roe v. Wade*.[42] Unfortunately, the recognition of the constitutional right to abortion did not end the policing and criminalization of pregnant people.[43]

B. Post-Roe/Pre-Dobbs Criminalization 1973-2022

It was inevitable that the criminalization of pregnant people and the losses they experienced would continue in the *Roe* era because *Roe v. Wade* never went far enough.[44] It certainly was not intended to remove the harmful stigma of abortion in the American consciousness.[45] A mere three years after *Roe v. Wade*, the Hyde Amendment made clear that the dichotomy between abortion versus other types of health care would continue.[46] Those who relied on federal funds to access healthcare would not be allowed to use it to pay for their abortions,[47] and this congressional amendment was upheld by the Supreme Court.[48] The Hyde Amendment was "the product of an effort to deny to the poor the consti-

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[40] Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, GUTTMACHER POL'Y REV. (Mar. 1, 2003), https://perma.cc/L2FS-AL6Y.

[41] REAGAN, *supra* note 12, at 168-169.

[42] REAGAN, *supra* note 12, at 236-43.

[43] *See generally* LAURA HUSS ET AL., IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS (Aug. 2022), https://perma.cc/5CAR-X3MR; FARAH DIAZ-TELLO ET AL., THE SIA LEGAL TEAM, ROE'S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL (Nov. 28, 2017); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 309 (2013).

[44] *See generally* DIAZ-TELLO, *supra* note 43.

[45] Bernard M. Dickens, *The Right to Conscience*, *in* ABORTION LAW IN TRANSNATIONAL PERSPECTIVES 225 (Rebecca J. Cook et al. eds., 2014).

[46] Steph Herold, *The Cultural Toll of the Hyde Amendment*, REWIRE NEWS GRP. (Sep. 20, 2016, 09:01 AM), https://perma.cc/4KWT-RTMR.

[47] Paula L. Abrams, *Abortion Stigma: The Legacy of* Casey, 35 WOMEN'S RTS. L. REP. 299, 310 (2014).

[48] Harris v. McRae, 448 U.S. 297 (1980) ("The Hyde Amendment places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion . . . encourages alternative activity deemed in the public interest.")

tutional right recognized in *Roe v. Wade*," and "represents a cruel blow to the most powerless members of our society."[49]

It is within that framing, even with the protections of *Roe v. Wade,* that surveillance and criminalization of abortion continued amid ballooning mass incarceration in the United States.[50] In 2019, The Sentencing Project reported that "[s]ince 1970, [the United States] incarcerated population has increased by 500%—2 million people in jail and prison today, far outpacing population growth and crime."[51] According to Interrupting Criminalization ("IC")[52] the expansion of surveillance and criminalization of pregnant people and their communities contributes to this trend.[53]

Even when abortion in and of itself could not technically be the conduct that formed the basis of criminal charges, state prosecutors became creative at doing it anyway, varying by political and biased motivations.[54]

1. Statutes that directly criminalized people who had abortions were rare

As explained above, at common law and in most of the U.S., states did not criminalize pregnant people for their own abortions. However, a minority of states enacted unconstitutional[55] statutes criminalizing self-

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[49] *Id.* at 338 (Marshall, J., dissenting).

[50] Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 309 (2013).

[51] *Mass Incarceration*, ACLU, https://perma.cc/X66Q-X3H3 (last visited Dec. 21, 2022); *see also* Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Oct. 29, 2019), https://perma.cc/V6PF-NMSE (In recent decades, women's incarceration has grown at twice the rate of men's, disproportionately in local jails, and over a million women are on probation).

[52] INTERRUPTING CRIMINALIZATION, https://perma.cc/TW7V-4JJR (last visited Oct. 16, 2022) ("[IC] aims to interrupt and end the growing criminalization and incarceration of women, girls, trans, and gender nonconforming people of color for criminalized acts related to public order, poverty, child welfare, drug use, survival and self-defense, including criminalization and incarceration of survivors of violence").

[53] DO NO HARM COAL., ABORTION DECRIMINALIZATION IS PART OF THE LARGER STRUGGLE AGAINST POLICING AND CRIMINALIZATION 2 (2021), https://perma.cc/U4MF-3T5 ("[The] expanding surveillance and criminalization of mutual aid, self-managed care, and bodily autonomy, and the growing attempts to criminalize pregnant people, parents, and health care providers" are factors contributing to this harmful trend). IC points to "[the] criminalization of sexual, reproductive and economic autonomy . . . rooted in a long history of racial capitalism and white supremacy in legal, medical, and social systems, which has deemed some people unfit' and 'undeserving' of basic needs like health care and reproductive autonomy" as the root cause of this harmful trend. *Id.* at 5.

[54] GOODWIN, *supra* note 23, at 30-31.

[55] *See e.g.*, McCormack v. Heideman, 694 F.3d 1004 (9th Cir. 2012).

managed abortions,[56] in direct contravention to the safety and efficacy of the practice.[57] Between 1973 and 2005, more than 400 people were criminalized for their own pregnancy outcomes, for offenses ranging from feticide, child abuse, to poisoning.[58] A recent research project has discovered at least 61 cases across 26 states from 2000 to 2020 where people have been criminally investigated or arrested for allegedly self-managing an abortion or helping someone else do so.[59]

Because the law rarely authorized prosecutions for having an abortion, politically-motivated prosecutors instead misused the law to prosecute pregnancy loss, regardless of whether such prosecutions were supported by black letter law.

In 2015, a 33-year-old Indian American woman in Indiana was convicted [60] for a miscarriage she was alleged to have self-managed with medication abortion. Other examples of prosecutions include a Black mother of three in Mississippi who was indicted for murder in the second degree after paramedics arrived at her home and found fetal remains,[61] a 26-year-old woman from Rio Grande Valley charged with murder after presenting to a hospital with a miscarriage,[62] and a 21-year-old Native American woman in Oklahoma convicted of manslaughter after having a miscarriage.[63]

Even when prosecutions for homicide are disallowed by the statutory scheme, prosecutors have misused other laws as well. In 2015, an Arkansas woman was charged with "concealing a birth" for allegedly using

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[56] As of the time of this writing only two states, South Carolina and Nevada, have active laws criminalizing self-managed abortion. S.C. CODE ANN. § 44-41-80(b) (2012); NEV. REV. STAT. § 200.220 (2013).

[57] *See* ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH, ISSUE BRIEF AUGUST 2016: SAFETY AND EFFECTIVENESS OF FIRST TRIMESTER MEDICATION ABORTION IN THE UNITED STATES (2016) (finding that with the advent of medication abortion, people are able to access safe abortions outside of the regulated abortion space).

[58] Paltrow & Flavin, *supra* note 50.

[59] HUSS, *supra* note 43.

[60] Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES (Apr. 1, 2015), https://perma.cc/DCD5-UFK3.

[61] Teddy Wilson, *Prosecution in Search of a Theory: Court Documents Raise Questions About Case Against Latice Fisher*, REWIRE NEWS GRP. (Feb. 21, 2018), https://perma.cc/X7GU-T24D; Cat Zakrzewski et. al., *Texts, Web Searches About Abortion Have Been Used to Prosecute Women*, WASH. POST (July 3, 2022), https://perma.cc/8LVF-THYF.

[62] Fidel Martinez, *The Troubling Case of Lizelle Herrera*, L.A. TIMES: LATINX FILES (Apr. 14, 2022, 8:00 AM), https://perma.cc/8W5Y-YTVV; Mary Ziegler, *How This Texas Woman's Arrest Highlights a Dangerous Anti-Abortion Phenomenon*, NBC NEWS: THINK (Apr. 16, 2022, 4:30 AM), https://perma.cc/XR6Q-FYN8.

[63] Robin Levinson-King, *US Women Are Being Jailed for Having Miscarriages*, BBC NEWS (Nov. 12, 2021), https://perma.cc/MX9W-565F.

pills to induce early labor leading to a stillbirth.[64] In 2014, a 39-year-old Pennsylvania mother was convicted of a felony for dispensing drugs without being a pharmacist, after helping her teenage daughter purchase pills to self-manage her abortion. [65] In 2019, a 28-year-old Alabama woman was charged with manslaughter after she was shot in the stomach during an altercation.[66]

Notably, these cases are disproportionately brought against people of color and low-income people.[67] And these racial disparities are reflected in the severity of the charges themselves: in the 61 known prosecutions for self-managed abortion between 2000 and 2020, "a homicide consideration was two times more frequent in cases involving people of color compared to those involving non-Hispanic white individuals."[68] Consistent with the larger context of mass criminalization in the United States, it is Black, Brown, Indigenous, and other people of color, along with people in poverty, who bear the brunt of wrongful criminalization.[69]

But exactly because of the variety of charges and conduct, there is an untold number of people who have been criminalized or subjected to probation or parole violations, family separation, or immigration consequences for conduct related to their pregnancy.[70]

Targeting supporters of pregnant people through travel, funding, and sharing information and chilling supporter networks was the explicit purpose of Texas' now infamous Senate Bill 8 ("SB8") [the 2021 law that created a civil cause of action for *anyone* against someone supporting a person seeking an abortion].[71]

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[64] Opinion, *How My Stillbirth Became a Crime,* N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html (on file with the CUNY Law Review).

[65] Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion,* N.Y. TIMES MAG. (Sept. 22, 2014), https://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-her-daughter-have-an-abortion.html (on file with the CUNY Law Review).

[66] Vanessa Romo, *Woman Indicted for Manslaughter After Death of Her Fetus, May Avoid Prosecution*, NPR (Jun. 28, 2019), https://perma.cc/6TDF-VGSQ.

[67] Paltrow & Flavin, *supra* note 50, at 311; *see also*, HUSS, *supra* note 43, at 2.

[68] HUSS, *supra* note 43, at 2-3.

[69] Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2022), https://perma.cc/7QEA-XXDF.

[70] GOODWIN, *supra* note 23, at 28. (Noting that despite lack of a national or state databases, advocates are able to track arrests and prosecutions, indicating a shift in pregnancy policing that did not occur before.).

[71] Jon Michaels & David Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES, (Sept. 4, 2021), https://perma.cc/4CCJ-C3JD; *see also* Leah Godesky & Kendall Turner, *The Texas Abortion Law Sleeper Issue: It Limits Access to Counsel*, BLOOMBERG L., (Sept. 10, 2021, 4:00 AM), https://perma.cc/6TSD-D62Z. SB8 advocates "seek to characterize as an 'aider or abettor' someone who merely lends a car to a friend so she can drive to obtain care,

In addition to targeting pregnancies as early as six weeks, often before someone realizes they are pregnant, SB8 permits frivolous lawsuits and discourages attorneys from accepting such cases through a statutory scheme that shifts attorney's fees onto the attorney.[72] This tactic attempts to cut abortion support networks off from access to counsel.[73]

The movement calling itself "Sanctuary Cities for the Unborn" also attempts to criminalize people who support abortion seekers. Since June 2019, at least 40 towns have voted on resolutions "outlawing abortion" with various degrees of success.[74] In Lebanon, Ohio, for example, the city criminalizes getting or assisting in an abortion.[75] While the city later opted to abandon parts of the ordinance, the law purports to criminalizes any conduct, including providing "transportation, instructions or money for an abortion," even if the abortion takes place outside city limits.[76] The penalty for these "crimes" may be fines up to $2,500 and up to a year in jail. Lebanon's ordinance, and those like it, show a steady trend of some lawmakers attempting to pass laws creating more crimes, thereby increasing stigma about abortion and the likelihood of rogue prosecutions.[77]

Thus, long before *Dobbs* removed the protections afforded to pregnant people under *Roe v. Wade*, criminalization remained a risk, especially for people already targeted for surveillance, policing, and prosecution.

C. Dobbs v. Jackson Women's Health Organization

The majority's decision in *Dobbs* is hateful, nihilistic, and disruptive. Justice Samuel Alito, joined by the majority, callously dismissed the many harms to living breathing people, to their families and friends, and to their communities that have formed to support and share life with them. In response to the many layers of psychological, bodily, and emotional harms raised by the dissent,[78] the majority cruelly suggest that there are willing parents, many experiencing infertility, who are eager to

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or a therapist who supports a patient through the difficult decision to terminate a pregnancy—or maybe even someone who has donated to help women in Texas access critical health care." *Id.*

[72] Godesky & Turner, *supra* note 71.

[73] *Id.*

[74] SANCTUARY CITIES FOR THE UNBORN, https://perma.cc/AX6T-KSJ3 (last visited on Dec. 16, 2022).

[75] Courtney King & Brian Planalp, *Lebanon Becomes Ohio's First 'Sanctuary City' for Unborn*, FOX19 NOW (May 25, 2021,11:06 PM), https://perma.cc/85BR-NSU8.

[76] Brian Planalp, *Ohio's Only 'Sanctuary City,' Lebanon Chooses Not to Enforce Abortion Ban*, FOX19 NOW (May 26, 2022, 5:47 PM), https://perma.cc/7C2F-VCLP.

[77] *Id.*

[78] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2320 (2022).

access a "domestic supply of infants."[79] With horror and parallels to popular science fiction, many in the U.S. reacted in disbelief to the majority's gleeful disregard of the intergenerational trauma that family separation causes.[80] Yet as already exploited parents who are Black and Indigenous, or have disabilities, or have migrated, know too well, and as parents of children seeking gender-affirming care have learned more recently, state-driven pipelines of family surveillance, separation, and exploitation for profit are already well-established through the criminal, immigration, and family court systems.[81]

The majority's decision is the antithesis of the rule of law. In addition to misconstruing Hale's interpretation of how early the law could limit abortions[82] the majority also dramatically appended the decision with laws from states that had criminalized abortion prior to *Roe v. Wade*.[83] A close read reveals that none of the statutes explicitly mention criminal penalties for pregnant people.[84] Through this obfuscation, Alito misconstrues Hale, Blackstone, and all of the statutes in the Appendix to conclude that a pregnant person has long been viewed as criminal for ending their own pregnancy.[85]

The majority's approach also falsely attempted to invoke biology and claim that the Mississippi legislature's "findings" included when "the 'unborn human being' has 'taken on the human form' in all relevant respects."[86] Yet, as biologist and philosopher Sahotra Sarkar reminds us, philosophers have "long pointed out that understanding what it is to be human requires a lot more than biology. And scientists cannot establish when a fertilized cell or embryo or fetus becomes a human being."[87] What the *Dobbs* majority (and the Mississippi legislature) did was not a report on biological findings—it was a usurpation of power for the purpose of imprinting their Christian faith's foundational way of knowing on the rest of us. Through a reactionary interpretation of "ordered" liberty, the majority explicitly attempts to subject the U.S. to a definition of freedom they restrict. Indeed, the Parliament of the World Religions, the

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[79] *Id.* at 2259 n.46.

