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## Extraterritorial State Criminal Law, Post-Dobbs

Darryl K. Brown

*University of Virginia, School of Law*, [brownd@law.virginia.edu](mailto:brownd@law.virginia.edu)

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## EXTRATERRITORIAL STATE CRIMINAL LAW, POST-*DOBBS*

DARRYL K. BROWN\*

*Like the federal government, states can apply their laws to people beyond their borders. Statutes can reach out-of-state conduct, such as fraud, that has effects within the state, and in some circumstances, states can prosecute their own citizens for out-of-state conduct. Many applications of extraterritorial jurisdiction are well established and uncontroversial; state common law and the Model Penal Code provide for such authority. The practice draws little attention when states' criminal laws are broadly similar and treat the same activities as crimes. In the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, however, state laws now sharply conflict over conduct related to abortion services. In addition to prohibiting in-state activities that facilitate access to abortions, some state legislatures and local prosecutors seek to extend criminal liability to persons acting in states in which their conduct is legal. Louisiana, for example, made it a crime for anyone outside of Louisiana to ship "abortion-inducing drugs" to a Louisiana resident.*

*This article analyzes the principles of state extraterritorial criminal jurisdiction and the longstanding state laws that authorize criminal jurisdiction over actors in other states. It then turns to the existing and proposed state criminal laws that target abortion services beyond a state's own borders. In some cases, such laws are well grounded; for others, the validity of extraterritorial application is unclear. But even for statutes with valid extraterritorial reach, barriers to enforcement remain. In many circumstances, cross-border enforcement depends on state cooperation, especially in extraditing defendants and obtaining out-of-state evidence and witness testimony. Federal law requires states to fulfill other states' extradition requests only for "fugitives," which creates a gap between the*

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\* O. M. Vicars Professor of Law, University of Virginia School of Law; brownnd@virginia.edu. For helpful comments and feedback, I thank Professor Jenia Turner and participants in the Reproductive Rights Seminar at University of Virginia School of Law and the *Journal of Criminal Law and Criminology* Symposium at Northwestern Pritzker School of Law.

*law of extradition and of extraterritorial jurisdiction. Those who violate one state’s criminal law while in another state are not fugitives, which means pro-choice states can refuse to extradite their residents for other states’ abortion-related prosecutions. A few states have already changed their laws to permit this kind of resistance—another sign of diminished comity between states. Finally, the article briefly surveys constitutional doctrines that might constrain extraterritorial prosecutions. Few of those doctrines provide clear limits, suggesting that, if the post-Dobbs world leads to extraterritorial prosecutions, the constitutional parameters for that practice will be one of the new battlegrounds.*

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#### INTRODUCTION

Can Louisiana punish a New Yorker who, without ever entering the state, somehow assists a Louisiana resident in obtaining an abortion?<sup>1</sup> Can

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<sup>1</sup> See LA. STAT. ANN. § 40:962.2(B), (D)(1) (2023) (“[D]elivery to a person in Louisiana by mail-order, courier, or as a result of a sale made via the internet [of an abortion-inducing drug] is strictly prohibited” and punishable by up to six months imprisonment, a \$1,000 fine, or both.); see also KY. REV. STAT. ANN. § 311.772(3)(a)(1) (West, Westlaw, current through the 2023 Reg. Sess.) (“No person may knowingly . . . procure for, or sell to any pregnant

Missouri or Idaho prohibit their own citizens from obtaining abortions in a state where abortion is legal?<sup>2</sup> Can citizens from states prohibiting abortion avoid liability by visiting a clinic outside any U.S. jurisdiction, such as aboard a ship in the Gulf of Mexico?<sup>3</sup>

These questions can be asked as two more general queries about the jurisdictional scope of state criminal law: Can one state impose criminal liability on a person who resides and acts in another state? Can a state punish

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woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being.”); WYO. STAT. ANN. §§ 35-6-123, -125 (2023) (same; and punishable by up to five years imprisonment, \$20,000 fine, or both); Nicole Girten, *Planned Parenthood of Montana Halts Medication Abortions for Patients from ‘Trigger Law’ States*, IDAHO CAP. SUN (July 1, 2022, 4:00 AM), <https://idahocapitalsun.com/2022/07/01/planned-parenthood-of-montana-halts-medication-abortions-for-patients-from-trigger-law-states/> [https://perma.cc/ANQ2-ZV4H] (reporting a new Montana Planned Parenthood policy to no longer provide abortion medication to residents of Idaho and nearby states because “[t]he risks around cross-state provision of services are currently less than clear, with potential for both civil and criminal action for providing abortions in states with bans”).

<sup>2</sup> See, e.g., John Kruzel, *Battle Lines Emerge over out-of-State Abortion*, THE HILL (July 14, 2022, 5:15 AM) <https://thehill.com/regulation/3558330-battle-lines-emerge-over-out-of-state-abortion/#:~:text=New%20battle%20lines%20are%20emerging,out%2Dof%2Dstate%20abortion> [https://perma.cc/9S46-KTAX]; Ava Sasani, *Is It Legal for Women to Travel out of State for an Abortion?*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/abortion-travel-bans.html> [https://perma.cc/3CNX-9TT8]; see also H. Amend. 4488H03.21H, H.B. 2012, 101st Gen. Assem., Reg. Sess. (Mo. 2022) (proposing strict civil liability upon the death of pregnant woman or unborn child for anyone who aids in transporting or providing “abortion-inducing drugs,” and providing that “the law of Missouri shall apply to any abortion . . . upon a resident or citizen of Missouri, regardless of where that abortion or attempted abortion occurs.”); cf. IDAHO CODE ANN. §§ 18-623(1)–(3) (West, Westlaw through Chapters 1 to 314 of the first 2023 Reg. Sess.) (making it a felony for an adult—without the consent of a minor’s parents—to “procure an abortion” or “an abortion-inducing drug” for a minor by “transporting the pregnant minor,” adding “[i]t shall not be an affirmative defense . . . that the abortion provider or the abortion-inducing drug provider is located in another state”); Aria Bendix, *Idaho Becomes One of the Most Extreme Anti-abortion States with Law Restricting Travel for Abortions*, NBC NEWS (Apr. 6, 2023, 9:24 AM), <https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225> [https://perma.cc/G5QX-S7TK] (quoting a supporter of the law banning out-of-state travel for abortions as saying, “‘When you’re talking about a minor being transported across state lines, . . . I think that is clearly within the authority of the state of Idaho to criminalize.’”).

<sup>3</sup> See, e.g., Reena Diamante, *California Doctor Proposes Floating Abortion Clinic as State Restrictions Tighten*, SPECTRUM NEWS ONE (July 26, 2022, 8:59 AM), <https://spectrumlocalnews.com/tx/south-texas-el-paso/politics/2022/07/26/california-doctor-proposes-floating-abortion-clinic-as-state-restrictions-tighten-> [https://perma.cc/WS66-RQL4]; Rachel Martin, *A Floating Abortion Clinic is in the Planning Stage, and People are Already on Board*, NPR (July 20, 2022, 11:21 AM), <https://www.npr.org/transcripts/1112219566> [https://perma.cc/PC6N-AY8E]; Selene San Felice, *Doctor Proposes Abortion Boat Clinic on the Gulf of Mexico*, AXIOS TAMPA BAY (July 12, 2022), <https://www.axios.com/local/tampa-bay/2022/07/12/abortion-boat-gulf-of-mexico> [https://perma.cc/Z8SM-GE4C].

the conduct of its citizens when they are in other states? Under well-established principles of jurisdiction, the answer to the first question, at least in some circumstances, is clearly “yes.” The answer to the second is less settled, although states clearly can prosecute their citizens for conduct that occurs outside of U.S. territory.

States routinely exercise criminal jurisdiction over persons in other states whose conduct has effects within the state.<sup>4</sup> A parent who fails to pay child support is subject to liability in a state he has never visited if his child has moved to that state.<sup>5</sup> A resident of Michigan who conspires with others to commit a murder in Arizona can be liable for conspiracy in Arizona.<sup>6</sup> One who forges a fraudulent deed while in Louisiana for property in Texas is subject to prosecution in Texas.<sup>7</sup> And one who solicits another to commit election fraud in Georgia, by means of a phone call from outside the state, can be guilty of soliciting election fraud in Georgia.<sup>8</sup> Although states less often assert that their citizens are subject to state law when outside the United States, the U.S. Supreme Court has clearly affirmed their authority to do so.<sup>9</sup>

Those examples of extraterritorial jurisdiction are uncontroversial, but they stand in tension with the assumption, sometimes articulated by U.S. courts, that the reach of state criminal law jurisdiction stops at the geographic boundaries of the state.<sup>10</sup> This authority to extend state law outside state

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<sup>4</sup> See, e.g., *State v. Jack*, 125 P.3d 311, 319 (Alaska 2005) (“The effects doctrine recognizes that a state may exercise extraterritorial jurisdiction over conduct outside the state that has or is intended to have a substantial effect within the state so long as the exercise of jurisdiction does not conflict with federal law and is otherwise reasonable,” regardless of the defendant’s citizenship or conduct while in another state.).

<sup>5</sup> See, e.g., *In re Vasquez*, 705 N.E.2d 606, 610–12 (Mass. 1999).

<sup>6</sup> So long as one of the conspirators commits an act in furtherance of the conspiracy within Arizona. See ARIZ. REV. STAT. ANN. § 13-108(A)(2) (2020).

<sup>7</sup> See *Hanks v. State*, 13 Tex. Ct. App. 289, 290–91, 309 (1882).

<sup>8</sup> See GA. CODE ANN. § 21-2-604 (West 2022); see also Norman L. Eisen, E. Danya Perry & Amy Lee Copeland, Opinion, *It’s Time to Prepare for a Possible Trump Indictment*, N.Y. TIMES (Feb. 17, 2023), <https://www.nytimes.com/2023/02/17/opinion/trump-georgia-grand-jury-report.html> [<https://perma.cc/R6FM-XZ5J>] (“There is now abundant evidence suggesting [former President Trump] violated Georgia statutes, like those criminalizing the solicitation of election fraud.”).

<sup>9</sup> See *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941) (affirming a Florida state court conviction of a Florida resident for conduct in international waters).

<sup>10</sup> *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 742 (Mo. 2007) (“Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect.”); *Bigelow v. Virginia*, 421 U.S. 809, 812–13, 823–24 (1975) (overturning conviction of a Virginia newspaper editor who printed an advertisement for a New York abortion clinic in violation of a statute prohibiting sale of publications that “encourage or prompt the procuring of [an] abortion” and observing “[t]he Virginia

territory means that people can be subject to the criminal laws of two (or more) governments for the same conduct. And while state policies are largely in harmony with regard to child support obligations and criminal conspiracies, they indisputably are not on some policies. Drug laws and firearm regulations are familiar examples,<sup>11</sup> but the prospect for conflicts in the particularly fraught context of abortion regulation has sharply increased in the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,<sup>12</sup> which overturned *Roe v. Wade*<sup>13</sup> and permits states to criminalize activity related to abortion services.<sup>14</sup> Broad criminal prohibitions and restrictions on abortion services, medications, and assistance have been adopted in well over a dozen states.<sup>15</sup> Several state

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Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State . . . . Virginia possessed no authority to regulate the services provided in New York.”)

<sup>11</sup> See, e.g., Joanna R. Lampe, CONG. RSCH. SERV., THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 118TH CONGRESS 4 (2023) (“[M]any drugs subject to the [federal Controlled Substances Act] are also subject to state controlled substance laws. Such state laws often mirror federal law. . . .”) (footnote omitted); *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019) (affirming federal conviction under 18 U.S.C. § 922(g) after an earlier state conviction under Ala. Code § 13A-11-72(a) (2015) for the same conduct of firearm possession by a convicted felon).

<sup>12</sup> 597 U.S. 215 (2022).

<sup>13</sup> 410 U.S. 113 (1973).

<sup>14</sup> See *Dobbs*, 597 U.S. at 301.

<sup>15</sup> ALA. CODE § 13a-13-7 (West, Westlaw through the end of the 2023 Sessions); ARIZ. REV. STAT. ANN. §§ 36-2321 to -2326 (2023); ARK. CODE ANN. § 5-61-404 (West, Westlaw through the 2023 Reg. Sess. and the 2023 First Extraordinary Sess. of the 94th Arkansas Gen. Ass.); IDAHO CODE ANN. § 18-622 (West, Westlaw through Chapters 1 to 314 of the first 2023 Reg. Sess.); KY. REV. STAT. ANN. § 311.772 (West, Westlaw, current through the 2023 Reg. Sess.); LA. STAT. ANN. § 40:1061 (2023) (amended by S.B. 342, 2022 Leg., Reg. Sess. (La. 2022) and S.B. 388, 2022 Leg., Reg. Sess. (La. 2022)); MISS. CODE ANN. § 41-41-45 (West 2022); MO. ANN. STAT. § 188.017 (West, Westlaw through the end of the 2023 First Reg. Sess. of the 102nd General Assembly); N.D. CENT. CODE ANN. §§ 12.1-19.01, -.02, -.03 (West, Westlaw through 2023 Reg. Sess. and Special Session); OKLA. STAT. ANN. tit. 63, § 1-731.4 (West, Westlaw through First Reg. Sess. of the 59th Legislature (2023) and the First Extraordinary Sess. of the 59th Legislature (2023) (amended by S.B. 1555, 2022 Leg. Sess. (Okla. 2022), and S.B. 612, 2022 Leg., Reg. Sess. (Okla. 2022)); S.D. CODIFIED LAWS § 22-17-5.1 (2017); TENN. CODE ANN. § 39-15-213 (West, Westlaw through 2023 Reg. Sess. and 1st Extraordinary Sess. of the 113th Tenn. Gen. Assem.); TEX. HEALTH & SAFETY CODE ANN. § 170A (West, Westlaw through the 2023 Reg., Second, Third and Fourth Called Sessions of the 88th Leg.); UTAH CODE ANN. § 76-7a-201 (West 2023); WYO. STAT. ANN. § 35-6-123 (2023); see generally *An Overview of Abortion Laws*, GUTTMACHER INST. (updated Aug. 31, 2023), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [https://perma.cc/J6YL-F223] (providing a rundown of abortion law by state); *Medication Abortion*, GUTTMACHER INST. (updated Aug. 31, 2023), <https://www.guttmacher.org/state-policy/explore/medication-abortion> [https://perma.cc/5NZR-V47Z] (providing a guide to state laws and policies regarding medication abortion).

legislatures are considering criminal statutes that punish out-of-state actors for conduct that facilitates abortions, even when they are acting in states in which those services are legal.<sup>16</sup> In some states, existing criminal statutes, enacted recently or in the pre-*Roe* era, may provide bases for criminal liability for various activities in support of abortion services.<sup>17</sup> Shortly after the *Dobbs* decision, Louisiana made it a crime for anyone outside of Louisiana to ship “abortion-inducing drugs” to a Louisiana resident.<sup>18</sup> Appropriately drafted in light of jurisdictional principles, such laws are valid exercises of a state’s power to assert extraterritorial application of its criminal law.

Still, there are practical and constitutional limits on states’ authority to criminalize conduct beyond their borders. States face considerable obstacles

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<sup>16</sup> See, e.g., Missouri S.B. 1178 (Mo. 2022) (proposing a class B felony for “trafficking abortion-inducing drugs” and a class D felony for “a licensed or registered out-of-state wholesale distributor, out-of-state pharmacy acting as a distributor, drug outsourcer, or third-party logistics provider to knowingly deliver directly to a patient in this state any medicine, drug, or other means or substance to be used to induce an abortion.”); Rachel Cohen, *The New Front in the Right’s War on Abortion*, VOX (Jan. 9, 2023, 6:00 AM), <https://www.vox.com/policy-and-politics/2023/1/9/23540562/abortion-pills-medication-dobbs-roe-mifepristone> [<https://perma.cc/V3HWXWUZ>] (“John Seago, president of Texas Right to Life, [said] . . . his group is working to identify examples of people who might be distributing abortion pills illegally for local prosecutors to then charge. Seago said Texas lawmakers are also going to explore ways to hold groups with ties to abortion pill distributors ‘financially and criminally accountable.’”); Jonathan Weisman & Jazmine Ulloa, *Supreme Court Throws Abortion to an Uneven State Playing Field*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/us/politics/abortion-ruling-states.html> [<https://perma.cc/TQ7C-EBFS>] (“[Texas] Republicans are now discussing legislation to potentially allow district attorneys to prosecute people who are involved in abortions in neighboring counties and criminally punish anyone who helps a woman get an abortion in another state.”); Caroline Kitchener, *Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill ‘Trafficking’*, WASH. POST (Dec. 14, 2022, 7:30 AM), <https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe/> [<https://perma.cc/5G4U-G3YZ>] (“Republican lawmakers in Texas are preparing to introduce legislation that would require internet providers to block abortion pill websites in the same way they can censor child pornography.”).

<sup>17</sup> See, e.g., KEN PAXTON, ATT’Y GEN. OF TEX., ADVISORY ON TEXAS LAW UPON REVERSAL OF *ROE V. WADE*, (June 24, 2022) (noting that “some prosecutors may choose to immediately pursue criminal prosecutions based on violations of Texas abortion prohibitions predating *Roe* that were never repealed by the Texas Legislature” and that the AG’s office “will assist any local prosecutor who pursues criminal charges”); Erin Douglas & Eleanor Klibanoff, *Abortion Funds Languish in Legal Turmoil, Their Leaders Fearing Jail Time if They Help Texans*, TEX. TRIB. (June 29, 2022), <https://www.texastribune.org/2022/06/29/texas-abortion-funds-legal/> [<https://perma.cc/N2HM-B7ZC>] (describing uncertainty about the scope of criminal liability under Texas law).

<sup>18</sup> LA. STAT. ANN. § 40:962.2 (2023) (“[D]elivery to a person in Louisiana by mail-order, courier, or as a result of a sale made via the internet [of an abortion-inducing drug] . . . is strictly prohibited” and punishable by up to six months imprisonment, a \$1,000 fine, or both.).

to their capacity to *enforce* such laws. For example, obtaining custody—and thus personal jurisdiction—over an out-of-state person requires the cooperation of the state in which that person resides. But there is notable uncertainty about precise parameters of limits in both dimensions. With some exceptions, such as antebellum disputes over fugitive slave laws, extraterritorial assertions of state criminal law mostly have been characterized either by harmony among state policies or comity toward other states’ divergent policies.<sup>19</sup> As a result, the constitutional law doctrines that might define limits on extraterritorial assertions of jurisdiction, or resolve conflicts among two states’ opposing efforts to regulate the same conduct, are unclear and underdeveloped.

This article addresses some of the issues that are beginning to arise in an era of diminished comity in criminal lawmaking among states, particularly in relation to regulation of abortion services. Part I examines the principles for extraterritorial jurisdiction for state criminal laws. To clarify the debates, it borrows from international law the distinctions between legislative, enforcement, and adjudicative jurisdiction that courts and scholars too often ignore in the context of domestic criminal law. Next, it documents a trend in many states (following the Model Penal Code) to now assert criminal jurisdiction over actors in other states, a trend the U.S. Supreme Court has largely endorsed. Finally, it identifies the principles that underlie existing or proposed state criminal laws targeting abortion services.

Part II assesses barriers to enforcement of extraterritorial crimes. Although legislative jurisdiction permits states to assert that their laws apply to activities beyond their borders, enforcement jurisdiction is much more limited. Because state law enforcement agencies generally have no authority to operate outside a state’s borders, their means to gather evidence, subpoena witnesses, and arrest defendants outside their territory are sharply restricted. The law of interstate extradition is the primary mechanism for obtaining custody of defendants in other states. Part II identifies the mismatch between the scope of state extraterritorial jurisdiction and states’ obligations under federal law to extradite persons demanded by other states. The U.S. Constitution’s Extradition Clause<sup>20</sup> and implementing federal law require states to extradite persons in their territory if the defendant is a “fugitive”

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<sup>19</sup> See generally John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1066–74 (1983) (describing interstate cooperation on criminal justice administration through “interstate compacts” despite differences in state criminal codes and historical extradition practices). One example of harmony in state policy is the Uniform Interstate Family Support Act, adopted by all states, which enables enforcement of child support orders issued by out-of-state courts. UNIF. INTERSTATE FAM. SUPPORT ACT (UNIF. L. COMM’N 2008).

<sup>20</sup> U.S. CONST. art. IV, § 2, cl. 2.

from the demanding state (i.e., is a person who has committed illegal conduct in that state and then fled).<sup>21</sup> In effect, this means that the duty to extradite does not extend to prosecutions that rely on extraterritorial jurisdiction. Each state's law governs whether it will extradite non-fugitives to another state seeking to prosecute them, which means states can refuse to send their own residents to another state when the demanding state seeks to punish those residents based on extraterritorial jurisdiction. Traditionally, states have granted these kinds of extradition requests as a matter of comity. But in light of the current, sharp disagreements among states over abortion policy, extradition law is now another site for conflict rather than comity. States that protect abortion rights will resist anti-abortion states' requests to extradite their residents charged with abortion-related offenses. States can further frustrate enforcement by declining to compel a resident to testify in another state. A few states have already taken advantage of this authority.<sup>22</sup>

Part III reflects on whether federal constitutional law permits or restricts a state's attempt to assert extraterritorial criminal jurisdiction. The key constitutional doctrines arise from due process, Article IV's Privileges and Immunities Clause, the right to travel, and dormant Commerce Clause. All four are unclear on whether, and to what degree, they constrain aggressive state extraterritorial enforcement. The case law on such conflicts is relatively thin, because states rarely have tried to punish conduct in another state that the other state considers legal. Scholars have offered plausible arguments for why these constitutional doctrines should constrain state extraterritorial jurisdiction.<sup>23</sup> However, given that (1) the applicable doctrines are underdeveloped, and (2) a majority of the current Supreme Court disfavors abortion rights, one should not be optimistic that constitutional law will constrain efforts to extend anti-abortion laws beyond the boundaries of anti-abortion states. Instead, the political process is the more likely route to constrain anti-abortion laws within the borders of anti-abortion states.

## I. THE LAW OF EXTRATERRITORIAL STATE JURISDICTION

### A. PRINCIPLES OF LEGISLATIVE JURISDICTION

In both international law and the common law, legislative jurisdiction—"the authority of a state to make law applicable to persons, property, or

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<sup>21</sup> See 18 U.S.C. § 3182.

<sup>22</sup> See *infra* Part II.B.2.

<sup>23</sup> See discussion *infra* Part III.

conduct<sup>24</sup>—is traditionally limited to the territory of the sovereign. The term “subjective territorial” jurisdiction describes this traditional authority to apply law to persons’ conduct within the state (even if some of the effects, or the crime’s result, occur outside the state).<sup>25</sup> But principles for asserting legislative jurisdiction to persons and conduct beyond a state’s borders are well established in customary international law.<sup>26</sup> The United States asserts and exercises extraterritorial jurisdiction in many federal criminal statutes,<sup>27</sup> as do other nation-states. Within the United States, states likewise can assert jurisdiction of their state criminal law over conduct committed by persons acting wholly within other states’ borders (or in international waters).<sup>28</sup> Most states take advantage of this authority.<sup>29</sup> Thus, while residing and acting wholly in one state, a person can also be subject to the criminal law of other states, despite U.S. courts’ occasional assertions to the contrary.<sup>30</sup>

International law recognizes several distinct bases on which nation-states can exercise jurisdiction over persons outside their borders. Three of those principles are recognized bases for U.S. states exercising jurisdiction beyond their own borders. The most frequently invoked and least controversial<sup>31</sup> is jurisdiction over wholly out-of-state conduct that causes detrimental effects within the state.<sup>32</sup> A second, closely related principle is “objective territorial” jurisdiction, pursuant to which a state can criminalize extraterritorial conduct if any constituent element (such as a result element)

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<sup>24</sup> RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. § 401, chap. 1, intro. note (AM. L. INST. 2018) (“Prescriptive jurisdiction concerns the authority of a state to make law applicable to persons, property, or conduct.”). The standard term for legislative jurisdiction in international law is prescriptive jurisdiction, or jurisdiction to prescribe. *See id.* § 401.