[80] Dahlia Lithwick, *The Horrifying Implications of Alito's Most Alarming Footnote*, SLATE (MAY 10, 2022, 4:27 PM), https://perma.cc/LL7P-VDMT.

[81] Khadijah Abdurahman, *Calculating the Souls of Black Folks: Predictive Analytics in the New York City Administration for Children's Services*, COLUM. J. RACE & L. 4, 75, 89-91 (2021).

[82] *Dobbs*, 142 S. Ct. at 2236, 2254, 2267.

[83] *Id.*, app. A at 79-108.

[84] *Id.*

[85] *Id*.

[86] *Dobbs*, 142 S. Ct. at 2243-44 (quotation marks in original).

[87] Sahotra Sarkar, *When Human Life Begins Is a Question of Politics — Not Biology*, SALON (Sept. 7, 2021), https://perma.cc/68GY-7Q5U.

world's "premiere interfaith convening organizations" said in a public statement it was "deeply disturbed" by the majority's "imposition by the government of the beliefs of some religious groups on members of other faiths, the unaffiliated, and those whose deep moral values are not rooted in religion . . . ."[88] Alito and the majority's combined denial of abortion's prevalence throughout history, other faiths' foundational understanding of life and death, and their commitment to a strained false narrative about the state's right to interfere in bodily autonomy should set off alarm bells about the majority's long-term intent for long-recognized liberty protections. The justices flag that they are willing to use their governmental authority and threat of state violence not only to force pregnancy and births, but to force their religious views[89] upon a country that purports to protect religious diversity, including faiths not grounded in a single supreme being.[90] As Justice Kennedy wrote in *Planned Parenthood of Southern Pennsylvania v. Casey*, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[91] The majority rejects this definition of liberty in *Dobbs* in favor of liberty "ordered" by the few for the many.

Dobbs is disruptive to the rule of law and the very concept of liberty—it reveals several justices' own statements under oath about the status of *Roe* as perjury,[92] stomps on *stare decisis*, abandons judicial restraint, and will cause a cacophony of shock waves through other canons of constitutional protections, medical malpractice, insurance, information access, electronic communications, travel, criminal, and commercial law. And it did so counter to popular will—61% of people in the U.S. believe that abortion should be legal.[93] *Dobbs* will result in multidimensional disruption felt at every layer of society. The result may be a

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[88] *Parliament Statement on the Recent U.S. Supreme Court Decision*, PARLIAMENT OF THE WORLD'S RELIGIONS (July 1, 2022), https://perma.cc/XB4D-EHJT.

[89] Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP (April 8, 2022), https://perma.cc/98BY-ZUUC.

[90] John R. Vile, Welsh v. United States *(1970)*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://perma.cc/V3M3-BAY7. The Supreme Court expanded the meaning of religion under the First Amendment for the purposes of determining whether an individual could obtain a religious exemption from the military draft during the Vietnam War to include nonreligious conscientious objectors whose moral convictions were intense, even if they were not grounded in belief in a supreme being. *Id.*

[91] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

[92] *See e.g.*, The Daily Show with Trevor Noah, *These Judges Make Lying Fun. It's the Black Robe Comedy Tour!*, YOUTUBE (June 24, 2022), https://youtu.be/zX5fYTE9wH8.

[93] PEW RSCH. CTR., AMERICA'S ABORTION QUANDARY (2022), https://perma.cc/MC4W-PCHB.

swift balkanization across states that protect abortion and other reproductive care like contraception, in-vitro fertilization, gender-affirming care, as well as same-sex and interracial marriage, end of life services, and other patient-directed care,[94] as some states encode human rights protections in their state constitutions and other states criminalize long-respected liberty protections.[95]

The constitutional consequences of *Dobbs* may cut even deeper than dismantling the substantive due process rights recognized in "post-Casey decisions like *Lawrence v. Texas* . . . (right to engage in private, consensual sexual acts), and *Obergefell* . . . (right to marry a person of the same sex)."[96] The majority emphasizes that it fully rejects a fundamental right to bodily autonomy and the right to "define one's 'concept of existence'" as "too much" for "ordered liberty."[97] It rationalizes that "those criteria . . . could license fundamental rights to illicit drug use, prostitution, and the like," concluding "[none] of these rights has any claim to being deeply rooted in history."[98] Just what Alito imagines "and the like" to include is worth exploring, considering the implications of criminalization and extradition discussed below and why we recommend broadly construing human rights protections into interstate extradition proceedings.[99]

As authority, Alito cites Judge Diarmuid O'Scannlain "dissenting from denial of rehearing en banc" from a Ninth Circuit decision in 1996, *Compassion in Dying v. Washington.*[100] In this dissenting remark, Judge O'Scannlain scorned his colleagues on the Ninth Circuit for "promulgating a new constitutional right, one unheard of in over two hundred years of American history, . . . by judicial fiat."[101] Similar to Alito's selective excavation of history, O'Scannlain dictates a version of history that

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[94] *See e.g.*, Hayley Penan & Amy Chen, *The Ethical & Religious Directives: What the 2018 Update Means for Catholic Hospital Mergers*, NAT'L HEALTH L. PROGRAM, (Jan. 2, 2019), https://perma.cc/8X98-6RVM.

[95] For example, Thomas' concurrence implies that *Dobbs* may threaten the constitutional protection to interracial marriage, which was established in part on substantive due process grounds. *Dobbs* 142 S. Ct. at 2300 (Thomas, J. concurring); *see* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[96] *Dobbs*, 142 S. Ct. at 2228, 2258, 2301.

[97] *Id*. at 2258.

[98] *Id.*

[99] *Id.* at 2236.

[100] *Id*. at 2258. To fully understand the future consequences of *Dobbs* and the red flags the majority is signaling, it is worth digging into this citation. This is not a dissent from a Ninth Circuit decision. It is Judge O'Scannlain's dissent stemming from the Circuit's rejection of "[an active judge *sua sponte* request[] that the full court rehear this case en banc." *See* Compassion in Dying v. Washington, 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting).

[101] *Compassion in Dying*, 85 F.3d at 1440 (O'Scannlain, J., dissenting).

erases any justification of suicide, including historic examples named by the district court, for example, under circumstances where the only alternative is living in agony.[102]

Organizations advocating for patient autonomy over medical decisions at the end of life have flagged the potential impact of *Dobbs* as potential fodder to void:

> people's advance directives, ignoring the decision-making authority of a patient's health care proxy, redefining the legal definition of death to keep patients on life support against their will, and allowing physicians opposed to medical aid in dying to refuse to transfer a patient's medical records to a physician willing to provide this option.[103]

We should consider at the very least that the playbook we will be facing for the next generation includes not just stripping rights for contraception, same sex marriage, and adult consensual sex, but also other rights to bodily autonomy, including euthanasia and many other types of patient decision-making.[104]

The protection from government intrusion articulated by the district court decision O'Scannlain sought to overturn cited to *Roe* and *Casey* throughout. Alito cited it because it is what the majority is really abandoning through *Dobbs,* with impact far beyond abortion:

> Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.[105]

A similar message, of course, applies to those opposing abortion.

D. Abortion Criminalization in the Wake of Dobbs

Recent scholarship emphasizes that outlawing travel may become the next tactic in the anti-abortion activists' playbook despite the histori-

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[102] *Id.* at 1445. The District Court also reviewed history, surfacing many examples of suicide being tolerated and not criminalized. *Id.*

[103] *SCOTUS Ruling that Abortion is Not Constitutionally Protected Is Troubling Trend of Restricting Patient–Directed Care, Group Says*, COMPASSION & CHOICES (Jun. 24, 2022), https://perma.cc/C3NG-QBFS.

[104] *Id.*; *see also* Penan & Chen, *supra* note 94.

[105] *Compassion in Dying*, 85 F.3d at 1444 (O'Scannlain, J., dissenting).

cal constitutional legal protections for travel.[106] Bills are already being introduced in a handful of states like Missouri, Texas, Arkansas, South Carolina, and South Dakota that attempt to punish people seeking reproductive health care outside of the state they reside in.[107]

These bills that punish traveling out of state for health care mirror recent attempts of states like Idaho to punish parents who take their children out of state for gender-affirming care demonstrate how this brash trend will emerge within the abortion context.[108] This Idaho bill builds on the Texas governor's directive to child welfare services to investigate parents who support their children's gender-affirming care.[109] Predictably, as states like Idaho and Texas seek to lengthen their longarm jurisdiction over their residents' conduct in other states, states that protect rights to both abortion and gender-affirming care have reacted by passing protective legislation of their own.[110]

A more direct comparison can be made to a 15-year-old Missouri rule for minors, which created a civil cause of action against anyone who helped a Missouri minor obtain an abortion out of state without a parent or judge's approval.[111] The state supreme court struck down the rule in 2007, finding that "it is beyond Missouri's authority to regulate

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[106] David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (draft at 17) (on file with CUNY L. Rev.) (Targeting cross-border abortion is an explicit post-*Dobbs* shift towards the anti-choice movement goal of outlawing abortion nationwide, with some, like the president of Students for Life, saying their previously quiet goals out loud: "if you travel out of state for an abortion, that abortionist can be held liable."); *see also* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism,* 67 N.Y.U. L. REV. 451, 451 (1992).

[107] Sahil Kapur et al., *Republicans Block Bill to Protect Women Who Travel to Other States for Abortions*, NBC NEWS (July 14, 2022, 6:00 PM), https://perma.cc/AP8Z-M3RR; Myah Ward, *South Carolina Republicans Advance Abortion Bill to Senate Floor Without Exceptions for Incest, Rape*, POLITICO (Sept. 6, 2022, 5:01 PM), https://perma.cc/X6QM-AGBT. These bills are generally built off of the National Right to Life Committee's model legislation. *National Right to Life Committee Proposes Legislation to Protect the Unborn Post-Roe*, NAT'L RIGHT TO LIFE COMM. (Jun. 15, 2022), https://perma.cc/9GR8-YBVF.

[108] Tyler Kingkade, *Idaho Lawmakers Seek to Punish Parents Who Take Trans Youth to Other States for Health Care*, NBC NEWS (Mar. 9, 2022, 8:44 PM), https://perma.cc/GMR7-H5HK.

[109] Caitlin Gibson, *Dreading the Knock at the Door: Parents of Trans Kids in Texas are Terrified for Their Families*, WASH. POST (Mar. 17, 2022, 5:51 PM), https://perma.cc/7K3A-K48X.

[110] Patrick Hoff, *Conn. Passes 'Safe Harbor' Law for Abortion, Trans Care*, LAW 360 (May 11, 2022, 8:55 PM), https://www.law360.com/employment-authority/articles/1492355/conn-passes-safe-harbor-law-for-abortion-trans-care (on file with CUNY L. Rev.).

[111] Kaia Hubbard, *Missouri Is Eyeing a Ban on Abortion Beyond Its Borders. It's Happened Before*, U.S. NEWS (Mar. 24, 2022, 3:10 PM), https://www.usnews.com/news/national-news/articles/2022-03-24/the-model-for-missouris-plan-to-ban-abortion-beyond-its-borders (on file with CUNY Law Review).

conduct that occurs wholly outside of Missouri," asserting that the law was only valid within the context of conduct occurring within Missouri.[112]

A handful of other states like Connecticut, New York, New Jersey, and Delaware passed safe harbor legislation in the weeks following the leaked *Dobbs* decision.[113] These laws also seek to protect access to gender-affirming care for trans people as states such as Texas and Alabama have increasingly sought to criminalize gender-affirming care.[114]

These safe harbor laws are not equal—the Connecticut law goes further than that of New York, for example, by prohibiting the use of state agency resources, including "time, money, facilities, property, equipment, personnel, or other resources in furtherance of any interstate investigation or proceeding seeking to impose civil or criminal liability upon a person or entity" for providing, receiving, or assisting someone seeking an abortion.[115] This litany of prohibitions also extends to a broader set of potential crimes for which extradition from Connecticut may be sought.[116]

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[112] Kaia Hubbard, *Out-of-State Bans Threaten to Extend the Reach of Anti-Abortion America. But Some States are Preparing*, U.S. NEWS (May 19, 2022, 5:37 PM), https://www.usnews.com/news/national-news/articles/2022-05-19/out-of-state-bans-threaten-to-extend-the-reach-of-anti-abortion-america-but-some-states-are-preparing (on file with the CUNY Law Review). "The Missouri decision relied on a 1975 U.S. Supreme Court decision, *Bigelow v. Virginia*, which concerned an advertisement in a Virginia newspaper for a New York abortion service, where the procedure had recently become legal. A Virginia statute prohibited any publication from encouraging women to get an abortion." *Id.* The justices wrote that Virginia could neither "prevent its residents from traveling to New York to obtain those services," meaning abortion, or "prosecute them for going there." *Id.* Furthermore, "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Id.*

[113] N.J. STAT. § 2A:160-14.1 ("Prohibits extradition of individuals from another state back to that state for actions related to conduct concerning reproductive health care services lawful in this State."); *see also* 83 Del. Laws c. 327 § 3928 (2022) (Provides "[l]imitations and protections against actions relating to the termination of pregnancy" including, as a matter of public policy, protection from "[a] law of another state that authorizes a person to bring a civil action against a person" for actions relating to the termination of pregnancy. *Id.* This section protects against the issuance of a summons for a criminal case or investigation, or a subpoena for information or testimony relating to the termination of pregnancy. *Id.*).

[114] *Alabama Ban on Gender-Affirming Care of Transgender Youth Takes Effect*, NBC NEWS (June 17, 2022), https://perma.cc/ZDK2-HMWX; Gibson, *supra* note 109; All Things Considered, *Texas Families With Trans Kids Are Leaving the State*, NPR (Apr. 27, 2022), https://perma.cc/7PXP-M3CH.

[115] CONN. GEN. STAT. § 22-19 (2022).

[116] Prohibits a judge from issuing a summons in a pending prosecution for a criminal violation of another state's law "*involving the provision or receipt of or assistance with reproductive health care services* . . . that are legal in this state, *unless the acts forming the ba-*

This analysis of whether criminalized conduct would also be criminal conduct in the safe harbor state is a familiar analysis called "dual criminality" in the context of domestic and international extradition, discussed in more depth below.[117]

While the New York law is a start, it needs more work in order to ensure that it is effective and meaningful for those it seeks to protect. Its prohibitions in regards to what state resources may be used are less extensive than Connecticut and do not trigger a dual criminality analysis—they are only triggered by a literal charge "relating to abortions legally performed in this state"[118] This is an important distinction between the two bills because New York's statute fails to prohibit extraditions for the many other penal codes that states may use to criminalize people for conduct related to seeking an abortion, as well as all conduct occurring in other states. As mentioned above,[119] motivated prosecutors have used myriad laws in the penal code to target people for the underlying conduct of controlling their reproductive lives.

New Jersey's law, like Connecticut's, includes a dual criminality analysis, protecting "actions related to conduct concerning reproductive health care services lawful in this State."[120] In Delaware, the law provides "[l]imitations and protections against actions relating to the termination of pregnancy," including protection from "[a] law of another state that authorizes a person to bring a civil action against a person" for actions relating to the termination of pregnancy, and against the issuance of a summons for a criminal case or investigation, or a subpoena for information or testimony relating to the termination of pregnancy.[121]

In Delaware, the law explicitly limits *non-fugitive* extradition of someone for committing an act that results in a criminal charge for the termination of pregnancy in another state.[122]

But all these statutes are severely limited in important ways. Even in Connecticut, these safe harbor laws do not require conduct to be described in extradition paperwork.[123] Any Connecticut state actor ex-

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sis of the prosecution or investigation would also constitute an offense in this state." Id. (emphasis added).

[117] *See* Section IV(B) *infra*.

[118] S.B. 9077A, 2022S., 2021-2022 Leg. Sess. (N.Y. 2022).

[119] *See* GOODWIN, *supra* note 23.

[120] N.J. STAT. § 2A:160-14.1.

[121] 83 Del. Laws c. 327 § 3928 (2022).

[122] *Id.* ("Pursuant to this bill, a person may only be extradited if the acts for which extradition is sought are punishable under Delaware law if their consequences, as claimed by the other state, had taken effect in this state.").

[123] Out-of-state warrants typically use a code chosen by the FBI when they enter the warrant into the National Crime Information Center ("NCIC"). NAT'L CRIME INFO. CNTR., NCIC CODE MANUAL (2021), https://perma.cc/MA8G-9Z92.

pected to refuse to deploy their resources would have no way to know enough facts to discern, for example, whether a warrant for an abortion describes conduct penalized in Connecticut.[124] These system actors are not poised to do factual analysis based on the statutorily required amount of information regarding whether the conduct in question is criminal in Connecticut. It is unrealistic to expect these actors to do anything but reflexively turn the system wheels they are responsible for, described in detail below, regardless of safe harbor statutes.

In addition to not being able to tell from the face of the extradition warrant whether the conduct criminalized is abortion-related, neither the Connecticut or New York legislation incentivizes system actors to stop the bureaucratic wheels they are responsible for, such as making an arrest for an out of state warrant, from churning. Examples of potential incentives could be accountability measures like disciplinary consequences, limits on immunity or private causes of action if state actors violate state safe harbor laws.

According to legal historian Mary Ziegler:

> How those disputes will be resolved – whether what the red state would be doing would be constitutional is unclear, which state's law would apply in those circumstances is unclear. And the great irony of it all, of course, is that if that's contested, it's going to end right back up in the Supreme Court, which in this draft is telling us that things are going to become much more peaceful when the court gets out of the abortion business and this goes back to the states.[125]

This should not discourage safe harbor states. Like state resistance to the Fugitive Slave Law, safe harbor laws can increase costs of enforcing abortion criminalization, prevent kidnapping, and delay subjection of people to extradition.[126]

E. Lessons From Immigration Sanctuary Cities

A review of how system actors within sanctuary cities during Trump's presidency to maintain coordination between local law enforcement and federal immigration officials, even when local laws prohibited it, provides insight into how these safe harbor laws may function in practice. While not a "city" law, Washington State legislators passed

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[124] This assumes that abortion-related conduct will be coded as abortion and not homicide, despite being charged as homicide historically, along with other crimes like abuse of a corpse, etc. *See* Section V *infra*.

[125] Hubbard, *supra* note 111.

[126] Const. Rts. Found., *supra* note 2, at 8.

the 2019 Keep Washington Working ("KWW") Act and the 2020 Courts Open to All Act ("COTA") to "place Washington state at the forefront of national efforts to protect immigrant rights through state law."[127] The text and intent of the law was similar to Connecticut's safe harbor abortion legislation.[128]

The Center for Human Rights at the University of Washington did a study of the laws' implementation across law enforcement agencies within the state and found, however, that "the mere passage of these laws doesn't mean they're actually being enforced."[129] In fact, some law enforcement officials openly declared their intention *not* to follow the state law.[130] But more commonly, localities failed to properly update their local policies to adhere to the new legislation prohibiting collaboration with immigration officials.[131] Local officials also, contrary to the prohibition, continued to collect and share citizenship, date of birth, and place of birth data with immigration officials: "In several cases, this information-sharing was so institutionalized in the regular practices of local law enforcement that it took place on a daily basis, even after KWW became law."[132]

One report cited by the University of Washington Center for Human Rights "Immigrant Rights Observatory" ("Observatory") found that after the sanctuary law was passed, "Clark County Sheriff's Office continue[d] to share inmates' personal information—particularly that of Latinos—with ICE."[133] This report, based on emails obtained through public access requests, described emails between immigration and jail

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[127] CTR. FOR HUM. RTS., THE UNIV. OF WASH., PROTECTING IMMIGRANT RIGHTS: IS WASHINGTON'S LAW WORKING? (2021), https://perma.cc/7AHD-JG5B.

[128] *Id.*

> No state agency, including law enforcement, may use agency funds, facilities, property, equipment, or personnel to investigate, enforce, cooperate with, or assist in the investigation or enforcement of any federal registration or surveillance programs or any other laws, rules, or policies that target Washington residents solely on the basis of race, religion, immigration, or citizenship status, or national or ethnic origin.

[129] *Id.*

[130] Charles Creitz, *Washington 'Sanctuary' Law Means Gov. Inslee Should Step Down or Be Held in Contempt, Arrested, Sheriff Says*, FOX NEWS (June 1, 2019, 1:14 AM), https://perma.cc/LAE9-2JBV.

[131] CTR. FOR HUM. RTS., THE UNIV. OF WASH., *supra* note 127 (section titled "KWW Implementation in County law Enforcement Policies"); JACOB HAMBURGER & KATHLEEN SCHMIDT, THE DIGITAL DEPORTATION MACHINE: HOW SURVEILLANCE TECHNOLOGY UNDERMINES CHICAGO'S WELCOMING CITY POLICY 6 (2021) (discussing the limitations of Chicago's Welcoming City Ordinance first passed in 2012 and how it has broad carve outs for many people accused of crimes).

[132] Troy Brynelson, *Clark County Communications with ICE Raise Legal Questions*, OR. PUB. BROAD. (July 2, 2021), https://perma.cc/YY7N-JWXM.

[133] *Id.* "ICE" refers to the U.S. Immigration and Customs Enforcement.

officials. Unlike routine public access requests that are answered slowly, ICE officials received answers to their questions for personal identifying information about the people detained in the jail within minutes.[134] When the ICE agent thanked her, the jail official responded, either oblivious to the sanctuary law prohibiting this exchange or in spite of it: "That's what I'm here for . . . !"[135] This is precisely the type of casual cooperation that occurs between law enforcement agents that may easily evade the intent of safe harbors and sanctuaries, regardless of the intentions of their lawmakers.

Lawmakers must consider the obvious motivations that system actors have across jurisdictions to share information with their peers despite local prohibitions. The Observatory researchers considered the cause of this type of interaction to be a result of "deep and durable preexisting relationships between local law enforcement and ICE/CBP, such that in many cases, local officers preferred to turn to ICE/CBP, rather than the Attorney General's Office, for guidance on how to implement the law."[136] Another cause identified by the Observatory is also relevant in the abortion context: federal immigration laws that explicitly permit requests for data give state system actors discretion to default to following federal law—similar to how state actors may default to following the Extradition Clause of the United States Constitution and the federal law that implements it.[137] Without incentives that encourage state actors to follow state law, such as private causes of action for violation of local laws, it is more likely that momentum will encourage nothing to change rather than system actors incorporating a new analysis into their routine.

1. Fusion centers and other surveillance technologies

In addition to failing to require practical changes that force demanding states to describe what conduct is the subject of their extradition order or including incentives or disincentives in the safe harbor laws, safe harbor states have also failed to specifically address interstate data sharing that may also invariably facilitate anti-abortion states. Database systems already exist through federal government and commercial systems that seamlessly share data without needing to be specifical-

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134 *Id.*

135 *Id.*

136 CTR. FOR HUM. RTS., THE UNIV. OF WASH., *supra* note 127. "CBP" refers to the U.S. Customs and Border Protection.

137 *Id.* (citing 8 USC §§ 1325-26) "As a result [of §§ 1325 and 1326] ICE effectively has a mandate to investigate virtually any undocumented person as a 'criminal suspect' whom it might otherwise target for civil immigration enforcement, even if it does not ultimately charge that person with a crime." *Id.* (quoting HAMBURGER & SCHMIDT, *supra* note 131).

ly given by a state actor.[138] For example, police in a Connecticut jurisdiction do not need to specifically cooperate with an anti-abortion state—they simply need to add information to an interstate database on a daily basis about everyone arrested on any given day.[139] For example, if there is a person arrested for petit larceny in Connecticut but they are wanted for extradition in Oklahoma, that information is automatically shared through interstate databases.[140]

Another report about the limits of implementing Sanctuary City protections focused on the Chicago Crime Prevention and Information fusion center. A fusion center "is [a] state-run information sharing hub[] that receive[s] federal funding."[141] Fusion centers introduce a problematic loophole into any attempt of states to firewall their criminal legal system information to other states or federal agencies, whether to protect migrant communities or pregnant people seeking abortion care. The fusion center's purpose is "to allow local, state, and tribal governments to gather, process, analyze, and share information and intelligence relating to all crimes and hazards."[142] Regardless of Chicago's Welcoming City Ordinance, fusion centers have continued this coordination in the shadows.[143] Fusion centers like this exist across the country.[144] Another report by Mijente focused on the Austin Regional Intelligence Center ("ARIC") in Texas.[145] It found that "ARIC's data sharing with local schools and community colleges allowed the [school district police] and ICE to profile and target noncitizen students and students of color based on arbitrary determinations of gang affiliation."[146]

Similarly in the abortion context, fusion centers will likely play a role in data-sharing across jurisdictions, even those with safe harbor statutes prohibiting data sharing. Data brokers are often a means of facil-

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[138] CTR. FOR HUM. RTS., THE UNIV. OF WASH., *supra* note 127 (citing HAMBURGER & SCHMIDT, *supra* note 131); Johana Bhuiyan, *How Expanding Web of License Plate Readers Could Be 'Weaponized' Against Abortion*, GUARDIAN, (Oct. 6, 2022), https://perma.cc/3QBF-ZV78 ("For instance, in California, the Vallejo police department, which has detected nearly 400,000 vehicles in the last month, shares its license plate reader data with law enforcement in Texas and Arizona.").

[139] *See* U.S. DEP'T OF JUST. & U.S. DEP'T OF HOMELAND SEC., FUSION CENTER GUIDELINES—DEVELOPING AND SHARING INFORMATION IN A NEW ERA 14 (2006).

[140] *See The Interstate Extradition Process*, PA. OFF. OF GEN. COUNS., https://perma.cc/J9X6-GXGF (last visited on Nov. 30, 2022).

[141] Rachel Levinson-Waldman & Faiza Patel, *DHS Needs to Clean Up its Act*, HILL (Apr. 22, 2022 8:30 AM), https://perma.cc/5EYD-KPGH.

[142] HAMBURGER & SCHMIDT, *supra* note 131, at 7.

[143] *Id.*

[144] *See* NAT'L FUSION CTR. ASS'N, *The National Network of Fusion Centers* (last visited Nov. 3, 2022, 9:09 PM), https://perma.cc/TB2D-M2DA.

[145] HAMBURGER & SCHMIDT, *supra* note 131.

[146] *Id*. at 6.

itating private data to government actors that would otherwise be inaccessible without lawful process.[147]

> If abortion is criminalized, fusion centers would undoubtedly play a role in tracking any person or organization assisting those seeking abortions. Fusion centers are a significant law enforcement intelligence multiplier, . . . giving state and local police access to federal government databases as well as commercial data brokers and aggregators. The fusion centers enjoy little oversight or regulation and there is no over-arching authority governing the fusion center network, so any rogue fusion center could collect and produce intelligence materials targeting providers or pro-choice activists that would be disseminated broadly through federal, state, and local law enforcement information sharing systems . . . .[148]

As sanctuary city ordinances prohibiting local resources from supporting immigration enforcement had to explicitly confront data-sharing fusion centers and ad-hoc data sharing by officers, statutes like Connecticut's and New York's must confront these structures to actually offer the protections they promise.[149] Furthermore, these safe harbor statutes fail to consider how the family regulation system, predicate felony penalties, probation, parole and other interstate operations should continue when half the country criminalizes health care. Another layer of complexity is how many more intersecting surveillance technology and shared databases exist between local, state, and federal law enforce-

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[147] *See* GEO. L. CTR. ON PRIV. & TECH., AMERICAN DRAGNET: DATA-DRIVEN DEPORTATION IN THE 21ST CENTURY 3, 6 (2022), https://perma.cc/M6R4-5LBQ.