<sup>25</sup> *Id.* § 408 cmt. c. Some state courts describe jurisdiction based on effects in the state as “extraterritorial.” *See, e.g., State v. Jack*, 125 P.3d 311, 319 (Alaska 2005).

<sup>26</sup> *See* RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. §§ 401–412 (AM. L. INST. 2018) (describing international law principles for exercising prescriptive jurisdiction).

<sup>27</sup> *See, e.g., 18 U.S.C. §§ 1114(b), 1596(a)* (authorizing extraterritorial jurisdiction for, respectively, homicides of federal employees and various human trafficking offenses).

<sup>28</sup> *See Skiriotes v. Florida*, 313 U.S. 69, 77 (1941).

<sup>29</sup> *See* state laws discussed *infra* Part I.B.1, I.B.3.

<sup>30</sup> *See, e.g., Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 742 (Mo. 2007) (“Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect.”).

<sup>31</sup> *See State v. Jack*, 125 P.3d 311, 319 (Alaska 2005) (“The effects doctrine is widely recognized and accepted.”); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”).

<sup>32</sup> RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. § 409 cmt. a (AM. L. INST. 2018).

of the offense occurred within the state.<sup>33</sup> Statutes in many states assert extraterritorial jurisdiction on these bases in order to prosecute out-of-state conspirators, child support scofflaws, and those who solicit or perpetuate a fraud by means of a phone call from outside the state.<sup>34</sup>

A third principle on which states can rely to assert criminal jurisdiction over conduct beyond their borders is based on the actor's state citizenship. Under this principle—called the “active personality” principle in international law literature<sup>35</sup>—jurisdiction is based on the actor's citizenship rather than her territorial location; the law of a person's home state follows her even beyond the state's borders. On that basis, Florida might criminalize a Florida citizen's purchase of abortion medication or services in, say, international waters off the coast of Florida, or perhaps in Mexico.<sup>36</sup> Whether this citizenship-based jurisdiction is constitutional as well when applied to an actor visiting another state, rather than outside the United States, is unsettled.<sup>37</sup> If it is, then a state such as Missouri might criminalize a Missouri citizen's purchase in New York of abortion services or medication, or a citizen who “aided and abetted” such conduct in New York by, for example, assisting the purchaser's travel.

One other potential basis for states' assertion of extraterritorial application of criminal law is worth noting. International law recognizes—and various federal criminal statutes rely upon<sup>38</sup>—jurisdiction over extraterritorial conduct based on the citizenship of the crime *victim* rather

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<sup>33</sup> *Id.* §§ 408, 408 cmt. c, 409, 409 cmt. a; *see also, e.g.*, ALA. CODE § 15-2-3 (2018) (“When the commission of an offense commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama.”).

<sup>34</sup> *See supra* notes 4–8 and accompanying text.

<sup>35</sup> RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. § 410 (AM. L. INST. 2018).

<sup>36</sup> *See Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (affirming a Florida state court conviction of a Florida resident for conduct committed in international waters, concluding that a State has power to “govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest”).

<sup>37</sup> *Skiriotes* affirmed Florida's assertion of extraterritorial legislative jurisdiction over its own citizen who was in international waters. *Id.* For a discussion of whether the same would hold when a state's citizen is in another state, *see infra* Part III.

<sup>38</sup> *See, e.g.*, 49 U.S.C. § 46502(b)(2)(A) (For a crime of “aircraft piracy” that occurs “outside the special aircraft jurisdiction of the United States . . . [t]here is jurisdiction over the offense . . . if . . . a national of the United States was aboard the aircraft.”); *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir. 1998) (noting that the passive personality principle based on victim citizenship “is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality”) (quoting RESTATEMENT (THIRD) OF FOREIGN REL. L. § 402 cmt. g (AM. L. INST. 1987)).

than of the criminal actor.<sup>39</sup> Only a few state criminal statutes currently seem to rely upon this jurisdictional principle.<sup>40</sup> But given some precedent for this principle in state codes as well as in federal statutes and international law, it is not hard to imagine that states with stringent anti-abortion policies could assert jurisdiction based on the citizenship of the pregnant woman or—pursuant to laws granting full legal personhood status to fetuses<sup>41</sup>—to the “fetal citizen,” much as Florida now does for an act of violence against a state resident in the territory of another sovereign.<sup>42</sup> Language to this effect has already appeared in legislative proposals. One Missouri bill sought to create a civil cause of action against anyone who assists in providing “abortion-inducing drugs” that result in an abortion and to extend the bill’s reach “to any abortion . . . upon a resident or citizen of Missouri, regardless of where that abortion or attempted abortion occurs.”<sup>43</sup> That bill, like most anti-abortion legislation, prohibited liability for the pregnant woman who sought the abortion, which forecloses jurisdiction based on the *defendant’s* citizenship.<sup>44</sup>

When states’ criminal laws are in harmony, states rarely need to assert such jurisdiction; New York can be counted on to prosecute New York

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<sup>39</sup> The international law label is “passive personality” jurisdiction. RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. § 411, 411 cmt. a (AM. L. INST. 2015) (“Passive-personality jurisdiction historically has been more controversial than jurisdiction based on territory or active personality. Despite this, states increasingly have exercised this form of prescriptive jurisdiction, particularly with respect to terrorist offenses.”).

<sup>40</sup> For examples, see FLA. STAT. ANN. § 910.006(3)(e), (f) (West 2014) (asserting “special maritime criminal jurisdiction of the state extends to acts or omissions on board a ship outside of the state” *inter alia* if “[t]he victim is a Florida law enforcement officer on board the ship in connection with his or her official duties” or “[t]he act or omission is one of violence, detention, or depredation generally recognized as criminal, and the victim is a resident of this state.”); IND. CODE ANN. § 35-41-1-1(b)(7)(B) (West 2012) (“A person may be convicted under Indiana law of an offense if . . . conduct . . . occurs outside Indiana and the victim of the offense resides in Indiana at the time of the offense.”).

<sup>41</sup> See, e.g., GA. CODE ANN. § 1-2-1(b) (West 2022) (“‘Natural person’ means any human being including an unborn child.”); see also *supra* note 15, citing state statutes.

<sup>42</sup> See FLA. STAT. ANN. § 910.006(3)(f) (West 2014); Idaho’s recently enacted offense punishes any adult who assists a minor in obtaining abortion services without a parent’s consent and prohibits “an affirmative defense . . . that the abortion provider or the abortion-inducing drug provider is located in another state.” IDAHO CODE ANN. §§ 18-623(1)–(3) (West, Westlaw through Chapters 1 to 314 of the first 2023 Reg. Sess.). But because the statute requires proof of in-state conduct such as “transporting the pregnant minor,” jurisdiction need not rest solely on the minor’s (or fetus’) citizenship. *Id.* § 18-623(1).

<sup>43</sup> H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. Amend. 4488H03.21H (Mo. 2022).

<sup>44</sup> *Id.* at 2, lines 42–44 (proposed Section 188.410(8)).

murderers of Louisiana citizens.<sup>45</sup> But on fetal status and abortion policy more broadly, state policies are in sharp conflict. Asserting extraterritorial jurisdiction for state criminal law on the basis of the victim's citizenship may prove tempting in anti-abortion legislatures.<sup>46</sup>

It bears emphasis that these principles justify only legislative jurisdiction which, as noted above, describes the ambit or scope of a statute's applicability,<sup>47</sup> such as whether and in what circumstances it applies extraterritorially. That is distinct from enforcement jurisdiction, which describes the scope of authority for a state's law enforcement agencies.<sup>48</sup> Unlike legislative jurisdiction, enforcement authority remains almost wholly confined within a state's territory. Finally, adjudicative jurisdiction primarily describes whether a court has jurisdiction to adjudicate a specific case.<sup>49</sup> The

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<sup>45</sup> For an example of a state's dissatisfaction with another state's prosecution of the murder of one of its citizens, see generally *Heath v. Alabama*, 474 U.S. 82, 82–83 (1985) (holding there was no double jeopardy bar to Alabama's prosecution of a defendant already convicted for the same murder in Georgia and noting the Court did not consider petitioner's claim that Alabama lacked jurisdiction over an offense committed at least partly in Georgia).

<sup>46</sup> Less relevant for state criminal law is the protective principle for legislative jurisdiction, on which some federal statutes rely, in accord with international law, to reach extraterritorial conduct "against the security of the state or against a limited class of other fundamental state interests, such as espionage, certain acts of terrorism, murder of government officials." RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. § 412 (AM. L. INST. 2018). Pursuant to a statute granting jurisdiction for offenses that have a "particular effect" in the state that is "materially harmful impact upon the governmental processes," New York recognizes jurisdiction on this principle over some out-of-state conduct. N.Y. CRIM. PROC. LAW § 20.10(4) (McKinney 2018); see also *People v. Puig*, 378 N.Y.S.2d 925, 933 (N.Y. Sup. Ct. 1976) (describing the protective principle under New York law); *Carvajal v. Artus*, 633 F.3d 95, 110 (2d Cir. 2011) (same). Some states such as Pennsylvania adopt the recommendation of MODEL PENAL CODE § 1.03(1)(f) and assert a somewhat broader principle to justify a statute that "expressly prohibits conduct outside this Commonwealth when the conduct bears a reasonable relation to a legitimate interest of this Commonwealth and the actor knows or should know that his conduct is likely to affect that interest." 18 PA. STAT. AND CONS. STAT. ANN. § 102(a)(6) (West 2015).

<sup>47</sup> Strictly speaking, "ambit" concerns whether the substantive law applies to the alleged conduct, which is often a question of the geographic reach of a statute, whereas "jurisdiction" commonly refers to the competence of a particular court to adjudicate a charge or claim. See Lindsay Farmer, *Territorial Jurisdiction and Criminalization*, 63 UNIV. TORONTO L.J. 225, 230–31 (2013).

<sup>48</sup> See *infra* Part II.A.

<sup>49</sup> "Adjudicative jurisdiction" is the standard term in international law. See RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. § 401 (AM. L. INST. 2018) (defining "jurisdiction to adjudicate" [as] the "authority of a state to apply law to persons or things, in particular through the processes of its courts" and "jurisdiction to enforce" as "the authority of a state to exercise its power to compel compliance with law."); An equivalent label is "judicial jurisdiction." See Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due*

key component is whether the court has personal jurisdiction over the defendant.<sup>50</sup> That is less important here, because in criminal law, personal jurisdiction for natural persons requires the defendant's presence.<sup>51</sup> And a state's capacity to compel a defendant's presence is restricted by the limits on its enforcement authority. Law enforcement officers of one state generally have no lawful power to affect arrests in other states. That, in turn, means that obtaining personal jurisdiction over a suspect in another state depends on the cooperation, via extradition process,<sup>52</sup> of the suspect's resident state.

#### B. STATUTES AND COMMON LAW ON EXTRATERRITORIAL STATE JURISDICTION.

As noted, many states explicitly assert jurisdiction over persons' conduct in another state, as well as in-state conduct that causes a prohibited result in another state. In some, this authority is still found only in common law,<sup>53</sup> but a notable minority of states have enacted general jurisdiction statutes that provide for extraterritorial jurisdiction in a wide range of

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*Process*, 116 COLUM. L. REV. 625, 630 (2016) ("Judicial jurisdiction is the power of a sovereign's court to hear a case.").

<sup>50</sup> See RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. §§ 401(b), 422 (AM. L. INST. 2018).

<sup>51</sup> See *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."). Criminal courts and treatises rarely discuss personal jurisdiction as such. See, e.g., WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 4 CRIMINAL PROCEDURE §§ 16.4, 24.2 (4th ed. 2022) (discussing requirement of defendant's presence and jurisdictional requirements without mentioning personal jurisdiction); WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 4.4 (3d ed. 2022) (summarizing jurisdictional principles without reference to personal jurisdiction). The doctrine of personal jurisdiction is largely confined to civil litigation. See *In re Vasquez*, 705 N.E.2d 606, 608–09 (Mass. 1999) (citing state decisions that affirm "the minimum contacts analysis [for personal jurisdiction] is inapplicable in the criminal context."). For background on the doctrine of personal jurisdiction in the civil context, see generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that due process requires a defendant have sufficient "minimum contacts" with the forum state such that the assertion of jurisdiction satisfies "traditional notions of fair play and substantial justice"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) (sale of product in one state that plaintiff brings to forum state held insufficient to meet due process standard).

<sup>52</sup> See *infra* Part III, discussing interstate extradition.

<sup>53</sup> See, e.g., *People v. Blume*, 505 N.W.2d 843, 845–46 (Mich. 1993) (describing requirements for extraterritorial jurisdiction); *State v. Doyen*, 676 A.2d 345, 349–50 (Vt. 1996) (affirming state's common law jurisdiction over out-of-state conduct that produces harmful results within the state); *State v. Dennis*, 607 S.E.2d 437, 451–52 (W. Va. 2004) (noting common law requirement that an element of the offense occur within the state).

circumstances. Roughly a third of states have enacted such statutes based in whole or in large part on Model Penal Code (MPC) § 1.03.<sup>54</sup> Thus, this MPC provision reflects a consensus of the MPC’s drafters endorsed by a substantial number of state legislatures about constitutional authority of states to extend the ambit of state criminal law to persons and conduct outside the state. For that reason, I use the MPC jurisdictional provision as the framework to describe three contexts in which the legitimacy of extraterritorial jurisdiction is regarded as well established. For each context, I highlight how the jurisdictional principle is relevant when states have conflicting policies on abortion—specifically, how anti-abortion states might use extraterritorial jurisdiction to extend the ambit of their criminal laws to reach conduct and persons in states that protect abortion services and related activities.

1. *Out-of-state conduct causing in-state results.*

Pursuant to an MPC-inspired statute, the first scenario in which a state might assert jurisdiction to prosecute an actor outside its borders involves out-of-state conduct that causes a result in the prosecuting state criminalized under that state’s law.<sup>55</sup> Here, we can think of those who provide abortion medication or other services in a state where that activity is legal, but which results in a patient’s abortion in a state that criminalizes abortion. The MPC criminal jurisdiction provision reflects a widely accepted position for this circumstance: a state can extend the ambit of its criminal laws to out-of-state actors’ conduct that has effects, or causes some result, in the legislating state. “[A] person may be convicted under the law of this State of an offense committed by his own conduct . . . if . . . either the conduct that is an element of the offense *or the result* that is such an element *occurs within this State.*”<sup>56</sup>

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<sup>54</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-108 (2020); GA. CODE ANN. § 17-2-1 (West 2014); 720 ILL. COMP. STAT. 5/1-5 (West 2016); N.Y. CRIM. PROC. LAW §§ 20.20, 20.30 (McKinney 2018); OHIO REV. CODE ANN. § 2901.11 (West 2020); OKLA. STAT. tit. 21, § 151 (2021); OR. REV. STAT. § 131.215 (2023); 18 PA. STAT. AND CONS. STAT. ANN. § 102 (West 2015); TEX. PENAL CODE ANN. § 1.04 (2021); WIS. STAT. ANN. § 939.03 (2005). As of 1978, the Model Penal Code and Commentaries reported that “twenty-nine states have enacted or proposed jurisdictional statutes modeled on this section of the Code or on an earlier version of it,” but some of the proposals were never enacted. MODEL PENAL CODE AND COMMENTARIES, PART I at 40–41 (AM. L. INST. 1985).

<sup>55</sup> As noted above, although this scenario involves application of state law to conduct occurring in another state, it is denoted “objective territorial” rather than, strictly speaking, *extra-territorial* jurisdiction. See RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL. § 408 cmt. C (AM. L. INST. 2018); see also *supra* note 33 and accompanying text.

<sup>56</sup> MODEL PENAL CODE § 1.03(1)(a) (AM. L. INST. 1985) (emphasis added); see also, e.g., ARIZ. REV. STAT. ANN. § 13-108 (2020); GA. CODE ANN. § 17-2-1(a), (c) (West 2014); HAW.

That is, one can be prosecuted for conduct occurring outside the state if the prohibited result occurs within the state. Moreover, even if the conduct does not achieve the result, extraterritorial conduct likewise can be the basis to convict one for an attempt, or a conspiracy, to commit the crime in the prosecuting state.<sup>57</sup>

Critically, this jurisdictional claim extends even to those who are located in a state that does not criminalize the result. Thus, a person residing and acting in a state where abortion is legal can be prosecuted by a state that prohibits abortion if their actions cause an abortion in the prosecuting state. The only limitation is a standard *mens rea* requirement: the out-of-state actor must have “purposely or knowingly caused the result within the State” that now prosecutes her.<sup>58</sup> Thus, as between states with conflicting laws on abortion services, *state A* can prosecute a person in *state B* who provides abortion medications to a patient if the resulting abortion occurs in *state A*, where abortion is prohibited. In many scenarios, proving the provider’s knowledge of causing that result will be easy. That is certainly true when the provider ships drugs from *state A* to the patient in anti-abortion *state B*. If the patient visits the provider’s state to obtain the drugs, the provider’s knowledge of causing the result that occurred *in the other state* would turn on whether the provider knew where the patient would administer the drugs, or at least whether the provider instructed the patient to ingest the drugs—and complete the abortion—in the provider’s state.

## 2. *In-state conduct causing out-of-state results.*

The second scenario in which some states assert jurisdiction outside their own borders is roughly the opposite: *state A* can punish actors whose in-state conduct has effects, or causes a result, in *state B*. Again, the difficulty arises when state policies diverge so that the state in which the result occurs does not prohibit that result. In the abortion context, this principle could provide jurisdiction for anti-abortion *state A* to convict a person whose actions in *state A* somehow assist a woman in obtaining abortion services in *state B*, where those services are legal. One example is Idaho’s felony offense

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REV. STAT. ANN. § 701-106(1)(a) (West 2008); KY. REV. STAT. ANN. § 500.060(1)(a) (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 102(a)(1) (West 2015). In some states, the same principle is established in common law. *See* *State v. Jack*, 123 P.2d 311, 319–22 (Alaska 2005).

<sup>57</sup> MODEL PENAL CODE § 1.03(1)(b), (c) (AM. L. INST. 1985).

<sup>58</sup> *Id.* § 1.03(3) (AM. L. INST. 1985); *see also* 18 PA. STAT. AND CONS. STAT. ANN. § 102(b) (West 2015) (substantively similar to MPC § 1.03(3)); N.Y. CRIM. PROC. LAW § 20.20.2(b) (McKinney 2018) (similar).

prohibiting an adult's in-state assistance to a pregnant minor seeking an out-of-state abortion without parental permission.<sup>59</sup>

The MPC and the state statutes based on it disfavor criminal liability in this circumstance but nonetheless assume that states have authority to impose it. Section 1.03(2) says jurisdiction based on in-state conduct

does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs . . . only in another jurisdiction where the conduct charged would not constitute an offense, *unless* a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.<sup>60</sup>

One way to understand this is as a presumptive requirement for dual criminality in interstate contexts, which a state can reject for particular offenses if it does so explicitly. If a state exercises this power and seeks to punish results that are legal in the states in which they occur, it sets the stage for interstate conflict. Until now, such conflicts have been unusual, because sharp differences in what states punish are relatively rare, and where they exist traditions of comity counsel deference to states in which the result occurs. Plus, resource constraints lead prosecutors to give low priority to effects that manifest in other states.<sup>61</sup> But states now have some sharp differences, especially on abortion policies. Whether these other reasons will constrain prosecution for extraterritorial effects and accompanying interstate conflicts remains to be seen.

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<sup>59</sup> IDAHO CODE ANN. § 18-623 (West, Westlaw through Chapters 1 to 314 of the first 2023 Reg. Sess.).

<sup>60</sup> MODEL PENAL CODE § 1.03(2) (AM. L. INST. 1985) (emphasis added). For examples of states adopting this policy, see DEL. CODE ANN. tit. 11 § 204(b) (West 2010); HAW. REV. STAT. ANN. § 701-106(2) (West 2008); N.J. STAT. ANN. § 2C:1-3(b) (West 2015). Other states assert jurisdiction in this scenario more aggressively, without regard to other states' policies. *See, e.g.*, TENN. CODE ANN. § 39-11-103(c) (West 2011) (jurisdiction for "an offense commenced within this state is consummated outside of its boundaries" regardless of law in the other state); ALA. CODE § 15-2-3 (2018) (substantively similar). On the other hand, a few state laws inspired by Model Penal Code § 1.03(2) remove the "unless" clause and so provide no authority for crimes in which the result element occurs in a state where the result is legal. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 7(2) (2006); N.H. REV. STAT. ANN. § 625:4(II)(a) (2016). A few omit any provision comparable to Model Penal Code § 1.03(2). *See, e.g.*, KY. REV. STAT. ANN. § 500.060 (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 102 (West 2015).

<sup>61</sup> Limits on jurisdiction related to enforcement—such as one state's law enforcement agency lacking search and seizure authority in another—might be additional reason, although this may play a modest role when the conduct occurs in the prosecuting state despite the result occurring elsewhere.

3. *Out-of-state conduct affecting a state's "legitimate interest."*

MPC § 1.03(1)(f) asserts authority to criminalize extraterritorial conduct if “the conduct bears a reasonable relation to a *legitimate interest* of this State and the actor knows or should know that his conduct is likely to affect that interest.”<sup>62</sup> According to the MPC’s *Commentaries*, this provision is intended to assert state authority even though “neither conduct nor a result (nor a design or threat of causing a result within the state) is made an element of the offense.”<sup>63</sup> The language is sufficiently capacious to support jurisdiction on three distinct grounds. The *Commentaries* emphasize that one valid basis under this provision is jurisdiction based on the defendant’s state citizenship. They cite the Supreme Court’s decision in *Skiriotes v. Florida* as the apparent source of the MPC’s “legitimate interest” terminology.<sup>64</sup> That decision affirmed the state’s authority to exercise extraterritorial jurisdiction based solely on the defendant’s citizenship in that state. The Court in *Skiriotes* unanimously held that a state may “govern the conduct of its citizens” even when they are outside the state’s own territory (at least, when they are “upon the high seas”) as long as the state has “a legitimate interest” in the matter regulated and there is no conflict with federal law.<sup>65</sup> The Court reasoned that because under the U.S. Constitution every state “retained the status of a sovereign,” each state, like the federal government, may assert jurisdiction based on the actor’s citizenship to “control the conduct of its citizens” beyond its borders.<sup>66</sup> As in international law, legislative jurisdiction may turn on citizenship as well as territory.<sup>67</sup>

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<sup>62</sup> MODEL PENAL CODE § 1.03(1)(f) (AM. L. INST. 1985) (emphasis added). For examples of state codifications, see ARK. CODE ANN. § 5-1-104(a)(6) (West, Westlaw through the 2023 Reg. Sess. and the 2023 First Extraordinary Sess. of the 94th Arkansas Gen. Ass.); DEL. CODE ANN. tit. 11 § 204(a)(5) (West 2010); HAW. REV. STAT. § 701-106(1)(f) (2008); IOWA CODE ANN. § 803.1(1)(d) (West 2015); N.J. STAT. ANN. § 2C:1-3(a)(6) (West 2015); OHIO REV. CODE ANN. § 2901.11(A)(4) (West 2020); 18 PA. STAT. AND CONS. STAT. ANN. § 102(a)(6) (West 2015); *cf.* KY. REV. STAT. ANN. § 500.060(1)(f) (West 2016) (substantively similar but without “legitimate interest” requirement); ME. REV. STAT. ANN. tit. 17-A, § 7(1)(F) (2006) (same); IND. CODE ANN. § 35-41-1-1(b)(7)(B) (West 2012) (asserting jurisdiction over out-of-state conduct if the victim is an Indiana resident).