[148] Spencer Ackerman, *Who Becomes a "Terrorist" in Post-Roe America?*, FOREVER WARS (May 10, 2022), https://perma.cc/GK9L-DHEH (quoting former FBI counterterrorism special agent turned whistleblower Mike German).

[149] This includes the sharing of immigration information in the National Crime Information Center ("NCIC") system, which allows law enforcement officers to check immigration databases through the NCIC. NCIC provides immigration status–related information about people whom local or state police officers stop and question, although the officers do not have the authority to enforce immigration law and may even be subject to local laws or policies that limit the extent to which they may be involved in immigration enforcement. *How ICE Uses Local Criminal Justice Systems to Funnel People into the Detention and Deportation System*, NAT'L IMMIGR. L. CTR. (Mar. 2014), https://perma.cc/K2E4-NGGG.

ment.[150] Unlawful access of these databases by police rarely receive serious punishment.[151]

Furthermore, law enforcement agencies throughout the United States are also sharing data through privatized databases like Automated License Plate Readers ("ALPRs").[152] "Using high-speed, computer-controlled camera systems, license plate readers ("LPRs") capture plates continuously and automatically as vehicles drive by. Smart software instantly translates images into text and compares the results against 'hot-list' databases of suspect plates, providing officers with real-time alerts as soon as a match is identified."[153] Research by the Electronic Frontier Foundation found "on average, law enforcement agencies were sharing data directly with around 160 other agencies. Most agencies were also adding to a pool of data shared by hundreds of other unidentified entities."[154]

These surveillance and forensic technologies are often purchased by local law enforcement agencies, including those in anti-abortion states, with federal grant money.[155] As electronic surveillance legal expert Riana Pfefferkorn recommended recently,

> Attorney General Merrick Garland should issue a policy prohibiting every component of the Department of Justice, especially the FBI, from using any federal resources to assist state or local law enforcement agencies in abortion-related investigations and prosecutions. No grant money. No personnel. No technology. No equipment. No training. No testimony in court. Not a minute of any federal agent's time.[156]

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[150] *See* Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74, OHIO ST. L.J. 1106, 1108 (2013); Rebecca Chowdhury, *America's High-Tech Surveillance Could Track Abortion-Seekers, Too, Activists Warn,* TIME (June 6, 2022, 9:51 AM), https://perma.cc/UA2K-BYMA.

[151] Yoav Gonen, *Bad Cops Not Getting Punishment They Deserve, Says Corruption Commission*, CITY (July 10, 2022, 8:00 PM), https://perma.cc/G26G-EUH8 (noting, for example, one NYPD officer who was only penalized with losing 10 vacation days for allowing unauthorized access of license plate reader database).

[152] *See Automated License Plate Reader Data Set, Explore the Data*, ELEC. FRONTIER FOUND., https://perma.cc/M3A2-NNV3 (last visited Nov. 3, 2022).

[153] Miranda McLaren, *The Key to Starting and Expanding Your ALPR Network with Ease*, JUST AUTO (Apr. 14, 2022), https://perma.cc/AX5S-JP4Q.

[154] *Automated License Plate Reader Data Set*, *Data Driven: What We Learned*, ELEC. FRONTIER FOUND., https://perma.cc/4FMA-ZNEC (last visited Nov. 3, 2022).

[155] *See* Matthew Guariglia, *End Two Federal Programs That Fund Police Surveillance Tech,* ELEC. FRONTIER FOUND., (Jan. 25, 2021), https://perma.cc/G2WQ-FMAM.

[156] Riana Pfefferkorn, Opinion, *Federal Government Will Help States Punish Abortion – Using Our Phones*, HILL (July 1, 2022, 10:30 AM), https://perma.cc/WN5J-3B78.

Truly meeting the moment of abortion criminalization requires examining all of the systems, government and commercial, already in place to facilitate the surveillance, forcible removal, and detention of people in the United States and worldwide. The unspoken assumption that all apparatuses of national data sharing, forensics, and surveillance hold in common is that law enforcement departments, large and small, federal, state, and local, generally should have access to policing related data, even when those jurisdictions do not share the same criminal laws.[157] The loss of various liberty interests as rights will result in some states passing bills criminalizing what is a right in another state. Keeping this context in mind in the following discussion of extradition should focus our attention on just how massive and imminent the *Dobbs* disruption will be on public safety.

III. HISTORY OF THE EXTRADITION CLAUSE

The Extradition Clause is an important aspect of comity between the states that was intended to increase cooperation among the states in the enforcement of their criminal laws.[158] While this clause of the Constitution has rarely been litigated, it ignited fierce firestorms of debate in the lead up to the Civil War due to southern slave states using its mechanism to expand the state enforcement of the horrid institution of slavery into free and abolitionist states.[159] It bears repeating that, while the institution of slavery and abortion access can never be directly compared, the context around them is a highly valuable area to analyze. The political response to an intense question of human rights that differs drastically between states will likely lead to interstate conflict. Thus, the Extradition Clause may become yet another constitutional clause used to expand the anti-abortion policies of states banning abortion and criminalizing access to it. However, it will not be limited to just abortion. This will inevitably include access to gender-affirming care, contraception, and queer relationships. It is vital to understand this history in order to build a human right-centered framework on how states should respond to the increasing compulsion to enforce laws violative of human rights.

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[157] GLOB. ADVISORY COMM., NATIONAL CRIMINAL INTELLIGENCE SHARING PLAN: BUILDING A NATIONAL CAPABILITY FOR EFFECTIVE CRIMINAL INTELLIGENCE DEVELOPMENT AND THE NATIONWIDE SHARING OF INTELLIGENCE AND INFORMATION, at vii (2016), https://perma.cc/4YMU-N2ZY.

[158] Wilbur Larremore, *Interstate Crime and Interstate Extradition*, 12 HARV. L. REV. 532, 537 (1899).

[159] JEREMY B. BIERBACH, FRONTIERS OF EQUALITY IN THE DEVELOPMENT OF EU AND US CITIZENSHIP 137 (T.M.C. Asser Press, 2017); *see also* Horace K. Houston Jr., *Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law*, 77 NEW ENG. Q. 252 (2004).

A. The Extradition Clause

The Extradition Clause was intended as an "obvious policy and necessity . . . to preserve harmony between States, and order and law within their respective borders."[160] The Extradition Clause states that a

> person charged in any state with treason, felony, or other crime, *who shall flee from justice*, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.[161]

The first element for extradition is that a person being sought for extradition must be *actually charged* with a crime in the demanding state; a promise to charge or threat to charge a criminal offense is insufficient.[162] The second element is that the person demanded must have fled from the demanding state.[163]

The Extradition Clause was not seen by Congress as self-executing and needed an enabling statute in order to effectuate the requirements of the constitutional provision.[164] The text of the federal enabling statute reads as follows:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such

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[160] Puerto Rico v. Branstad, 483 U.S. 219, 225 (1987) (citing Kentucky v. Dennison, 65 U.S. 66, 103 (1860)).

[161] U.S. CONST. art. IV, § 2, cl. 2 (emphasis added).

[162] Larremore, *supra* note 158, at 538.

[163] "[I]f the person apprehended does deny that he was corporeally within the demanding State at the time of the . . . alleged offence, he has a constitutional right to have such issue passed upon by the governor in the first instance, and by the courts on habeas corpus." *Id.* Further, "he is constitutionally entitled to be discharged unless it appear at least presumptively that he is an actual fugitive." *Id.*

[164] Gregory K. Wanlass, *Interstate Extradition: Should the Asylum State Governor Have Unbridled Discretion*, 1980 BYU L. REV. 376, 378 n.17 (1980).

> agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.[165]

Thus, the operative function of the Extradition Clause is housed within the federal code. This did not attract much controversy until just before the Civil War. Northern states began withholding extradition of those charged with aiding the escape of enslaved persons due to their anti-slavery and abolitionist views.[166]

Kentucky v. Dennison, a decision by the Taney court, reflected a view that the Extradition Clause was a "duty mandatory in nature but unenforceable in practice."[167] This remained the law until *Dennison* was reversed by the Supreme Court in 1987 in *Puerto Rico v. Branstad*, which held that the commands of the Extradition Clause are "mandatory and afford no discretion to the executive officers or courts of the asylum State."[168] Thus, for nearly two centuries of the country's history, the Extradition Clause had no meaningful enforcement until 1987. This was a sea change towards a stronger view of federal courts to compel state executives to turn over fugitives regardless of the justification for doing so.

i. Constructive Presence

In the years after Reconstruction, a case arose that challenged the understanding of what constituted an actual fugitive for the purpose of meeting the requirements of the Extradition Clause. This case involved criminally accused people in North Carolina alleged to have shot across state lines, killing people in the state of Tennessee.[169] The Supreme Court of North Carolina first held that the shooters could not be charged with murder in the state of North Carolina because they were "deemed by the law to have accompanied the deadly missile sent by them across the border."[170] Despite the great interest of North Carolina in pursuing the prosecution, the Supreme Court of North Carolina found that the shooters could not be extradited to Tennessee because while the commission of the murders created "constructive presence" in Tennessee,

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[165] 18 U.S.C. § 3182.

[166] Kentucky v. Dennison, 65 U.S. 66, 68 (1860). *See also* Wanlass, *supra* note 164, at 376.

[167] Wanlass, *supra* note 164, at 379.

[168] Puerto Rico v. Branstad, 483 U.S. 219, 226-27 (1987).

[169] State v. Hall, 20 S.E. 729 (N.C. 1894). The case itself does not give much detail on exactly how the defendants were present in the state of North Carolina but were capable of murdering people located in Tennessee. The decision makes reference to "missiles" but does not elaborate beyond attaching the locus of the crime to the missiles so that they may be charged in Tennessee for the murders. *Id.*

[170] *Id.* at 729-30.

that constructive presence was insufficient to qualify the accused as actual fugitives of the law from Tennessee.[171] The court paid special attention to note how this conclusion would protect the innocent from the "annoyance, expense and invasion of personal liberty involved in being extradited."[172] Indeed, the court highlighted the need to "enforce laws not simply to punish the guilty, but as well to protect the innocent."[173] Thus, the court held that the finding that the accused were constructively present and subject to extradition was erroneous and reversed the holding of the lower appellate court.[174] This is a stunning admission that, despite the gravity of the allegations, the Constitution requires actual corporeal presence in the demanding state during the commission of the crime for the accused to qualify for extradition.

Extradition became an increasingly difficult issue in the Reconstruction era due to the rapid expansion of the United States and increasing ease of interstate travel.[175]

B. The Second Nullification Crisis

The history of nullification as a concept in American history is far too dense and complex to cover adequately here. In short, since 1798 states have asserted a right to nullify federal law that is inconsistent with their view of what is constitutional.[176] While much is known about the original nullification crisis of the 1830s, little has been made of the second nullification crisis that preceded the Civil War.[177] The first nullification crisis focused on the ability of the federal government to levy tariffs based on a comically bad law not originally intended to pass.[178] The esoteric interests surrounding tariff policy in the first nullification crisis threatened by South Carolina were drastically different from the motivations of states immediately preceding the Civil War.[179]

The second nullification crisis focused on northern states resisting attempts to coerce them into the vile machinery of slavery by returning fugitive enslaved persons to Southern slave states.[180] Abolitionist

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[171] *Id*.

[172] *Id.* at 731-32.

[173] *Id.* at 731.

[174] *Id.* at 732.

[175] Larremore, *supra* note 158, at 532-44.

[176] Houston, *supra* note 159, at 254-55.

[177] Houston, *supra* note 159, at 253.

[178] ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845, VOL. III 134-37 (Harper & Row, Publishers, Inc., 1st ed. 1984).

[179] The roots of nullification can be traced to Jefferson's opposition to the Alien and Sedition Act of 1798 and evolved into a more forceful belief by John Calhoun during the nullification crisis. *See* Houston, *supra* note 159, at 254-55.

[180] S*ee* Houston, *supra* note 159, at 252.

movements pushed Northern states to not be complicit in this evil institution that was a pillar of Southern states.[181] Pennsylvania in particular saw an increasing pushback against slave holders using the machinery of the state to enforce their claims to escaped enslaved persons within its borders.[182] This reflected a broader trend within Northern states to enact legislation to prevent state resources from being used to support slavery in the South.[183] Increasingly, tensions rose between free states and slave states, resulting in the enactment of the Fugitive Slave Act in 1850 which attempted to settle disputes among the states by creating a federal law requiring the return of escaped enslaved persons.[184] This did not have the intended effect and resulted in free states taking increasingly radical measures to protect free persons within their borders.[185] This led to Vermont passing a habeas corpus law that severely restricted if not outright nullified the Fugitive Slave Act within its borders.[186]

i. Vermont's Habeas Corpus Law

On November 13, 1850, the Vermont habeas corpus law went into effect.[187] It created an affirmative duty for state officials, including states attorneys and "all judicial and executive officers," to "protect, defend, and procure to be discharged every such person . . . claimed to be a fugitive slave."[188] This law required a state's attorney to seek a writ of habeas corpus for anyone being held in custody who claimed to be a formerly enslaved person.[189] Additionally, anyone who lost the initial habeas hearing had a right to immediate appeal[190] and the factual portion of the appeal was to be heard by a jury.[191] The inclusion of a jury in the decision-making process provided an opportunity for jurors to effectively nullify the mandates of the Fugitive Slave Act. They could simply

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[181] Many Northern states such as Pennsylvania increasingly fought against returning enslaved persons to slave states beginning in the 1840s as part of a broader legal movement to eliminate the recognition of enslaved persons as property. *See* DAVID G. SMITH, ON THE EDGE OF FREEDOM: THE FUGITIVE SLAVE ISSUE IN SOUTH CENTRAL PENNSYLVANIA, 1820-1870, at 90-93 (Fordham University Press, 2012).

[182] States increasingly began not only depriving slaveholders of state resources to return formerly enslaved persons, but they also began to prosecute those who went outside legal process with charges of kidnapping. *See id.* at 96.

[183] *See* Houston, *supra* note 159, at 254-55, 258.

[184] *See* Houston, *supra* note 159, at 252-59.