<sup>63</sup> MODEL PENAL CODE AND COMMENTARIES, PART I at 54 (AM. L. INST. 1985).

<sup>64</sup> *Id.*

<sup>65</sup> *Skiriotes v. Florida*, 313 U.S. 69, 76–77 (1941) (“Even if it were assumed that the locus of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from . . . [conduct] at that place . . . There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas.”).

<sup>66</sup> *Id.* at 77.

<sup>67</sup> State courts rely on *Skiriotes* to approve prosecutions of state citizens outside territorial waters. *See* *State v. Jack*, 125 P.3d 311, 312–22 (Alaska 2005) (holding that Alaska had

Beyond its emphasis on Florida's extension of state law to a Florida citizen's conduct in international waters, *Skiriotos* offered no clue as to whether a state can exercise the same extraterritorial authority when its own citizen acts in *another state's* territory. A few nineteenth-century state court decisions held that a state can exercise jurisdiction over its citizens in that context.<sup>68</sup> On the other hand, there are reasons to think that modern constitutional doctrines should limit states' extraterritorial authority in such scenarios but, as Part III addresses, the law remains unclear on the issue.

Additionally, jurisdiction to protect a state's legitimate interest accords with the "effects" doctrine, pursuant to which "acts done outside a jurisdiction which produce detrimental effects inside it justify a state in punishing him who caused the harm, as if he had been present at the place of its effect."<sup>69</sup> The Supreme Court in *Strassheim v. Daily*<sup>70</sup> approved on this ground a state prosecution of a defendant whose conduct occurred entirely in another state, and state courts, relying on *Strassheim*, do the same. Alaska and Florida courts, for example, have approved extraterritorial jurisdiction for sexual assault prosecutions aboard ships at sea without regard to the defendant's citizenship. In the Alaska case, the offense occurred aboard a state ferry in Canadian waters.<sup>71</sup> In the Florida prosecution, the conduct occurred aboard a cruise ship in international waters that was flagged to Liberia, making it formally Liberian territory; neither the defendant nor the

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jurisdiction to punish sexual assault committed on a ferry while in Canadian waters); *Livingston v. Davis*, 465 So. 2d 507, 509 (Fla. 1985) (holding that Florida had jurisdiction to punish fishing law violations by its citizens in Gulf of Mexico); *People v. Weeren*, 607 P.2d 1279, 1279 (Cal. 1980) (holding that California had jurisdiction to punish fishing law violations by its citizens in international waters); see also ALASKA STAT. ANN. § 44.03.030(1) (West 2007) ("This chapter does not limit or restrict . . . the jurisdiction of the state over a person or subject inside or outside the state that is exercisable by reason of citizenship, residence, or another reason recognized by law.") (emphasis added).

<sup>68</sup> See, e.g., *State ex rel. Chandler v. Main*, 16 Wis. 398, 414 (1863) ("[T]he power of a state over its own citizens stands upon a still stronger ground, and it may [pass criminal] laws which are binding and obligatory upon them everywhere, and for the violation of which they may be punished whenever the state can find them within its jurisdiction."); *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 189 (1819) (approving Virginia's exercise of jurisdiction over a state citizen to punish larceny against another Virginia citizen in the District of Columbia); see also WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 4 CRIMINAL PROCEDURE § 16.4(c) (4th ed. 2022) (opining based on these decisions and *Skiriotos* that "the same principle should be applicable to acts done on land outside the state . . . in another state of the United States").

<sup>69</sup> *State v. Bundrant*, 546 P.2d 530, 555 (Alaska 1976); see also *State v. Stepansky*, 761 So. 2d 1027, 1035–36 (Fla. 2000) (describing the effects doctrine).

<sup>70</sup> 221 U.S. 280, 284–85 (1911).

<sup>71</sup> *Jack*, 125 P.3d at 312.

complainant was a Florida citizen.<sup>72</sup> Both courts concluded that the state's economic interest in tourism, which could be adversely affected if people feared for their safety aboard vessels traveling to and from that state, justified effects-based jurisdiction.<sup>73</sup>

Finally, states' legitimate interests may include protecting the lives of its citizens even outside the state, pursuant to which a state may assert extraterritorial jurisdiction based on the citizenship of the crime *victim*. This argument may prove attractive in the wake of *Dobbs* for states seeking grounds to extend the reach of their anti-abortion policies. Most or all states, including those that protect abortion rights, explicitly protect the interests of unborn children through criminal homicide and wrongful death statutes.<sup>74</sup> And fetal personhood statutes assert a state's interest in protecting the lives of the unborn, including granting rights and privileges of citizenship.<sup>75</sup> Yet states that prohibit abortion cannot expect the rights of the unborn as they define them to be protected by states that permit abortion. Given the commitment of anti-abortion legislatures to protecting pregnant women from liability for obtaining an abortion, jurisdiction based on citizenship of the "unborn victim" may prove a tempting additional basis to reach the conduct of out-of-state actors.

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<sup>72</sup> *Stepansky*, 761 So. 2d at 1029–30.

<sup>73</sup> *See id.* at 1035–36; *Jack*, 125 P.3d at 319–22.

<sup>74</sup> *See, e.g.*, CAL. PENAL CODE § 187(a) (West, Westlaw through Ch. 1 of 2023-24 1st Ex.Sess. and all laws through Ch. 890 of 2023 Reg.Sess.) ("Murder is the unlawful killing of a human being, or a fetus."); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West, Westlaw through P.A. 103-583 of the 2023 Reg. Sess.) (homicide of an unborn child, amended in 2023 to exclude abortions); 18 PA. STAT. AND CONS. STAT. ANN. §§ 2603–2605 (West 2015) (homicide of unborn child); PA. STAT. AND CONS. STAT. ANN. § 102(c) (West 2015) (presumption of jurisdiction "[w]hen the offense is homicide or homicide of an unborn child, . . . [inter alia] if the body of a homicide victim, including an unborn child, is found within this Commonwealth") (emphasis added). A Lexis search conducted on May 9, 2023 for the phrase "unborn child" in "all states" returned 1,798 results.

<sup>75</sup> *See* ARIZ. REV. STAT. ANN. § 1-219(A) (West, Westlaw through First Reg. Sess. of the Fifty-Sixth Leg. (2023)) ("[L]aws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state."); GA. CODE ANN. § 1-2-1(a)–(e) (West 2019) (defining "unborn child" as a natural person and requiring, inter alia, that the unborn "shall be included in population based determinations."); LA. CIV. CODE ANN. art. 26 (2023); MO. ANN. STAT. § 1.205(2) (West 2023) ("Unborn children have protectable interests in life, health, and well-being.").

## II. BARRIERS TO EXTRATERRITORIAL ENFORCEMENT

### A. LIMITS ON ENFORCEMENT JURISDICTION

It is one thing to criminalize out-of-state conduct; it is another to successfully prosecute offenses based on such conduct. The law of legislative jurisdiction permits states to criminalize out-of-state actors in many circumstances. But enforcement jurisdiction—meaning “the authority of a state to exercise its power to compel compliance with law”<sup>76</sup>—is much more tightly confined to state territory. States generally cannot grant their law enforcement agencies authority to exercise their official powers, such as search and seizure, beyond their own borders. Unless interstate agreements provide otherwise, one state’s police officers have no lawful authority to arrest suspects or search for evidence in the territory of other states. Thus, while a state can criminalize conduct in another state, it may lack capacity to enforce those laws without the cooperation of the state in which the conduct occurred, evidence is located, or the defendant resides.

In routine cases, enforcement jurisdiction’s strictures often don’t pose significant hurdles to exercising extraterritorial legislative jurisdiction because states cooperate with each other’s law enforcement objectives. Aside from extradition, the most important mechanism may be the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (“Uniform Act to Secure Witnesses”).<sup>77</sup> That model act, which all states have adopted in some form,<sup>78</sup> enables states to obtain testimony and other evidence from persons outside the state through the assistance of courts in which the witness is located. Statutes based on the Uniform Act to Secure Witnesses authorize a state court, upon request from a court in another state, to compel the person in the state “to attend and testify in the prosecution or a grand jury investigation in the other state.”<sup>79</sup> Obtaining out-of-state evidence

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<sup>76</sup> RESTATEMENT (FOURTH) OF THE L. OF FOREIGN REL., § 401 (AM. L. INST. 2018); *see also id.* § 431 cmt. a (“Courts in the United States have understood enforcement jurisdiction to encompass compelling compliance with law through the use of force and the performance of other coercive governmental functions. Examples include the search of a place, the arrest of a person, imprisonment after criminal conviction, and the seizure of property.”).

<sup>77</sup> *See* UNIF. ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIM. PROC. §§ 1–9 (UNIF. L. COMM’N 1931) [hereinafter UNIFORM ACT TO SECURE WITNESSES] (amended 1936); *see also* *New York v. O’Neill*, 359 U.S. 1, 912 (1959) (affirming constitutionality of the Uniform Act to Secure Witnesses).

<sup>78</sup> For a list of state statutes codifying the Uniform Act to Secure Witnesses, *see Uniform Act to Secure Witnesses Reference Chart*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/uniform-act-to-secure-witnesses-reference-chart/> [https://perma.cc/7GS7-T29P].

<sup>79</sup> UNIFORM ACT TO SECURE WITNESSES, *supra* note 77, § 2.

can be critical, of course, when some or all of the alleged criminal conduct occurred outside the prosecuting state.

Two other sources of interstate cooperation are worth noting, although they apply only in relatively narrow circumstances. “Fresh pursuit” laws expand state law enforcement authority extraterritorially. Many states provide that law enforcement officers from “another state . . . have the same authority to arrest . . . as has any member of any . . . peace unit of this state” if the out-of-state officers are in “fresh pursuit” of a suspect who is “believed to have committed a felony in such other state.”<sup>80</sup> This authority is confined to relatively infrequent scenarios in which police are actively chasing a suspect across state lines only for offenses based on subjective territorial jurisdiction, i.e., a crime allegedly committed within the prosecuting (“pursuing”) state. Nonetheless, within this context, these laws create a regime of reciprocity; states gain some modest extraterritorial authority for their law enforcement agents in exchange and grant other states the same.

Additionally, federal law authorizes interstate compacts for mutual assistance in criminal law enforcement.<sup>81</sup> Subject to various limits and prerequisites, many states have adopted statutes that authorize officers from state and local police agencies to operate outside their local jurisdictions and state borders, and that permit out-of-state officers to operate on equal footing with in-state officers. Some of this occurs through interjurisdictional task forces and other kinds of mutual-aid policing agreements with agencies and localities in neighboring states.<sup>82</sup> Like fresh pursuit laws, however, these

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<sup>80</sup> NEB. REV. STAT. § 29-416 (2016). For examples of similar statutes, see IDAHO CODE §§ 19-701, -701A (2021); OKLA. STAT. tit. 22, § 221 (2021); TEX. CODE CRIM. PROC. ANN. art. 14.051 (West 2015); S.D. CODIFIED LAWS §§ 23A-3-9 to -11 (2016).

<sup>81</sup> See 4 U.S.C. § 112 (authorizing states to “enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies”); see also National Crime Prevention and Privacy Compact, 34 U.S.C. §§ 40311-40316 (authorizing states to disseminate criminal history record information to other states for noncriminal legal purposes). Absent such legislation, the Constitution prohibits interstate compacts. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.”).

<sup>82</sup> See, e.g., NEB. REV. STAT. § 18-1706 (2022) (“Any city or village may by resolution authorize its . . . police department . . . to provide . . . police, and emergency service outside of the limits of such city or village either within or without the state.”); MD. CODE ANN., CRIM. PROC. §§ 2-105(b), (e) (West 2023) (Cities or counties “may determine the circumstances under which the police officers . . . may lawfully go or be sent . . . to any place within or outside the State” and “may make a reciprocal agreement . . . [with other governments] within or outside the State, . . . to provide mutual aid by providing its police officers.”); OHIO REV. CODE ANN. § 737.04 (West 2010) (authorizing local governments to enter contracts with localities in an “adjoining state” regarding police services and crime task forces); VA. CODE

arrangements do little to enable a state to seize offenders for conduct committed in another state. But these forms of interstate cooperation, like the Uniform Act to Secure Witnesses, reflect a high degree of comity among states that moderates the territorial strictures on enforcement jurisdiction.