[185] *See* Houston, *supra* note 159, at 259, 261.

[186] *See* Houston, *supra* note 159, at 261.

[187] Vermont 1850 Habeas Corpus Act, 1850 Vt. Acts & Resolves 9.

[188] *Id.* at §§ 2, 4.

[189] *Id.* at §§ 2, 3.

[190] *Id.* at §§ 2, 5.

[191] *Id.* at § 6.

make a binding factual finding, at the appellate level, that the unlawfully detained person was not formerly enslaved—whether or not their finding was accurate, they would have decided it was just.

Through a modern lens, such a statute might appear puzzling. In the twenty-first century in the United States, government entities are almost exclusively the party imprisoning people under color of law. They usually respond to, rather than bring, allegations via habeas that a person is unlawfully detained. However, in the mid-nineteenth century, the Fugitive Slave Act had deputized everyday citizens to imprison anyone they suspected of being an "escaped" formerly enslaved person.[192] Under the Vermont habeas law, the duty was placed on the state to inquire into the imprisonment of an alleged formerly enslaved person who was most likely imprisoned by private residents.[193] The Vermont law was one in a trend across abolition states that implemented "due process" proceedings to protect fugitive enslaved persons.[194] Vermont's 1851 law was never fully challenged due to the Civil War and enactment of the Thirteenth Amendment.[195]

The brazen nature of Vermont's direct challenge to the Fugitive Slave Act led to accusations by the Southern press that Vermont had engaged in an act of nullification. The *Richmond Whig and Public Advertiser* printed the headline "Nullification Made Easy" after republishing a "scathing denunciation" of abolitionist John Greenleaf Whittier's comments stating that "[s]o far as [the Fugitive Slave Act] is concerned, I am a nullifier."[196] The response by Southern press went even further by alluding to retaliation by Southern states:

> When it becomes apparent that [the Fugitive Slave Law's] operation is practically nullified by the people of one or more States, differences of opinion may arise as to the proper remedy, but one thing is certain that some ample mode of redress will be chosen, in which the South with entire unanimity will concur.[197]

This response to Vermont's pushback against the Fugitive Slave Act was not isolated. The *Daily National Intelligencer* of Washington D.C. stated that they were "mortified and astonished that such an enactment should not only have received the concurrence of the Legislature, but the sanction of the Governor . . . . This act of Vermont, plainly and

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[192] Fugitive Slave Act of 1850, Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

[193] Houston, *supra* note 159, at 261-62.

[194] *See* CONST. RTS. FOUND., *supra* note 2.

[195] Houston, *supra* note 159, at 271.

[196] *Id.* at 259.

[197] *Id.*

intentionally overrules and sets aside the Constitution and the Law of Congress."[198]

While the Vermont law went largely unenforced and never truly tested in court, it remains a stark reminder of the power of states to protect the human rights of those within its jurisdiction from the abrogation of those rights by other states. Comity between the states may be of intense interest, but in states committed to protecting fundamental human rights, comity should never take precedence.

ii. Ohio Governor's Refusal to Extradite in *Kentucky v. Dennison*

The most important case during the buildup to the Civil War was *Kentucky v. Dennison* which saw Kentucky bring a lawsuit against the governor of Ohio, William Dennison.[199] *Dennison* concerned Willis Lago, a free Black man in Ohio who was charged in Kentucky for assisting in the escape of an enslaved person.[200] The criminal charge was not a crime in Ohio, where he was being sought.[201] As such, the governor of Ohio, William Dennison refused to extradite Mr. Lago, citing an opinion by the Ohio attorney general that the prosecution for aiding an escaped enslaved person was not *malum in se,* which translates as "evil in and of itself."[202] The Commonwealth of Kentucky sought a writ of mandamus in federal court seeking to compel Mr. Lago's extradition.[203] Like the *Dobbs* majority, the Kentucky governor also invoked the original intent of the Constitution's authors: "It may, in truth, be said that the Constitution was the work of slaveholders."[204] The Court rejected Governor Dennison's rationale for denying the extradition request as inconsistent with the intent of the Extradition Clause, but also denied the power of federal courts to issue a writ of mandamus to compel the extradition.

The decision in *Dennison* should be viewed as a product of its time as it was decided mere days before the South seceded and the Civil War

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[198] The Houston article cites several other contemporaneous sources for the broad reaction against Vermont's legislation. Some fell short of declaring it nullification, but essentially did so in their characterization of the law. *Id.* at 266.

[199] *See* Kentucky v. Dennison*,* 65 U.S. 66, 68 (1861).

[200] *Id.* at 72.

[201] An important point here is the discordance among criminal laws among the states and the persistent intuition among states that they should not extradite persons charged with crimes that are not a crime in the demanded state. This fundamental tension is codified in international law but remains noticeably absent as an overriding concern in U.S. case law and precedent of the extradition clause. *See id.* at 68.

[202] *Id.* at 68-69, 70.

[203] *Id.* at 71, 72.

[204] Stephen R. McAllister, *A* Marbury v. Madison *Moment on the Eve of the Civil War: Chief Justice Roger Taney and the* Kentucky v. Dennison *Case*, 14 GREEN BAG 2D 405, 410 (2011).

began.[205] However, it incorporated the relatively common understanding at the time of a weak federal government.[206] The decision focused in particular on the binding nature of the adoption of the Constitution and the discretionary concerns of the state.[207] The Court framed the debate around the ability of states to maintain discretion over extradition when it stated that the Extradition Clause "was not to be regarded or construed as an ordinary treaty for extradition between nations."[208] The Court further explained the construction of the Extradition Clause as being:

> not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by pass-

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[205] *Id.* Kentucky's Governor Magoffin responded with this chilling threat:

> It is sufficient to say that the federal Constitution was the work of delegates whose almost entire constituency were citizens of slave States. It may, in truth, be said that the Constitution was the work of slaveholders; that their wisdom, moderation, and prudence gave it to us. Nonslave-holding States were then the exception, not the rule. The organic law of the nation recognized by its provisions, in unmistakable terms, the right to slave property, some of which provisions were designed for its protection.

Id. at 410. Magoffin closed with the threat that Dennison's legal position would lead to "a dissolution of the Union." *Id.* at 411.

[206] Puerto Rico v. Branstad, 483 U.S. 219, 225 (1987) (noting that the "practical power of the Federal Government [was] at its lowest ebb since the adoption of the Constitution").

[207] The arguments by the state of Kentucky vigorously defended the idea that they "think the State has peculiarly come under the obligation expressed in the [extradition] clause in question. Her hands are tied by the clause." *Dennison,* 65 U.S. at 80. The state of Kentucky in particular took offense to the idea that states could exercise discretion because it would lead to "conflicts between State and Federal Agencies, by inculcating the idea that there is an incompatibility in the exercise of official fidelity . . . . The State functionary owes allegiance and obedience to the Constitution of the United States, and the laws made in pursuance thereof, before everything else." *Id.* at 82. Kentucky roundly rejected the idea that concerns about the charged offenses were not "known to civilized nations generally, to the common law, or to the statutes or polity of Ohio," by stating that such conflicts would "destroy the force of this clause of the Constitution at its inception, and . . . would make each a supervisor of the police power of the others, and, by reason of conflicting policies in their progress, would inevitably lead to **alienation, confusion, and ultimate discord**. *Id.* at 84 (emphasis added).

[208] *Id*. at 100.

> ing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered.[209]

The central theme of the decision was to insist that the reading of the Extradition Clause as mechanically binding without discretion was intended to prevent extradition from becoming "a constant source of controversy and irritating discussion."[210]

This reasoning ultimately gave great deference to Southern slaveholding states to continue using criminal prosecution to enforce the horrid institution of slavery while forcing abolitionist states to become complicit in perpetuating slavery by means of the Extradition Clause.[211] The Court's holding was *morally unconscionable* and was the product of Chief Justice Taney's failing to maintain peace between slaveholding states and anti-slavery states. It maintained the institution of slavery over the concerns of inherent human rights of those persons who escaped its grasp. This is no surprise coming from the same Court that had decided the most infamously wrong case of *Dred Scott.*[212]

Chief Justice Taney limited the impact of the decision to eliminate state discretion in extradition by declining to recognize the ability of federal courts to compel governors to comply with the Extradition Clause.[213] The *Dennison* decision ultimately foreclosed any actual ability for demanding states to compel asylum states to extradite those charged with crimes in the demanding states through a writ of mandamus.[214] In essence, governors could forcibly protect those within their state's jurisdiction from extradition under the pretense that they did not recognize extradition requests where elements of dual criminality were not met. While they violated the commands of the Constitution, there was no enforceable means by which states could compel extradition. A holding that prohibits states from exercising discretion in extradition when fundamental human rights are at stake should not survive when its holding sought to maintain legal claims to slavery.[215]

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[209] *Id.* at 100.

[210] *Id.* at 102.

[211] *Id.* at 104-06.

[212] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[213] *Dennison,* 65 U.S. at 109-10.

[214] *Id.*

[215] Indeed, the 1987 decision *Puerto Rico v. Branstad* distances itself from the factual circumstances of *Kentucky v Dennison*: "*Kentucky v. Dennison* is the product of another time . . . . [It] is fundamentally incompatible with more than a century of constitutional development." Puerto Rico v. Branstad, 483 U.S. 219, 227, 230 (1987).

C. The Uniform Criminal Extradition Act

In the 1920s there was a concerted effort to unify and harmonize each state's extradition laws, resulting in the Uniform Criminal Extradition Act.[216] A proliferation of interest in the Extradition Clause emerged at the end of the nineteenth century, spurred by the growing nation and the realities of interstate extradition in an age where it could take weeks to travel from coast to coast.[217] Thus, in July 1926, the National Conference of Commissioners on Uniform State Laws and Procedure finalized a draft of model legislation known as the Uniform Criminal Extradition Act ("UCEA").[218] The first states to adopt the UCEA were Idaho, New Mexico, Pennsylvania, and Utah.[219] A report by the Association of Grand Jurors in New York City presented to Governor Franklin D. Roosevelt and the New York State legislature contained a version of the Uniform Criminal Extradition Act.[220] The text of this act was adopted by the New York State legislature shortly after and remains substantially unchanged to this day under the Criminal Procedure Law Article 570.[221] To date, 47 states have adopted this model legislation and those who have not have enacted their own statutes to comply with the interstate Extradition Clause.[222]

The UCEA goes beyond what is required by either the Constitution or the federal law enforcing the constitutional provision in ways that are instructive in a post-*Dobbs* world. For example, the Constitution requires only that a person must be extradited if they are an actual fugitive, that is, they were physically present in the demanding state at the time of the commission of the crime and subsequently fled.[223] The UCEA permits, though does not mandate, the extradition of a person who has never even visited the demanding state.[224]

Presumably this extradition provision was designed to address a fact pattern like that previously discussed in *State v. Hall,* the Tennessee

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[216] *See generally* FRANKLIN D. ROOSEVELT, INTERSTATE EXCHANGE OF WITNESSES AND INTERSTATE EXTRADITION (Governor's Conference at New London, 1929).

[217] Many of the primary sources for this article were written in the late nineteenth century with the most comprehensive being the Larremore article in the 1899 volume of the Harvard Law Review. Larremore, *supra* note 158, at 533-44; *see also* SAMUEL THAYER SPEAR, THE LAW OF EXTRADITION: INTERNATIONAL AND INTER-STATE (3d ed. 1885).

[218] George Young, *National Conference of Commissioners on Uniform State Laws*, 1 LEGISLATOR (1926).

[219] *Id.*

[220] ROOSEVELT, *supra* note 216.

[221] *See* N.Y. CODE CRIM. PROC. Article 570 (McKinney 2022).

[222] *Summary Overview Statement and Levels of Authority*, PA. OFF. OF GEN. COUNS., https://perma.cc/SJ8A-WZLE (last visited Jul 17, 2022).

[223] Michigan v. Doran*,* 439 U.S. 282, 289 (1978).

[224] *See* N.Y. CODE CRIM. PROC. § 570.16 (McKinney 2022).

case seeking extradition of shooters in North Carolina for shots fired across state lines.[225] Its inclusion is relevant for two reasons addressed in more detail below. First, it demonstrates that the concept of dual criminality is not a new idea in the world of inter-state extradition law. To the contrary, a dual criminality analysis is deeply rooted in the history and tradition of the United States' understanding of comity in inter-state extradition.[226] Second, it illustrates the manner in which the laws passed by so-called safe harbor states are inadequate to address the long-arm reach that criminalization states will seek to enforce. For example, New York's so-called safe harbor statute, in apparently attempting to limit this provision, *explicitly permits the extradition of persons charged with abortion*—so long as the abortion was performed unlawfully in the demanding state.[227]

Another provision in the UCEA which extends beyond the Constitutional mandate is the authorization of private persons to make warrantless arrests:

> The arrest of a person in this state may be lawfully made also by any police officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year; but when so arrested the accused must be taken before a local criminal court with all practicable speed . . . .[228]

Astonishingly, states apparently authorize *anyone* to arrest a person they believe is charged in any other state with a crime so long as they take that person to a court in "practicable speed." As long as such arrests are deemed lawful under UCEA, the very people safe harbor states oth-

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[225] State v. Hall, 20 S.E. 729 (N.C. 1894).

[226] Kentucky v. Dennison, 65 U.S. 66, 69 (1861)

> The act of which Lago is thus accused by the grand jury of Woodford County certainly is not 'treason,' according to any code of any country, and just as certainly is not 'felony,' or any other crime, under the laws of this State, or by the common law. On the other hand, the laws of Kentucky do denounce this act as a 'crime,' and the question is thus presented whether, under the Federal Constitution, one State is under an obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offence not known to the laws of the former, nor affecting the public safety, nor regarded as malum in se by the general judgment and conscience of civilized nations.

[227] *See* N.Y. CODE CRIM. PROC. § 570.17 (McKinney 2022) ("Extradition of abortion providers. No demand for the extradition of a person charged with providing an abortion shall be recognized by the governor unless the executive authority of the demanding state shall allege in writing that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he, she or they fled from that state.").

[228] *See* N.Y. CODE CRIM. PROC. § 570.34 (McKinney 2022).

erwise seek to protect may remain subject to potentially dangerous and violent kidnapping by other civilians on the basis of a vague, "reasonable information" for whatever time period is deemed "practicable."