## B. EXTRADITION AND ENFORCEMENT JURISDICTION

### 1. *Federal law duty to extradite fugitives*

A more important tool to address the gap between legislative and enforcement jurisdiction is the law of extradition, through which a state can obtain custody of a defendant who is outside its borders. Extradition law defines the process for a prosecuting (or demanding) state to enlist assistance from the asylum state in which the defendant is now located. In some cases, the Constitution and federal law require states to grant extradition requests and deliver suspects to demanding states. In other cases, no such federal obligation exists, but in accord with state statutory law, states will arrest persons within their jurisdiction and render them to a demanding state.

The federal obligation arises from the Extradition Clause, which says that “[a] Person charged in any State with . . . [a] Crime, who shall flee from Justice, and be found in another State, shall on Demand of . . . the State from which he fled, be delivered” to the demanding state.<sup>83</sup> The Supreme Court has interpreted the Clause to require states to fulfill extradition requests from

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ANN. § 15.2-1724 (West 2013) (“Whenever the necessity arises,” state and local enforcement officers “may . . . lawfully go or be sent beyond the territorial limits of [their] locality . . . to any point within or without the Commonwealth.”); N.C. GEN. STAT. ANN. § 160A-288 (West, Westlaw through S.L. 2023-133 of the 2023 Reg. Sess. of the Gen. Assem.) (authorizing police from other states that “allow for the provision of mutual aid with out-of-state law enforcement officers” to “temporarily provide assistance to another [in-state] agency”); *see also* Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353, 384–85, 384–85 nn.179–83 (2022) (describing the 1934 Crime Prevention Compact Act and listing state statutes and compacts for intra-state and interstate policing agreements, noting that “twenty-five states and the District of Columbia passed laws enabling interjurisdictional policing.”); *cf.* TEX. LOC. GOV’T CODE ANN. § 362.005(a) (West 2023) (authorizing a local police department to “operate the Texas Transnational Intelligence Center”). More have joined federally authorized compacts for sharing state criminal conviction records and for supervision of offenders still under sentences. *See* 34 U.S.C. §§ 40311–40316 (authorizing states to disseminate criminal history record information to other states for noncriminal justice purposes); *About*, INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, <https://interstatecompact.org/about> [<https://perma.cc/6QBM-TEF5>] (coordinating oversight of parolees across state lines).

<sup>83</sup> U.S. CONST., art. IV, § 2, cl. 2 (“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.”).

other states for a person in their territory charged with a crime by the demanding state.<sup>84</sup> Critically, however, that obligation does not apply to every person charged with a state crime; it reaches only those who “flee from Justice.”<sup>85</sup> Federal legislation implementing the Clause is similarly limited.<sup>86</sup> Thus, states are obliged to extradite only those charged persons who are “fugitives,”<sup>87</sup> meaning only those who committed the criminal conduct while present in the demanding state and afterwards left that state. Note how this limitation maps onto the law of legislative jurisdiction. It means that asylum states are required to render to demanding states only those persons who are charged by the demanding based on in-state conduct—that is, when the charge rests on subjective territorial jurisdiction.<sup>88</sup> The Extradition Clause does not mandate that one state assist another’s efforts to enforce an offense based on out-of-state conduct; it compels cooperation only when demanding states are not prosecuting extraterritorially. One whose conduct occurred entirely inside the asylum state is not a “fugitive” even though that conduct violates a criminal law of the demanding state, and even though the demanding state’s law is a valid exercise of its legislative jurisdiction.<sup>89</sup>

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<sup>84</sup> See, e.g., *Michigan v. Doran*, 439 U.S. 282, 289 (1978); see also *New Mexico, ex rel. Ortiz v. Reed*, 524 U.S. 151, 152 (1998).

<sup>85</sup> See *Doran*, 439 U.S. at 286.

<sup>86</sup> See 18 U.S.C. § 3182 (2022) (requiring states to honor valid extradition requests from other states only for a “fugitive from justice” who “has fled” the demanding state).

<sup>87</sup> See *Ortiz*, 524 U.S. at 152; *Puerto Rico v. Branstad*, 483 U.S. 219, 226–28 (1987); *Doran*, 439 U.S. at 287; *Hyatt v. New York ex rel. Corkren*, 188 U.S. 691, 719 (1903) (holding that the Extradition Clause applies only when a fugitive “was in fact within the demanding State when the alleged crime was committed”); *Kentucky v. Dennison*, 65 U.S. 66, 103 (1861) (“[T]o preserve harmony between the states,” the Extradition Clause “gives the right to the Executive authority of the State to demand the fugitive from the Executive authority of the State in which he is found.”).

<sup>88</sup> See *Hyatt*, 188 U.S. at 712 (concluding that New York held no obligation under federal law to extradite a habeas petitioner sought by Tennessee because it was undisputed that the petitioner was in Tennessee when the alleged crime alleged was committed, and noting: “The exercise of [j]urisdiction by a state to make an act committed outside its borders a crime against the state is one thing, but to assert that the party committing such act comes under the Federal statute [implementing the Extradition Clause], and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition.”).

<sup>89</sup> This hurdle to enforcement also effectively constrains adjudicative jurisdiction because U.S. courts can commence a criminal case only if the defendant is physically present in the court (so that the court has, in civil law lingo, personal jurisdiction). See *Illinois v. Allen*, 397 U.S. 337, 337 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”); *Lewis v. United States*, 146 U.S. 370, 372 (1892) (“A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.”). “Adjudicative jurisdiction” is the standard term in international law. See

Interstate extradition of fugitives is a necessary corollary to the ease of interstate travel—and the right to travel—in a federal union. The obligation facilitates unity among states whose separate criminal codes may reflect divergent policy preferences,<sup>90</sup> and it bars states from resisting other states' policies by hindering enforcement of intra-territorial crimes. In that sense federal extradition law forces states to respect each other's sovereignty.

The absence of a duty to extradite non-fugitives fits this larger framework as well. A state that asserts objective-territorial or citizenship-based jurisdiction to punish conduct in another state is extending the ambit of its law into another state's territory. A non-fugitive actor thereby is subject to the concurrent jurisdiction of two states. By limiting states' extradition obligations to fugitives, federal law gives priority, in non-fugitive cases, to the state in which the actor resides and acted, i.e., the asylum state. That state can choose whether to assist the demanding state in enforcing its law extraterritorially. By contrast, an alternative rule, under which federal law compelled extradition even of non-fugitives, would give priority to the demanding state even with respect to the asylum states own residents' conduct in that state.

Note also that under federal law (in contrast to most extradition treaties<sup>91</sup>), a state's duty to extradite is not limited to cases of dual criminality. Through that feature, along with confining the state's extradition duty to demands based on territorial jurisdiction (in the narrowest sense, excluding objective-territorial or effects-based jurisdiction), federal law facilitates diversity in substantive criminal law. Federal law requires states in a federal compact to assist each other in enforcing their own laws against conduct in

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RESTATEMENT (FOURTH) L. FOREIGN REL. § 401 (AM. L. INST. 2018) (defining “jurisdiction to adjudicate [as] the authority of a state to apply law to persons or things, in particular through the processes of its courts” and “jurisdiction to enforce [as] the authority of a state to exercise its power to compel compliance with law.”). An equivalent label is “judicial jurisdiction.” See Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 630 (2016) (“Judicial jurisdiction is the power of a sovereign’s court to hear a case.”).

<sup>90</sup> See *Dennison*, 65 U.S. at 103 (1861) (“[T]o preserve harmony between the states,” the Extradition Clause “gives the right to the Executive authority of the State to demand the fugitive from the Executive authority of the State in which he is found.”); see also *Branstad*, 483 U.S. at 227 (1987) (quoting *Dennison* and observing that “[t]he Framers of the Constitution perceived that the frustration of [states refusing to extradite fugitives] would create a serious impediment to national unity.”).

<sup>91</sup> See, e.g., Extradition Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. 2.1, U.K.-U.S., Mar. 31, 2003, T.I.A.S. No.07-426, <https://2009-2017.state.gov/documents/organization/187784.pdf> [<https://perma.cc/TZV2-NQ3P>] (effective Apr. 26, 2007) (“An offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States.”).

their own territories and prevents states from operating as sanctuaries for fugitives based on their disagreement with other states' policy choices.<sup>92</sup> Thus, federal extradition law enables states to enforce their own laws when interstate travel would otherwise undermine it. At the same time, it preserves an aspect of state sovereignty by disfavoring other states' attempts at cross-border regulation through extraterritorial applications of their laws.

## 2. *State extradition law and extraterritorial jurisdiction*

The limited scope of the Extradition Clause creates a potentially significant gap between states' extradition obligations on the one hand and states' power to criminalize extraterritorial conduct on the other. State law, however, has closed this gap. All states have adopted policies (with modest variations) to fulfill other states' extradition requests for non-fugitives. The Uniform Extradition and Rendition Act has been an influential model for state statutes that expand extradition authority to non-fugitives.<sup>93</sup> Three rationales support this policy consensus among states. One is a long tradition of interstate comity,<sup>94</sup> which rests on states having sufficient confidence in the integrity of each other's criminal legal systems—respect buttressed by federal constitutional doctrines that set minimal standards for states' criminal investigation practices and adjudication procedures.<sup>95</sup> A second is states' mutual interests in obtaining non-fugitive suspects from other states in order to enforce their own laws against out-of-state actors.

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<sup>92</sup> See *Michigan v. Doran*, 439 U.S. 282, 287 (1978) (mandating extradition of fugitives “preclude[s] any state from becoming a sanctuary for fugitives from justice of another state”).

<sup>93</sup> UNIF. EXTRADITION AND RENDITION ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1980). Nearly all states' extradition statutes are based on the Uniform Extradition and Rendition Act or its predecessor, the Uniform Criminal Extradition Act. See John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1090–91 (1983). The distinction between rendition and extradition processes matters little here; for an explanation of the difference, see Murphy, *supra*, at 1101–02.

<sup>94</sup> The Extradition Clause likewise is understood to foster interstate comity, albeit only in extradition cases that involve fugitives. See *Doran*, 439 U.S. at 287–88 (1978) (noting the Extradition Clause “articulated, in mandatory language, the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV . . . [and] served important national objectives of a newly developing country striving to foster national unity.”).

<sup>95</sup> See Jenia Iontcheva Turner, *Interstate Conflict and Cooperation in Criminal Cases: An American Perspective*, 4 EUR. CRIM. L. REV. 114, 116, 123 (2014) (developing this point and other reasons for comity among U.S. states on extradition requests). There are occasional examples of state courts' disapproval of practices in other states. See, e.g., *People v. Doran*, 258 N.W.2d 406, 408–09 (Mich. 1977) (concluding an Arizona court's warrant for a defendant's arrest was not based on probable cause), *overturned by Michigan v. Doran*, 439 U.S. 282 (1978).

A final reason is the broad consensus among states about what conduct they criminalize—i.e., on substantive criminal law. At least with regard to the kinds of offenses on which extradition requests are based, there is almost always dual criminality, meaning that both the demanding state and the asylum state prohibit the alleged conduct, from child support nonpayment and receiving stolen goods to homicide or fraud. In the main, states have little reason to frustrate other states' prosecution of offenses that they likewise enforce, and for which they periodically will need other states' cooperation in the extradition of non-fugitives.<sup>96</sup>

The last of these rationales no longer holds with respect to abortion policy. The sharp dissensus on this issue brings to mind antebellum divisions over slavery, free states' resistance to rendering enslaved persons back to pro-slavery jurisdictions, and punishment of those who assisted the flight of enslaved persons.<sup>97</sup> The intensity of state policy differences over abortion likewise raises the prospect that some states will eschew comity and refuse to cooperate with states' enforcement of extraterritorial applications of laws that undermine access to abortion services. In the context of antebellum slavery disputes, federal law intervened to compel free states' cooperation to slave states' enforcement efforts.<sup>98</sup> With regard to abortion disputes,

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<sup>96</sup> There are exceptions. In *Reed v. State ex rel. Ortiz*, the New Mexico Supreme Court refused to extradite a defendant sought by Ohio, concluding that "Ohio's conduct toward Reed was not just" and "he left Ohio because he risked death or great bodily harm at the hands of prison officials" for his activism on Native American issues, and he was "thus not a fugitive from justice. Rather, he is a refugee from injustice." 947 P.2d 86, 103, 106 (1997), *overturned by* New Mexico, *ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998); *see also* Commonwealth *ex rel. Mattox v. Superintendent of Cnty. Prison*, 31 A.2d 576, 577 (Pa. Super. Ct. 1943) (refusing to extradite a Black defendant accused of assault on a white victim, based on evidence that officials in Georgia, the demanding state, would not protect defendant from lynching); *In re Hampton*, 2 Ohio Dec. 579, 579 (Ohio Com. Pl. 1895) (declining to extradite to Kentucky a Black defendant charged with shooting a white victim, based on "convincing [proof] that the prisoner would have been dealt with unlawfully" and that he faced "threats and the probabilities of violence in [Kentucky], especially to one of his color," also noting "that nineteen people have been illegally executed in the state of Kentucky within the past twelve months by lynching"); *see generally* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149 (2013) (providing a thorough history of such cases).

<sup>97</sup> *See* Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War between the States*, 172 U. PA. L. REV. (forthcoming 2024) (available at <https://ssrn.com/abstract=4372100> [<https://perma.cc/D998-NHUZ>]) (making this comparison).

<sup>98</sup> *See* Fugitive Slave Clause, U.S. CONST. art IV, § 2, cl. 3; *see also* Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (increasing, *inter alia*, penalties for one who interfered with the process of capturing and returning an escaped enslaved person to a slave state); Fugitive Slave Act, ch. 7, 1 Stat. 302 (1793) (punishing by \$500 penalty one who assisted persons who escaped slavery, and empowering owners of enslaved people and their agents to search for

however, prospects are slim in the foreseeable future for a resolution through federal law. And in the wake of *Dobbs*, states committed to protecting access to abortion services need only amend their own statutes to frustrate other states' criminal and civil enforcement of extraterritorial anti-abortion policies.

At least a few states have already done so,<sup>99</sup> one specifically withholding assistance to states attempting to enforce abortion-related crimes. In 2022, Connecticut amended its versions of the Uniform Act to Secure Attendance of Witnesses and the Uniform Criminal Extradition Act to prohibit cooperation by its officials with other states' enforcement of their anti-abortion laws. Connecticut's extradition statute now authorizes the governor to order extradition of an in-state person only if "the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted from those acts in the demanding state had taken effect in this state."<sup>100</sup> Likewise, the relevant witness statute now provides that:

no judge shall issue a summons in a case where prosecution is pending . . . for a criminal violation of a law of such other state involving the provision or receipt of or assistance with reproductive health care services or gender-affirming health care services . . . that are legal in this state.<sup>101</sup>

Colorado has sought to accomplish the same thing with a broader, more general prohibition of any state or local "government actions" that "deprive, through prosecution, punishment, or other means" an individual of control

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enslaved persons in the territory of free states); *Prigg v. Pennsylvania*, 41 U.S. 539, 622 (1842) (affirming the constitutionality of the 1793 Fugitive Slave Act while striking down as unconstitutional a Pennsylvania statute which had criminalized the kidnapping of suspected escaped enslaved persons within the state); *see generally* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE L. J.* 75, 121–24 (2001) (describing effects and federalism implications of the Fugitive Slave Clause and Fugitive Slave Acts).

<sup>99</sup> For a recent statute with this aim targeted at civil law enforcement, see CAL. HEALTH & SAFETY CODE § 123467.5 (West, Westlaw through Ch. 1 of 2023–24 1st Ex.Sess, and all laws through Ch. 890 of 2023 Reg.Sess) (prohibiting enforcement of civil judgments from other states based on abortion services).

<sup>100</sup> CONN. GEN. STAT. § 54-162 (2023) (codifying 2022 Conn. Pub. Act 22-19 Reg. Sess.).

<sup>101</sup> CONN. GEN. STAT. § 54-82i (2023); *see also* CONN. GEN. STAT. § 54-155b (2023) ("No public agency . . . or employee . . . or any other person acting on behalf of a public agency may provide any information or expend or use time, money . . . or other resources in furtherance of any interstate investigation or proceeding seeking to impose civil or criminal liability upon a person or entity for (1) the provision, seeking or receipt of or inquiring about reproductive health care services or gender-affirming health care services . . . that are legal in this state.").

over a pregnancy.<sup>102</sup> Arizona’s governor issued an executive order announcing a policy to “decline any request from . . . another state for the arrest, surrender, or extradition of any person” charged with a crime related to reproductive healthcare.<sup>103</sup>

Even without such limits on extradition authority, state extradition statutes do not *obligate* state officials to grant other states’ requests to render a non-fugitive. Whether to grant another state’s request lies in the discretion of the governor; state *courts* have little basis on which to hinder executive extradition decisions.<sup>104</sup> Given the political salience of abortion policy, it would hardly be surprising to see a governor in a state that protects abortion services refuse to extradite a non-fugitive resident charged with an abortion-related offense in another state.<sup>105</sup>

In sum, these policies are harbingers of how comity-based interstate cooperation can break down in the context of sharp policy dissensus. Substantive disagreements this stark are unusual across state criminal codes. That is likely the reason that neither the Uniform Act to Secure Witnesses nor its counterpart on extradition contains the restriction that is standard in international extradition treaties—that the conduct one state seeks to

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<sup>102</sup> See COLO. REV. STAT. ANN. § 25-6-404(b) (West, Westlaw through the First Extraordinary Sess. of the 74th Gen. Assem. (2023)) (“A public entity shall not . . . deprive, through prosecution, punishment, or other means, an individual of the individual’s right to act or refrain from acting during the individual’s own pregnancy based on the potential, actual, or perceived impact on the pregnancy, the pregnancy’s outcomes, or on the pregnant individual’s health.”); see also *id.* § 25-6-405 (West, Westlaw through the First Extraordinary Sess. of the 74th Gen. Assem. (2023)) (specifying that § 25-6-404 applies to “all state and local laws, . . . executive orders, and government actions . . .”).

<sup>103</sup> Ariz. Governor, Exec. Order No. 2023-11 (June 22, 2023), at 3.

<sup>104</sup> See UNIF. EXTRADITION AND RENDITION ACT §§ 3-101, 3-104, 3-105, 4-103, 4-106 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1980) (all sections providing for gubernatorial discretion); *id.* §§ 3-107, 4-104 (judicial duties and limited role); see also New Mexico, *ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998) (state court wrongly granted habeas relief after another states’ governor issued an extradition arrest warrant); Michigan v. Doran, 439 U.S. 282, 288–89 (1978) (same, noting “courts of an asylum State are bound by [Art. IV, § 2], . . . 18 U.S.C. § 3182, and . . . the Uniform Criminal Extradition Act.”). As previously noted, when the defendant is a fugitive from the demanding state, federal law controls; in those cases, even state governors have no discretion to deny extradition. See Puerto Rico v. Branstad, 483 U.S. 219, 227 (1987) (“We reaffirm the conclusion that the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or courts of the asylum State.”).

<sup>105</sup> For a recent example of a governor announcing his refusal to facilitate extradition on political grounds, see Shane Goldmacher, *DeSantis Says Florida Wouldn’t Aid Trump’s Extradition to New York*, N.Y. TIMES (Mar. 30, 2023), <https://www.nytimes.com/2023/03/30/us/politics/trump-extradition-desantis-florida.html> [<https://perma.cc/27XA-RBCD>].

prosecute must be criminalized in both states.<sup>106</sup> As Professor Jenia Turner has noted, nation-states require dual criminality when there is a lower degree of trust in one another's criminal legal systems.<sup>107</sup> With a few exceptions, dual criminality across state codes is generally taken for granted.<sup>108</sup> State codes vary in their details and with respect to a few offenses (such as marijuana possession), but every state criminalizes homicides, assaults, thefts, fraud, arson, perjury, and other long-established offenses. Only in its absence is it clear the degree to which state cooperation on cross-border enforcement depends on agreement about the substantive law, and likewise how much extraterritorial application of state criminal law depends upon interstate cooperation. Aside from federal law on the extradition of fugitives—and holding aside enforcement of state civil judgments, where constitutional requirements for interstate recognition are stronger<sup>109</sup>—expansive legislative jurisdiction generally depends on other states to voluntarily facilitate enforcement efforts. One tool, then, for states to frustrate other states' expansive exercise of legislative jurisdiction, when it serves policy aims they sharply oppose, is to leverage the territorial limits on enforcement jurisdiction and withhold cooperation.

### III. CONSTITUTIONAL PARAMETERS ON STATE EXTRATERRITORIAL JURISDICTION

The scope of extraterritorial jurisdiction provisions in state criminal codes, case law, and the Model Penal Code suggests that the U.S. Constitution permits cross-border assertions of state law on these principles.

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<sup>106</sup> The same assumption implicitly underlies fresh pursuit laws. Likewise, Model Penal Code § 1.03 largely forgoes dual criminality requirements, save in section 1.03(1)(d), which addresses complicity and conspiracy to commit a crime in another state, and section 1.03(3), which limits jurisdiction for result-crimes when “the result is caused by conduct occurring outside the State that would not constitute an offense if the result had occurred there.” Section 1.03(2) creates a presumptive requirement for dual criminality (for crimes based on in-state conduct cause results in another state) but specifies that the legislature can reject that presumption with clear statutory language.

<sup>107</sup> See Turner, *supra* note 95, at 127.

<sup>108</sup> One of those exceptions appears in the Model Penal Code, which bars the use of effects-based jurisdiction to prosecute out-of-state conduct unless both states define the result caused by out-of-state conduct as criminal. See MODEL PENAL CODE § 1.03(1)(a), (3); see also PA. STAT. AND CONS. STAT. ANN. § 102(a)(1), (b) (West 2015) (tracking language of MODEL PENAL CODE § 1.03).

<sup>109</sup> See U.S. CONST. art. IV, § 1, cl. 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); see also Berman, Goldstein & Leff, *supra* note 97, at 62 (discussing Full Faith and Credit Clause doctrine and noting “it has long been established that penal laws are not subject to Full Faith and Credit Clause commands”).

In fact, however, the constitutional permissibility for some applications is unclear, and what answers exist depend on the specific jurisdictional basis on which state law relies and the circumstances in which they are applied. Much of the constitutional law that might restrict extraterritorial criminal law is underdeveloped. Because state attempts to enforce criminal law outside their borders—particularly on policies over which states are sharply divided and which federal intervention did not resolve—have been relatively rare, courts have had few occasions to assess constitutional claims regarding those practices. Federal law intervened in state disagreements over fugitive slave policy, as it did on recognition of same-sex marriages<sup>110</sup> (where criminal law played no meaningful role). Conflicting state policies on marijuana legalization have generated little extraterritorial enforcement, and courts have found the conflict between state and federal policies to be constitutionally unproblematic.<sup>111</sup>

The constitutional provisions most likely to limit state extraterritorial jurisdiction include the Privileges and Immunities Clause,<sup>112</sup> the dormant Commerce Clause,<sup>113</sup> and the right to travel.<sup>114</sup> Recent scholarship has

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<sup>110</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 663–80 (2015) (recognizing the fundamental right to same-sex marriage under the Due Process and Equal Protection Clauses). Analogously, state policy differences over firearms regulation are increasingly minimized by the shrinking constitutional scope for such regulation. See, e.g., *New York State Rifle & Pistol Ass’n Inc. v. Bruen*, 597 U.S. 1, 9–13 (2022); *McDonald v. City of Chicago*, 561 U.S. 742, 749–50 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>111</sup> For an excellent discussion of courts’ treatment of state marijuana legalization in light of federal prohibition, see Gabriel J. Chin, *Policy, Preemption, and Pot: Extra-Territorial Citizen Jurisdiction*, 58 B.C. L. REV. 929, 943–49 (2017). Both the Supremacy Clause, U.S. Const. Art. VI, ¶ 2, and doctrine under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, give priority to federal law over conflicting state laws; the Commerce Clause also serves to restrict one state’s regulatory authority in the territory of others. See, e.g., *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336–37 (1989) (“The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State” in part to “protect[] against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”).