IV. INTERNATIONAL EXTRADITION

While interstate extradition is not subject to the international norms around extradition, it is important to recognize the analogy, as humanitarian considerations currently analyzed in the international extradition context may serve as inspiration for the domestic extradition context. Although international extradition law does not mandate a humanitarian analysis, countries regularly contemplate human rights and humanitarian concerns when responding to other countries' extradition requests.[229] Given the decentralization of U.S. federal abortion law and the increasing discordance between state approaches to multiple liberty interests and rights, interstate extradition law should draw from the use of dual criminality in history, current statutes, and especially current international extradition law. As such, to the extent that international extradition law involves humanitarian considerations, interstate extradition law and approaches should do the same, but with more force.

International extradition is a "formal process by which a person is surrendered by one nation state to another based on a treaty, reciprocity, or comity, or on the basis of national legislation."[230] Extradition in the United States is governed by the federal extradition statute.[231] Extradition from the United States to a foreign state must be based on treaties,[232] which should be liberally interpreted to achieve their purpose: to surrender fugitives for trial for their alleged offenses.[233] While there is no rule precluding the United States from requesting extradition from a foreign nation state in the absence of a treaty, the Restatement of Foreign Relations (Third) § 475 notes that such requests are rare.[234] Title 18, section 3196 of the United States Code gives discretion to the Secre-

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[229] *See generally* HARMEN VAN DER WILT, THE LAW AND PRACTICE OF EXTRADITION 124-82 (2022) (explaining the relationship between human rights and extradition).

[230] M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 2 (6th ed. 2014).

[231] *See* 18 U.S.C. §§ 3181-96.

[232] *See* 18 U.S.C. § 3184.

[233] BASSIOUNI, *supra* note 230, at 643-44.

[234] RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 475 (AM. L. INST. 1987); *see also* Ntakirutimana v. Reno, 184 F.3d 419, 425 (5th Cir. 1999) ("[A]lthough some authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor . . . [relevant jurisprudence] require that the authorization come in the form of a treaty.").

tary of State to surrender a U.S. citizen even if a treaty does not require it.

There are four categories of grounds that result in the denial of extradition requests. First, a nation state may deny extradition based on reasons relating to the offense charged, which may be political, military, or fiscal.[235] Second, a nation state may deny extradition based on grounds relating to the person who committed the act, for example, if the person is a foreign national or person protected by special immunity.[236] Third, extradition may be denied based on grounds relating to the criminal charge or prosecution of the offense charged, which can include the legality of the charged offense, double jeopardy, statute of limitations, immunity and plea bargains, and trials in absentia.[237] Fourth, a nation state may refuse to extradite for reasons relating to the penalty and punishability of the person who committed the act, such as the possibility of the death penalty or cruel and unusual punishment.[238]

The anticipated violation of the person's human rights by the requesting nation state might be a fifth ground for extradition refusal.[239] The United Nations Charter, the Universal Declaration of Human Rights, the United Nations covenants, and multilateral treaties all provide schemes to protect minimum standards of human rights.[240] Because

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[235] M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 368-69 (1974). The rationale for the rule that the terms of an extradition treaty should be liberally construed by the courts is that extradition is an executive branch function, not a judicial one. *See In re* Rodriguez Ortiz, 444 F. Supp. 2d 876 (N.D. Ill. 2006).

[236] *Id.*

[237] *Id.*

[238] John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1975 (2010) (denying extradition for reasons relating to punishment is a distinctly legislative power, as courts have relied on the doctrine of 'non-inquiry' in extradition cases falling in this category.)

> [T]he Supreme Court and lower courts repeatedly have invoked the 'rule of non-inquiry,' under which courts hearing extradition cases may not inquire into the procedures or treatment—including possible physical abuse—that await the extradite in the requesting state. In its 2008 decision in *Munaf v. Geren*, for example, the Supreme Court applied this rule to the transfer of two U.S. citizens from U.S. military custody to Iraqi custody for trial in Iraqi courts. In response to their claim that they were likely to be tortured in Iraqi custody, the Court stated that 'it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.' Put plainly, federal courts should not engage in judicial review of the policy decision by U.S. officials to send a person from the United States to another country, even if that person would face arbitrary procedures or harsh treatment in that country.
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> *Id.*

[239] *Id.*

[240] *Id.*; *see also* U.N. Hum. Rts. Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc.

the first four grounds for extradition refusal deal with some of the human rights violations covered by these agreements and declarations, contemporary extradition law does not recognize the applicability of those minimum standards of human rights to the extradition process, except in cases of asylum and the grounds for denial.[241]

A. Guiding Principles Behind International Extradition

Though human rights are not specific grounds for extradition denials, human rights pervade extradition law and practice.[242] "[T]he most conspicuous and well-known way" is that the requested nation state "bears responsibility for the relator and must ensure that the latter is not exposed to a real risk of a flagrant violation of human rights in the requesting state."[243] In this way, extradition is an element of international protection of human rights.[244]

Extradition law is designed to produce reciprocity and comity among nations. Reciprocity is the idea that one sovereign will surrender fugitives so long as its own requests for fugitives will be honored.[245] The substantive requirements for extradition—dual criminality, extraditable offenses, specialty, and non-inquiry—are predicated on reciprocity by mutual treatment and mutual legal obligations.[246] Reciprocity is explicit in bilateral treaties where each party agrees to acquiesce to requests on the understanding that its own requests will be honored,[247] and treaties are intended to be interpreted to produce reciprocity between the signatories.[248] The "rule of non-inquiry" is also based on the premise of reciprocity, in that states shall not sit in judgment of each other's legal systems.[249]

CCPR/C/GC/36 (Oct. 30, 2018) ¶ 8 (explaining that state parties must provide access to safe, legal, and effective abortion care as part of ensuring the right to life).

[241] *Id.*

[242] *See* VAN DER WILT, *supra* note 229.

[243] *Id.* at 5.

[244] *See* GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS (Kluwer Law International 1998).

[245] John T. Soma et al., *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 HARV. J. ON LEGIS. 317, 322 (1997) ("Many of the United States' bilateral treaties do not specifically address reciprocity in their articles, but reciprocity can be assumed through simple adherence to a treaty.").

[246] BASSIOUNI, *supra* note 230, at 497. Specialty "requires the requesting state to observe the limitations provided by the requested state in connection with the charges and penalties for which the relator can be prosecuted or the type of punishment he/she can receive."

[247] GILBERT, *supra* note 244, at 28.

[248] John Bourdeau, *Extradition* § 18, *in* AMERICAN JURISPRUDENCE (2d. ed. 2022) (citing *In re* Extradition of Jarosz, 800 F. Supp. 2d 935 (N.D. Ill. 2011)).

[249] BASSIOUNI, *supra* note 230, at 497. While the idea of one country not judging another country's legal system might be formally in place in judicial settings, the concept that coun-

Courts also interpret treaties to promote principles of international comity—that is, to "effect the apparent intention of the parties to secure equality and reciprocity between them."[250] In doing so, U.S. courts protect their own citizens in prosecutions abroad, and in turn, the other country to the treaty guarantees that it will honor limitations placed on prosecutions in the United States.[251] Comity might be interpreted as an outgrowth of reciprocity, [252] as the two concepts are interrelated. In this vein, some courts have made the existence of reciprocity a test of whether comity should apply, thus recognizing or enforcing a foreign cause of action, or a foreign judgment, or refusing to recognize or enforce the same, according to whether the courts of the foreign state would recognize and enforce a similar cause of action or judgment of the forum.[253]

While human rights considerations enter analyses of whether to extradite, such considerations are not explicit within the law of international extradition. Extradition treaties often include direct language safeguarding individual rights,[254] and though such clauses have the effect of securing individual rights, they are not justified entirely in human rights terms.[255] Moreover, the international extradition process creates

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tries do not value other countries' legal systems differently is fiction; countries, as a matter of process, must size up another country's legal system in deciding whether to enter a treaty with that country at all.

[250] *In re* Extradition of Jarosz, 800 F. Supp. 2d 935, 938 (N.D. Ill. 2011) (quoting Factor v. Laubenheimer, 290 U.S. 276, 294 (1933)).

[251] BASSIOUNI, *supra* note 230, at 569 (citing United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir. 1988)).

[252] Forgan v. Bainbridge, 274 P. 155, 158 (Ariz. 1928) ("The rule of comity is essentially based upon the principle of reciprocity. It is the necessary intercourse of the subjects of independent governments which gives rise to a sort of compact or understanding that their municipal institutions shall receive a degree of reciprocal efficacy and sanction within their respective dominions."); *see also* King v. Sarria, 69 N.Y. 24, 25 (1877).

[253] Annotation, *Reciprocity as Affecting Comity*, 87 A.L.R. 973 (1933) ("Other courts, however, have rejected the view that reciprocity plays any determinative role in applying or rejecting the principles of comity; thus recognizing and enforcing a foreign cause of action or judgment, notwithstanding that the foreign court would not recognize or enforce a similar cause of action or judgment of the forum.").

[254] John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. OF INT'L L. 187, 188 (1998).

[255] *See* Dugard & Van den Wyngaert, *supra* note 254, at 118. For example, the political offense exception, which allows states to refuse extradition in respect of persons seen to be engaged in the struggle for human rights in the requesting state, protects the state from the accusation that its failure to take sides implicates its support for a specific party. *Id.* Additionally, the double criminality requirement, which ensures respect for the principle of *nullum crimen sine leg*, and the specialty principle, which guarantees that the extradited person will be tried only for the crime for which he was extradited, "ensure that foreign states will not be allowed to punish fugitives for conduct considered contrary to the requested state's own-often chauvinistic-notions of criminal justice." *Id*.

tension between the desire to include human rights considerations and the demand for more effective international cooperation in the suppression of international crime.[256] This is because conflicts between treaty-based obligations to extradite and obligations stemming from human rights conventions are likely to arise.[257] Accordingly, norms provided for in international human rights conventions do not prevail over obligations to extradite based on preexisting extradition treaties.[258] The only such norms that do trump treaty obligations are those belonging to the realm of *jus cogens*, which include the prohibition against torture[259] or inhuman treatment, and the *nullum crimen* principle, which, like dual criminality, is considered when the charge that the extradition is requested for does not constitute a criminal offense in the requesting state.[260]

Although human rights play a balanced, if not background, role in international extradition processes altogether, human rights can be of paramount concern when states consider the impending punishment that an extradited person would face in the requesting state. Regarding attention to the person's punishment in the decision of whether to extradite, *Soering v. United Kingdom*[261] was a "breakthrough" for extradition and human rights.[262] In *Soering*, the European Court of Human Rights held that the extradition of a German national to the United States to face the death penalty violated the prohibition against "inhuman or degrading treatment or punishment" in the European Convention on Human Rights.[263] Though extradition and human rights were linked since World

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[256] *See* Dugard & Van den Wyngaert, *supra* note 254, at 187-212 (arguing that "[t]he incremental and casuistic response of extradition law to this development fails to provide a proper legal framework for the balancing of the human rights of the fugitive and the interest of states in the suppression of transnational crime" and that a clearer acknowledgment of the role of human rights in extradition will serve the interests of both the individual and international criminal law enforcement).

[257] VAN DER WILT, *supra* note 229, at 128. Van der Wilt posits that the reason for such conflicts is that states are "inclined to enter into extradition relations if they have confidence in each other's administration of justice. The incorporation of a clause that questions this mutual trust would appear to be self-contradictory." *Id.*

[258] VAN DER WILT, *supra* note 229, at 130.

[259] *See* GILBERT, *supra* note 244, at 155 ("The Convention Against Torture forbids States Party from 'extraditing a person to another State where there are substantial grounds for believing he would be in danger of being subjected to torture.' Torture does not include, however, 'pain and suffering: arising only from, inherent in or incidental to lawful sanctions.' Whether the mental suffering consequent on spending time on death row would qualify as torture so as to prevent extradition is, therefore, so far unanswered.").

[260] VAN DER WILT, *supra* note 229, at 130.

[261] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

[262] Dugard & Van den Wyngaert, *supra* note 254, at 192.

[263] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

War II through common language in treaties that excluded extradition where the requesting state retained the death penalty and was unable to assure against its use,[264] *Soering* made it considerably more difficult for the United States to demand extradition of fugitives facing the death penalty.[265] Thus, *Soering* amplified the relevance of humanitarian considerations to international extradition.

Soering wove human rights and the international law of extradition closer together.[266] As a result, numerous arguments for incorporating human rights clauses or rules outright into international extradition law have emerged.[267] In contrast, some contend that even without a specific clause, established international human rights rules are incorporated by reference.[268]

B. Dual Criminality

The international extradition requirement of dual criminality, much like *Dennison*'s rejection based on *malum in se* finding, inherently implicates human rights concerns. Dual criminality refers to the status of conduct as criminal under the laws of both the requesting and requested states.[269] The requirement of dual criminality ensures that extradition is

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[264] Dugard & Van den Wyngaert, *supra* note 254, at 192.

[265] Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128, 145 (1991).

[266] *See* Dugard & Van den Wyngaert, *supra* note 254, at 195-96 (describing the "wealth of scholarly writing in support of Soering and the notion that human rights considerations should be taken into account in the extradition process," and elucidating that "the question that then arises is which human rights fall into this category").

[267] *See* Aruni H. Wijayath, Extradition Under International Law: Overview of Basic Principles, Applications and Challenges in Extradition Law 5 (Sept. 1, 2008) (unpublished manuscript), https://perma.cc/3X42-T7A2; *see also* Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1010 (9th Cir. 2000) (noting that courts "in many jurisdictions . . . have discussed the possibility of a humanitarian exception to extradition" but failing "to identify any case in which this theoretical exception has been applied"); Parry, *supra* note 238, at 1900-91 (noting that when courts have been alarmed for humanitarian reasons about extraditing someone, they have tended to find another reason to deny extradition rather than relying on those humanitarian concerns).

[268] Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*, 91 J. CRIM. L. & CRIMINOLOGY 1, 2 (2000); *see also* Wijayath, *supra* note 267, at 4 (exposing the argument that asylum is one of the roadblocks for extradition in an indirect way, based on an accepted principle of international public law that persons who are citizens of asylum country are excluded from extradition, and thus granting asylum could be treated as a method of protecting criminals); *see also* Dugard and Van den Wyngaert *supra* note 254, at 212 ("The enforcement of international criminal law is better served by an extradition law that expressly accommodates the interests of human rights than by one that fails to acknowledge the extent to which human rights law has reshaped this branch of international cooperation.").

[269] *See* BASSIOUNI, *supra* note 230, at 500.

granted only for crimes regarded as serious in both states.[270] The dual criminality requirement can be imposed via treaty or implied.[271]

Though there are some variations on how nation-states apply the dual criminality requirement to charged offenses that are criminal in both nations, most states apply dual criminality where the act is chargeable in both states as a criminal offense regardless of whether the act is prosecutable, meaning that the state could prove the elements of the charge beyond a reasonable doubt.[272] Courts look at whether the crime charged by the requesting nation would be substantially analogous to a United States crime.[273] A mirror-image identity of terms is not necessary to qualify crimes as substantially analogous; rather, it is sufficient for dual criminality "if the particular acts alleged make out a crime under the laws of both countries."[274] It is "well-established" that dual criminality "is not driven by the crime charged, but rather by the underlying facts and whether they constitute a crime in both legal systems, irrespective of how they are labeled."[275] A practical approach has developed to determine the applicable US law in the international extradition context, given discordant state criminal codes: a judge will determine whether there are a sufficient number of U.S. states that have criminalized the ac-

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[270] *See* United States v. Saccoccia 58 F.3d 754, 766 (1st Cir. 1995) ("The principle of dual criminality dictates that, as a general rule, an extraditable offense must be a serious crime (rather than a mere peccadillo) punishable under the criminal laws of both the surrendering and the requesting state.").

[271] *See* Brauch v. Raiche*,* 618 F.2d 843, 847 (1st Cir.1980); *see also* BASSIOUNI, *supra* note 230, at 502 (explaining that in addition to being found implicitly or explicitly within treaties, the requirement of dual criminality is also found in the national laws and judicial practice of most states and is therefore part of customary international law and highlighting that some states, such as the United States, hold that symmetry in timing of the conduct's criminality is not necessary, relying upon the conduct's criminal status in both legal systems at the time of the request, not at the time the conduct occurred).

[272] Theresa L. Kruk & Russel G. Donaldson Annotation, *Test of Dual Criminality Where Extradition to or from Foreign Nation Is Sought*, 132 A.L.R. Fed. 525 (1996, Supp. 2022). Other states consider whether the act is chargeable and also prosecutable in both states or whether the act is chargeable and prosecutable, and could also result in a conviction in both states. *Id.*

[273] *See, e.g.*, Yee-Chun v. Immundi, 686 F. Supp. 1004 (S.D.N.Y. 1987).

[274] *Id.* (citing Shapiro v. Ferrandina 478 F.2d 894 (2d Cir. 1973)). Minor discrepancies do not defeat dual criminality. For example, many treaties provide that the court should disregard jurisdictional impediments to dual criminality. *See, e.g.*, Agreement with Hong Kong for the Surrender of Fugitive Offenders, U.S.-H.K., Dec. 20, 1996, 98 T.I.A.S. 121.

[275] BASSIOUNI, *supra* note 235, at 503 (highlighting that, despite the established approach, the U.S. is frequently inconsistent in applying it). There is a potential discrepancy not only in the fact that some states designate abortion as criminal while others do not but also that among states that do criminalize abortion, they might do so at different stages of pregnancy. Thus, the potential elements of criminal abortion might be distinguishable among states as their criminal laws differ.

tion in question to legitimize the extradition, regardless of whether the specific state where the person was apprehended made the particular conduct criminal.[276]

Dual criminality "promotes reciprocity and safeguards individual rights by shielding the individual from unexpected and unwarranted arrest and imprisonment."[277] Dual criminality is distinct from—and, in fact, based upon—the premise of reciprocity.[278] The requirement promotes reliance on corresponding treatment by each state and ensures that no state surrenders someone for conduct that it does not deem criminal.[279] Though extradition is regarded primarily as an instrument of interstate cooperation,[280] importantly, dual criminality serves what Geoff Gilbert characterizes as a "protective function vis-à-vis the individual."[281] Insofar as the dual criminality rule recognizes the different ways that states appraise harmful human conduct,[282] by the inverse, dual criminality honors differential viewpoints on what conduct is not harmful and therefore not meriting punishment. By honoring conflicting ideas of non-punishable rights, the dual criminality rule carries with it the humanitarian concerns that undergird states' recognition of such rights.

V. A PATH FORWARD: POTENTIAL SOLUTIONS FOR STATES TO PROTECT THEIR CITIZENS

A. Current Practice of Extradition Law

In order to develop policies to prevent the extradition of people criminalized for abortion related activity, it is critical to understand the routine manner in which extradition proceedings occur every day in criminal courtrooms across the country. The current practice of interstate extradition law within the United States is generally codified in a

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[276] Kurk & Donaldson, supra note 272, at § 2[a]. Courts look first to "federal law as the actual law of the 'contracting party' to the treaty; then to the law of the state where the person to be extradited was found; then, if no analogous offense has yet been found, to the law of the majority of states, as representing a consensus of American jurisprudence on the issue. Only then . . . should extradition be denied on the basis of an absence of dual criminality." *Id.*

[277] Soma, *supra* note 245, at 324.

[278] *See* BASSIOUNI, *supra* note 235, at 497; *see also* BASSIOUNI, *supra* note 235, at 314 ("While double criminality creates mutual obligations, reciprocity creates an expectation that the requesting state shall equally honor similar future requests and double criminality contemplates similar crimes.").

[279] BASSIOUNI, *supra* note 235, at 500.

[280] BASSIOUNI, *supra* note 235, at 502.

[281] VAN DER WILT, *supra* note 229, at 22 (citing GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS (1998)).

[282] VAN DER WILT, *supra* note 229, at 24-25.

uniform way because of the UCEA.[283] An extraditing or demanding state, upon filing charges, issues a warrant that is sent to the National Crime and Information Center ("NCIC") with the FBI.[284] These out-of-state warrants usually surface for someone during a pedestrian or vehicle law enforcement stop, though occasionally they may prompt an independent enforcement action.[285] If a police officer asks for a license or runs a person's identifying information through their database, it will connect to NCIC and an out-of-state warrant will be identified; how much an officer knows about what the out-of-state warrant is for depends on their access to information at the time of the stop.[286]

As discussed above, states that follow the UCEA authorize arrest by police *or any private person,* even in the *absence of a warrant* so long as the accused is brought before a court on the extradition warrant "with all practicable speed."[287] It is this provision and ones like it which permit an officer (or apparently anyone) to bring a person before a tribunal without access to the actual warrant upon which the request has been made. The database provides law enforcement a "reasonable" basis to believe the person is charged "in the courts of another state." Nothing in the UCEA requires that an indigent person be assigned counsel free of charge, nor has the Constitution been interpreted to mandate a right to counsel.[288]At that initial hearing, the accused has access to only a few basic due process protections.[289] These protections include the ability to demand that the asylum state actually present the warrant upon which the officer's information is based to the court within 30 days.[290] This is known as a "governor's warrant."[291]

Functionally, a governor's warrant is a formal request from one governor to another to transfer custody of a person for the purpose of criminal prosecution or, in some cases, continued probation or parole supervision.[292] If authorities fail to obtain the warrant from the demanding state within 30 days, the UCEA goes beyond the federal statute and

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[283] *See* N.Y. CODE. CRIM. PROC. § 570.16 (McKinney 2022).

[284] *National Crime Information Center (NCIC),* Fed. Bureau of Investigation, L. Enforcement Ress., https://perma.cc/E7TL-6JCW (last visited Nov. 30, 2022).

[285] *Id.*

[286] Sarah W. Craun & Andrew D. Tiedt, *Time to Apprehension and the Correlates of Warrant Closure,* 63 CRIME & DELINQUENCY 296 (2017).

[287] N.Y. CODE CRIM. PROC. § 570.34 (McKinney 2022).

[288] *See id.*

[289] N.Y. CODE CRIM. PROC. § 570.36-.40 (McKinney 2022).

[290] N.Y. CODE CRIM. PROC. § 570.36; Uniform Criminal Extradition Act, 18 U.S.C. § 3182.

[291] PA. OFF. OF GEN. COUNS., *supra* note 140.

[292] *See* INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION, INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION (2021).

authorizes an additional 60 days in order to obtain it.[293] The court may release the person at that time or may continue their detention.[294] Though time consuming, it is a rare instance in which the responsible executive officials fail to procure the governor's warrant.[295]

The UCEA also authorizes bail pending extradition.[296] Given that the nature of the allegation is that the accused committed a crime and then left the jurisdiction, it comes as no surprise that judges are loath to set bail. Typically, remand is ordered in these circumstances.[297] Occasionally, on offenses which are considered less serious by the court, or where the demanding state is in close proximity to the asylum state, a judge may grant bail on the condition that the person agrees to voluntarily surrender to the demanding state.[298] As practitioners, we cannot recall an instance in which a court granted bail for someone who sought to challenge their extradition. As a result, the overwhelming majority of people accused of being a fugitive from justice remain incarcerated pending their extradition.[299]

An accused person in this situation is faced with a decision: remain incarcerated and fight the extradition via habeas[300] or waive any further due process protections so that they can be quickly transferred to the demanding state. There are very limited grounds upon which a person alleged to be a fugitive from justice can challenge the extradition process. These grounds include "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."[301]

A person seeking to contest their extradition on one of these grounds typically brings a writ of habeas corpus (or mandamus if bail

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[293] N.Y. CRIM. PROC. LAW § 570.40 (McKinney 2022).

[294] *Id*.

[295] The authors have been unable to locate any data bank documenting the frequency with which governor's warrants are obtained. However, in the authors' experience as career public defenders, we can recall few instances where a governor's warrant was sought and not obtained.

[296] N.Y. CRIM. PROC. LAW § 570.38 (McKinney 2022). Bail is a sum of money imposed by the court that, if paid, secures the release of an incarcerated person. In this way those with sufficient wealth can purchase their freedom if bail is set.

[297] Remand is a mandatory detention order and, unlike an order of bail, no amount of money can secure release.

[298] *See* N.Y. CODE CRIM. PROC. § 570.38.

[299] *See* N.Y. CODE CRIM. PROC. §§ 570.24; 570.36. There is no systematic tracking of this data but, this is based the author's direct experience handling these cases at Legal Aid.

[300] N.Y. CODE CRIM. PROC. § 570.24 (McKinney 2022).

[301] Michigan v. Doran, 439 U.S. 282, 289 (1978); *see* N.Y. CODE CRIM. PROC. § 570.46 (McKinney 2022).

has been granted and posted).[302] Under the Supreme Court decision in *Michigan v. Doran*, a person cannot challenge whether the demanding state properly found probable cause to issue the warrant; the asylum state must defer to the requesting state's finding.[303] Thus, whether a person is factually innocent of the allegations is irrelevant in extradition proceedings. The UCEA proclaims straightforwardly, that "the guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition . . . shall have been presented . . . ."[304] That is only properly challenged upon their arrival in the requesting state.

Usually there is no strong ground to challenge the extradition via habeas: the paperwork will be sufficient on its face; the accused is in fact the person named; they have been properly charged in the demanding state; and they are a fugitive in that the alleged conduct occurred in the demanding state and the person did in fact leave that state.[305] Faced with these options, most people choose to waive due process rights, agree to be promptly picked up by the extraditing state in hopes of minimizing imprisonment time in the asylum state, and attempt to resolve the matter as expeditiously as possible in the demanding state.[306] In short, incarceration exerts extreme coercive pressure to forgo statutory and constitutional rights.

If there is a due process waiver, the demanding state sends officials who coordinate with the asylum state to pick up the person and transport them to the demanding state. Upon arrival in the demanding state, the extradited individual will be subject to local criminal processes. Occasionally, the alleged criminal conduct is relatively minor such that the requesting state declines to extradite unless the asylum state is in close geographic proximity.[307] Sometimes this is noted on the extradition re-

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[302] N.Y. CODE CRIM. PROC. § 570.46 (McKinney 2022).

[303] *Doran,* 439 U.S. at 290.

[304] N.Y. CODE CRIM. PROC. § 570.46 (McKinney 2022).

[305] *See Doran*, 439 U.S. at 289.

[306] There is little if any data kept on the rate of waiver in the face of an extradition warrant. However, the authors' experience and observations in the criminal courts in New York City and conversations with other defenders throughout the country, indicate that most people choose to waive extradition unless facing an extremely grave charge such as homicide. "However, the biggest reason [why "we don't see" extradition hearings more often] is that most defendants elect to waive extradition and voluntarily return to whatever state is demanding their return." Zack Wavrusa, *5 Questions You've Been Meaning to Ask About Interstate Extraditions*, TEX. DIST. & CNTY. ATT'YS ASS'N (Jan.-Feb. 2022), https://perma.cc/53BX-S762.

[307] For example, the NCIC report that accompanies criminal arraignment paperwork might say "will only extradite from adjoining states."

quest, which can prevent asylum state officers from initiating an arrest in the first place.[308]

While legislators in pro-abortion states have sought to enact legislation to protect people from extradition for abortion-related charges in anti-abortion states, the legislation fails to provide any mechanism to adequately disrupt the machinery of extradition. Importantly, most people criminalized for abortion-related activity may not be directly charged with a crime of "abortion." Their arrest warrants are likely to state charges of homicide, infanticide, abuse of a corpse, child abuse, and aiding and abetting or conspiracy to commit such acts.[309] Warrants for such charges are treated with deference by state executive branch officials.[310]

While the safe harbor laws that ban state resources from being used for extradition add a small layer of protection for those facing extradition,[311] they still fall far short from incentivizing system actors not to arrest people. For example, it is difficult to imagine a scenario in which a police officer encounters a person with an out-of-state warrant for conspiracy to commit homicide and simply declines to take that person into custody because the charge may be abortion related. Even if they were tasked with doing so, there is no mechanism for law enforcement to make a determination as to whether an out-of-state charge is abortion-related unless so coded by the FBI in the NCIC.[312]

To complicate matters further, these safe harbor laws, as a practical matter, require law enforcement to make an on-the-ground determination not just about whether the conduct in the warrant was abortion-related, but whether this type of abortion-related conduct would be legal under, for example, Connecticut's penal code.[313] This is not a task law enforcement is equipped to handle nor should they be. When given the power to make discretionary decisions, law enforcement agencies have a long and well-documented pattern of wielding their power against Black people, Indigenous people, other people of color, and the economically

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[308] This is also consistent with authors' direct professional experience and conversations with public defenders across the country.

[309] *See* discussion of criminalization *supra* Section II.

[310] *See* N.Y. Cts., *Pretrial Release Data*, https://perma.cc/W39H-R5JW (last visited on Dec. 22, 2022) (demonstrating that charges with longer sentences are more likely to have bail set, and set at higher rates).

[311] *See* N.J. STAT. § 2A:160-14.1; 83 Del. Laws c. 327 § 3928 (2022).

[312] *See supra* notes 124-25 and accompanying text.

[313] CONN. GEN. STAT. § 22-19 (2022).

marginalized.[314] Police are not a group with whom we ought to entrust this kind of discretion.

It is equally unfathomable that a person so accused, brought before a judge, would be released based on the word of their attorney that the allegations are abortion-related—if they are fortunate enough to live in a state that affords them an attorney—or that a judge would declare such a warrant unenforceable under state law. In practice, anyone charged with abortion-related crimes, which are not literally charged as "abortion," will be arrested and jailed indefinitely prior to their extradition, even in safe harbor states.[315]

Were an attorney to successfully challenge the extradition and the fugitive matter before the court is dismissed, the warrant would continue to exist. There is no mechanism to cancel an extradition warrant—only for a governor to refuse to comply with it.[316] The warrant remains in national databases, accessible to all manner of law enforcement.[317] Thus, the accused will forever have an outstanding warrant upon which they could be arrested at any time. It is conceivable, even likely, that under the current state of the law, a person who successfully challenges their extradition could be put through the extradition process several times, each time having to demonstrate to a judge that the warrant should not be honored.

There is a moral imperative for states to not only openly disavow morally repugnant laws, but to actually refuse complicity in the enforcement of these laws. To some extent, the following recommended provisions will impact the speed and efficiency with which states are able to effectuate carceral policies generally, which offer a net benefit rather than a detraction. Some of our suggestions may result in freeing some people criminalized for abortion-related activities from the harm of prosecution. Others provide mechanisms to either slow down or delay prosecutions as long as possible. We are under no illusion that the machinery of the carceral state will undermine itself. These policy suggestions leverage two powerful resources: time and freedom. With the accused free and given ample time, there is space for organizers, activists,

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[314] Sawyer, *supra* note 69; *see generally* ALEX VITALE, THE END OF POLICING (2017); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Commonwealth v. Warren, 475 Mass. 530 (2016).

[315] *See* N.Y. CODE CRIM. PROC. § 570.16 (2014); N.Y. CODE CRIM. PROC. § 570.36 (2014); N.Y. CODE CRIM. PROC. § 570.38 (2014).

[316] *See* Kentucky v. Dennison*,* 65 U.S. 66 (1861); though admittedly, under *Branstad*, such a refusal would be violative of the clause. *See* Puerto Rico v. Branstad, 483 U.S. 219 (1987)

[317] *See supra* notes 124-25 and accompanying text.

and community members to plan, organize, pressure officials, and interrupt carceral processes.

B. A Dual Criminality and Human Rights Based Doctrine for the US Constitution's Extradition Clause

To the extent states find themselves morally compelled to exempt certain categories of criminalized people from extradition, they might ground their decisions in the dual criminality and human rights principles well established in international extradition. As discussed above, *Kentucky v. Dennison* wrestled with the concept of dual criminality.[318] That portion of the holding in *Dennison*, with which *Branstad* agreed, rested on the notion that states had a duty to enforce the laws of other states even if there was no dual criminality, even in the face of as grave a human rights violation as the practice of *enslavement.*[319] *Dennison* was wrong then and it is wrong now. It rests on the notion that the most heinous human rights deprivations must be knowingly perpetuated, simply in the name of comity. No nation that aspires toward freedom can stand for such a trade.

Therefore, we suggest that states who seek to slow the machinery of extradition in the face of human rights violations codify a dual criminality and human-rights-based test into their extradition statutes. For example, if a person is presented promptly before a tribunal, as required by the UCEA, they should be afforded the opportunity to raise a defense to the extradition on dual criminality and/or human rights grounds. Specifically, the person subject to extradition could state that the crime for which they are being accused is not a crime in the sending state. Additionally, even if the conduct is criminalized in some way in the sending state, the accused could separately allege either that the very criminalization of the act is in contravention of well-established human rights law, or that they are likely to suffer some other human rights abuse in the demanding state.

These two steps are important. Imagine a scenario in which a person living in New York obtained abortifacient drugs via prescription, they drove to a state where abortion is criminalized, gave their friend the drugs, and then drove back to New York. The friend took the drugs, ended up in an emergency room, and after pressure from physicians and local law enforcement, admitted to taking the drugs. Now the friend has been charged with homicide and the New York resident is charged as a

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[318] See *supra* Section IV.

[319] *See Dennison*, 65 U.S.; *see Branstad*, 483 U.S.

co-conspirator with the same. The maximum punishment for homicide is death in the criminalization state.

If analyzed under only a dual criminality standard, the New Yorker would most certainly be extradited.[320] It is unlawful to pass a controlled substance to another person in New York state.[321] In fact, the mere handing of such a substance is a felony punishable by up to nine years in state prison, even on a first offense, even if no money was exchanged.[322] Therefore, the human rights component to the test is essential. The New Yorker could raise a human rights-based defense on at least two grounds: first that criminalizing abortion is a violation of multiple human rights, second the death penalty is a violation of human rights.[323]

In order to make this kind of argument the accused would, at minimum, need access to the underlying facts that support the allegations in the requesting state's charge and the maximum permissible sentence in that state. Thus, states seeking to be a safe-harbor must also require that valid extradition paperwork include sentencing information and a factual portion to support the charges.[324]

While this paper centers on the criminalization of abortion care, this suggestion will also protect those criminalized for seeking gender-affirming care and other protected liberty interests in the *Dobbs* majority's crosshairs. It could also protect those criminalized for drug possession, sex work, those facing potential execution, or any range of current carceral harms that amount to human rights violations.[325] Thus, statutes must be written to include a broad range of potentially criminalized

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[320] There is no question that under New York's current law, under these facts, the New Yorker would be extradited.

[321] N.Y. PENAL LAW § 220.39 McKinney (2014); N.Y. PENAL LAW § 220.00(1) McKinney (2021).

[322] *Id.*; s*ee also* N.Y. PENAL LAW § 70.70 McKinney (2021).

[323] *See* Soering, 161 Eur. Ct. H.R. (ser. A) (1989).

[324] *Cf.* Michigan v. Doran, 439 U.S. 282, 290 (1978).

[325] Laws criminalizing sexual and reproductive health services, including abortion, violate the obligation of States to respect the right to sexual and reproductive health, as well as other human rights. Human rights mechanisms have called for these laws to be repealed or eliminated. In calling for the decriminalization of abortion, human rights mechanisms have recognized that such laws can target women and girls who undergo abortion, as well as service providers, and that all such laws should be removed. The Human Rights Committee has stated that imposing "a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion" fails to respect women's right to privacy. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has clarified that "the practice of extracting, for prosecution purposes, confessions from women seeking emergency medical care as a result of illegal abortion in particular amounts to torture or ill-treatment." UNITED NATIONS HUMAN RTS., OFF. OF THE HIGH COMM'R, ABORTION (2020), https://perma.cc/T7QS-GLE2.

conduct and harm, rather than amended every few years pending the most recent human rights rollback by the nation's highest court.

C. *Right to Counsel, Mandatory Release Pending Extradition, Juries as Fact Finders, And Certificates of No-Extradition*

The statutory right to mount a dual criminality or human-rights based defense to extradition is relatively meaningless if the accused is not provided with adequate resources to mount such a challenge. To this end, states seeking to provide something resembling safe harbor, must provide counsel automatically (that is, without need for application), free of charge, to every person alleged to be a fugitive, regardless of indigency status.[326] Ideally, that attorney would come from a centralized public defender office, if one exists, as such attorneys have the institutional support and training resources necessary to make novel legal arguments.[327]

Additionally, once the attorney asserts that they will be presenting either a dual criminality and/or human-rights based defense, this should trigger an *automatic* release-pending-extradition provision. A mere right to bail provision would be completely inadequate. Nearly a quarter of the people incarcerated in the United States are held pre-trial, most on bail they cannot afford.[328] Courts consistently, in jurisdictions across the country, apply bail laws in a racist and classist manner.[329] Thus, criminal courts and judges cannot be relied upon to justly and fairly implement a bail scheme related to extradition. In order for a statute to achieve the goal of creating a "safe harbor" for people criminalized for abortion care, it cannot risk subjecting those people to the violence of incarceration while they mount a defense. Thus, judges must not be given discretion to set bail or impose any other form of carceral surveillance such as electronic monitoring in these circumstances.

After an initial arraignment has been made, notice of an affirmative defense declared, and release ordered, the accused must be provided ample opportunity to present their case that there is no dual criminality and/or that extradition would contravene well established tenants of human rights law. As Vermont in 1850 granted those accused of being fu-

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[326] *See generally* Ginger Jackson-Gleich & Wanda Bertram, *Nine Ways that States Can Provide Better Public Defense*, PRISON POL'Y INITIATIVE (July 27, 2021), https://perma.cc/ZS5C-F33W.

[327] *Id*.

[328] *See* Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://perma.cc/574K-REBC.

[329] *See generally* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201-40 (2018).

gitives from enslavement a right to a fact-finding jury on appeal, states seeking to provide safe harbor must similarly grant a right to a jury determination on the issues however at the trial level. We support the legislature of 1850s Vermont and its apparent encouragement of the practice of jury nullification in extradition cases.[330] It provided the jurors in the asylum state the opportunity to effectively find the requesting state's law morally repugnant and in violation of human rights.

Just as in a criminal trial, if there is a finding by the jury or judge that the grounds for extradition do in fact violate dual criminality or human rights principles, the decision must be final and non-appealable. However, if the determination is that the alleged fugitive ought to be extradited, they must have an opportunity for prompt appeal. The filing of a notice of appeal must hold the lower court's decision in abeyance until the appeals process is final, lest the person be extradited prior to the termination of the proceeding.

Upon conclusion of an extradition proceeding in which a person successfully asserts a dual criminality or human rights defense to extradition, they must be provided some documentation to verify that the extradition request is not to be honored by state officials in the future. Some type of state-issued No-Extradition Order and procedures for the mandatory issuance of such an order must be codified by the safe harbor state. As discussed above, the extradition request will remain active in any number of national databases accessible to law enforcement. Thus, to prevent repeated cycles of re-arrest, the person will need to carry the order on them at all times in the event of an unplanned law enforcement interaction.

Of course, such a No-Extradition Order would only be valid in the safe harbor state. Additionally, our experience as public defenders tells us that even then, law enforcement officials are loath to ignore what appears in their database as an outstanding warrant. Therefore, there must also be a mechanism to note the outcome of a canceled extradition in internal law enforcement databases. We suspect that nevertheless there will be individual actors who firmly disagree with these statutes and will simply not abide by them, claiming the Constitution requires them to comply with the request.

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[330] Horace K. Houston Jr., *Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law*, 77 NEW ENG. Q. 252, 262 (2004) ("[T]hat any person not discharged as a result of the habeas corpus procedure had the right of appeal to the next session of the county court; and that the appeal process had to involve a trial by jury.").

D. Prohibition on the Use of State Resources for Extradition, Associated Cause of Action, and Stripping of Immunity from State Actors

To the extent states seek to follow a model which prohibits any state resource from being used to extradite someone for seeking or aiding in abortion-related care, there must be some enforcement mechanism to incentivize state actors to abide by this directive. To that end we suggest associated causes of action that explicitly includes any use of force, technology, kidnapping, detention, or other use of state resources, broadly construed, by any state, corporate, or private actor. These actions can be brought against anyone, including a corporation, who knew or should have known that they were facilitating an unlawful extraction or out-of-state investigation, as well as against any supervising state actor who failed to report or discipline such conduct. Liability should also be extended to municipalities whose policies, patterns and practices foreseeably precipitate such conduct.[331] For state actors, including judges, prosecutors, police, and social workers, states must also explicitly prohibit immunity protection in these contexts. In particular, states must account for how all the technology and data-driven systems used by its law enforcement automatically share information across state lines and take action to withdraw from such data-sharing agreements and tools.

VI. CONCLUSION

The consequences of *Dobbs* will be far reaching and drastic—and our collective response needs to be drastic too. States that truly want to protect their residents' liberty interests and human rights must broadly design protections in anticipation of an endless assault on bodily autonomy and freedom to act in accordance with one's beliefs. Again, *Dobbs* will be recalled not just as a decision about reproductive health care, but about the usurpation of power for the purpose of a particular and arbitrary interpretation of ordered liberty, restricting freedoms aligned with one dominant faith's set of beliefs.

Many will hesitate in the name of interstate comity, going along to get along. This Article hopes to call upon our leaders to choose protection of human rights over comity and reciprocity. Dual criminality was historically invoked in similar contexts, is currently acknowledged in current statutes, and is currently practiced internationally. Along with the procedural and access to counsel protections we recommend, and the

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[331] This may include ongoing inclusion in ICAOS compacts used to enforce interstate probation and parole. *See generally White Paper—State Liability: Why Your State Can Be Sanctioned Upon Violation of the Compact or the ICAOS Rules*, INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION (Sept. 2, 2011), https://perma.cc/TU8V-9KL6.

causes of action to incentivize, it may save some lives and mitigate some harm. These legal fixes will manage but not end oppression—they must be understood as temporary measures while we continue deeper work constructing explicit protections for limiting government's intrusion into personal liberties.