<sup>112</sup> U.S. Const. Art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

<sup>113</sup> U.S. Const. Art. I, § 8. For a description of dormant Commerce Clause doctrine, see Berman, Goldstein & Leff, *supra* note 98, at 29–39. Dormant Commerce Clause doctrine substantially constrains states’ power to regulate extraterritorially, predominantly through civil law. See Ruth Mason & Michael S. Knoll, *Bounded Extraterritoriality*, 122 Mich. L. Rev. (forthcoming 2024) (manuscript at pp.8–17) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4375149](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375149)).

<sup>114</sup> See generally Berman, Goldstein & Leff, *supra* note 98, at 17–28 (overview of constitutional right to travel case law, noting the “textual source of the right to travel in the Constitution remains a mystery”).

assessed how the Supreme Court might, or should, cabin states' extraterritorial regulatory efforts under these bodies of law.<sup>115</sup> For that reason, I do not attempt here a full account of the constitutional doctrines that courts might employ to regulate applications of extraterritorial state law related to abortion. Instead, in this Part, I clarify what the Supreme Court to date has said—and not said—regarding extraterritorial applications of state criminal law. I frame the brief account below with particular attention to how anti-abortion states might employ these jurisdictional principles in the abortion context, and in terms of two key variables: the specific basis for extraterritorial jurisdiction and whether state laws conflict on the policy effectuated by a prosecution.

In his *Dobbs* concurrence, Justice Kavanaugh suggested that constitutional law clearly prohibits one form of extraterritorial enforcement—a state's power to restrict its citizens' abortion-related conduct when they are in another state.<sup>116</sup> *Doe v. Bolton* seems to support that view.<sup>117</sup> But *Doe* was a companion case to *Roe v. Wade*, and lower courts have already questioned its viability in the wake of *Dobbs*.<sup>118</sup> More significantly, the right-to-travel doctrine is hardly clear on this point, which is why scholars differ sharply on whether the right to travel provides the answer that Justice

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<sup>115</sup> See Berman, Goldstein & Leff, *supra* note 98, at 14–39 (Part II); David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 122 COLUM. L. REV. 1, 16–31 (2023); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 858–59, 896–945 (2002); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 884–89 (1993) (arguing that states exercising territorial jurisdiction should have priority in conflicts with states exercising residency-based jurisdiction); Seth F. Kreimer, “*But Whoever Treasures Freedom*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 913–26 (1993); Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 MICH. L. REV. 939, 944–50 (1993).

<sup>116</sup> See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) (“[A]s I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”).

<sup>117</sup> 410 U.S. 179, 200 (1973) (“Just as the Privileges and Immunities Clause . . . protects persons who enter other States to ply their trade, . . . so must it protect persons who enter Georgia seeking the medical services that are available there. . . . A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.”).

<sup>118</sup> See, e.g., *Goe v. Zucker*, 43 F.4th 19, 32 (2d Cir. 2022) (suggesting *Doe*'s authority may be undermined by *Dobbs*). It bears noting also that, in *Dobbs*, Justice Kavanaugh expressed agreement with the dissent in *Doe v. Jackson Women's Health Org.*, 597 U.S. 215, 341 (2022) (Kavanaugh, J., concurring). Other justices who thought *Roe* was wrongly decided also linked *Doe* with *Roe*. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Scalia, J., dissenting).

Kavanaugh suggests.<sup>119</sup> In part this is because many right-to-travel cases addressed different questions—the burdens of policies imposed by the state to which the citizen traveled, rather than the one they left.<sup>120</sup> Moreover, as Professor Lea Brilmayer noted, “The obvious problem with relying directly on the right to travel in the abortion context . . . is that the state is not denying anyone the right to leave its borders; nor is it even creating a disincentive to leave.”<sup>121</sup> Thus, scholars writing in support of Justice Kavanaugh’s view explicitly argue from broader constitutional principles for a rule that the case law does not now expressly endorse.<sup>122</sup>

The broader point here is that constitutional guidance on extraterritorial state criminal law is less than pellucid. On the one hand, the Supreme Court has long approved states’ assertions of their criminal law beyond their own borders, based on three established principles: (1) objective territorial jurisdiction to punish out-of-state conduct that causes harm within their territory;<sup>123</sup> (2) jurisdiction based on protecting a legitimate state interest;<sup>124</sup> and (3)—as previously noted<sup>125</sup>—citizenship-based jurisdiction, which permits a state to govern its own citizens’ conduct outside the state’s borders.<sup>126</sup>

On the other hand, the Court has sometimes (too) broadly asserted that states may not regulate activities occurring in another state.<sup>127</sup> That overbroad

<sup>119</sup> For arguments that the right to travel doctrine permits states to regulate their citizens’ out-of-state conduct, see Rosen, *supra* note 115, at 913–19; Brilmayer, *supra* note 115, at 883 (“[T]he ‘right to travel’ by itself does not specify which law will apply once one gets to the other state.”). For a contrary view, see Kreimer, *supra* note 115, at 914–17.

<sup>120</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 489, 500–02 (1999) (describing the “right to be treated as a welcome visitor . . . when temporarily present” and “the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State”).

<sup>121</sup> Brilmayer, *supra* note 115, at 883.

<sup>122</sup> See, e.g., Kreimer, *supra* note 115, at 915 (“The right to travel provides us with the ability to experiment with modes of living other than those sanctioned at home . . . . A system that allows states to truncate these experiments by allowing travel but punishing its object has the effect of undercutting this liberty.”). Professor Brilmayer reaches the same conclusion—that states cannot regulate their citizens’ access to abortion services in other states—on different grounds. See Brilmayer, *supra* note 115, at 883 (“To decide this issue, [rather than the right to travel] we must consult the constitutional limits on extraterritorial application of local law—and . . . the most directly relevant provisions are due process, full faith and credit, and the Commerce Clause.”).

<sup>123</sup> *Strassheim v. Daily*, 221 U.S. 280, 284–85 (1911).

<sup>124</sup> *Skiriotos*, 313 U.S. at 77; *Strassheim*, 221 U.S. at 284–85.

<sup>125</sup> See *supra* Part I.B.3.

<sup>126</sup> *Skiriotos*, 313 U.S. at 79.

<sup>127</sup> *Bigelow v. Virginia*, 421 U.S. 809, 823–24 (1975) (“The Virginia Legislature . . . obviously could not have proscribed the activity in that State . . . . Virginia

statement surely does not hold for activity that both states prohibit, as is true for most offenses in state criminal codes. For example, Michigan can prosecute a person whose fraudulent scheme in Illinois defrauded Michigan victims.<sup>128</sup> Nonetheless, there are limits on the kinds of out-of-state conduct a state can punish, and on the contexts in which it can do so. Relying on the dormant Commerce Clause, the Court reversed a misdemeanor conviction under a statute that prohibited the manufacture and sale of oleomargarine—a “healthy and pure article” of commerce—as a substitute for butter.<sup>129</sup> While a “State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported,” the Court reasoned, “such police power does not include the total exclusion even of an article of food.”<sup>130</sup> That principle should have implications for state laws that prohibit shipment into its territory of a safe (federally approved) pharmaceutical such as mifepristone that facilitates abortions.<sup>131</sup> More broadly, it implies constitutional limits on what in-state effects or interests are recognized as sufficiently legitimate to justify a state law’s extraterritorial ambit.

Likewise, whether a state may exercise citizenship-based jurisdiction when its citizen acts while in another state’s territory (rather than on the high seas) is unclear.<sup>132</sup> One clue to an answer—and perhaps to the scope of legitimate interests and effects as well—may lie in another rule devised for the unusual circumstance in which two states have concurrent jurisdiction over the same territory, such as a river.<sup>133</sup> When that is the case, either state may prosecute, so long as both prohibit the conduct.<sup>134</sup> However, one state

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possessed no authority to regulate the services provided in New York . . . . 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.”); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

<sup>128</sup> See *Strassheim*, 221 U.S. at 283–86.

<sup>129</sup> *Schollenberger v. Pennsylvania*, 171 U.S. 1, 5, 13 (1898).

<sup>130</sup> *Id.* at 12.

<sup>131</sup> See, e.g., LA. STAT. ANN. § 40:962.2 (2022).

<sup>132</sup> *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941) (noting that the defendant’s conduct occurred in international waters).

<sup>133</sup> In a few locations, state territories overlap where rivers define their boundaries and Congress granted both states concurrent territorial jurisdiction over the river. See *Nielsen v. Oregon*, 212 U.S. 315, 319 (1909) (describing the concurrent jurisdiction of Washington and Oregon over the Columbia River); *Wedding v. Meyler*, 192 U.S. 573, 584 (1904) (noting the concurrent jurisdiction of Kentucky and Indiana over the Ohio River).

<sup>134</sup> *Nielsen*, 212 U.S. at 320. In this concurrent jurisdiction context only, the prosecution by one state precludes subsequent prosecution by the other. *Id.* (“[T]he one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states.”). Otherwise, when two states have jurisdiction over the same crime, the Double

may *not* prosecute conduct in that concurrent space *if* the other state has explicitly *authorized* that conduct, say, by licensing it.<sup>135</sup> (If the non-prosecuting state does not regulate the conduct at all, the rule is unclear.)

Those parameters suggest that a state's power to punish extraterritorial conduct affecting its legitimate interests—or power to govern its own citizens outside its borders—may not extend to contexts in which the actor's conduct occurs in another state that authorizes and protects that conduct. Put differently, there is a plausible argument for the Court to conclude that extraterritorial jurisdiction of actors in other states' territories requires, if not dual criminality, at least the absence of direct conflicts between how the conduct is treated in the prosecuting state and the state in which the conduct occurs. Such direct conflicts are precisely what occurs with many efforts to enforce anti-abortion laws extraterritorially in states that protect abortion services by statute or the state constitution. For example, providing abortion medication may be lawful in the state in which the providers operate but unlawful in the prosecuting state. Or those who provide transportation for women seeking abortion services may be acting lawfully in one state but liable for aiding and abetting an abortion-related offense in another state.

Dicta in another decision, however, could be leveraged for a contrary view. In *Bigelow v. Virginia*, the Court overturned a conviction of a Virginia newspaper editor who published an advertisement for a New York abortion provider; a Virginia misdemeanor statute prohibited the sale of a publication that encouraged abortion.<sup>136</sup> A strong reading of *Bigelow* might enlist its holding to support the conclusion that a state cannot restrict its citizens from accessing services in another state where those services are legally protected.<sup>137</sup> But a critical component of *Bigelow*'s context no longer holds in the wake of *Dobbs*: at the time, abortion was not simply legal under New York law; it was constitutionally protected nationwide. Moreover, the

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Jeopardy Clause does not bar prosecutions by both states for the same conduct. *See* *Heath v. Alabama*, 474 U.S. 82, 87–93 (1985). The same holds for federal and state prosecutions, given that the federal government has concurrent territorial jurisdiction with every state territory. *See* *Gamble v. United States*, 139 S. Ct. 1960, 1963–64 (2019) (finding that, pursuant to the dual sovereignty doctrine, the Double Jeopardy Clause does not prohibit federal prosecution for gun possession by a felon after state prosecution for the same conduct); *Bartkus v. Illinois*, 359 U.S. 121, 122–26 (1959) (finding the same regarding state prosecution for bank robbery after federal prosecution for the same conduct).

<sup>135</sup> *Nielsen*, 212 U.S. at 320–21.

<sup>136</sup> *Bigelow v. Virginia*, 421 U.S. 809, 811–14 (1975).

<sup>137</sup> *Id.* at 812–13, 822–23, 824–27 (overturning the conviction of a Virginia newspaper editor who printed an advertisement for a New York abortion clinic, in violation of a statute prohibiting the sale of publications “encourage[ing] or prompt[ing] the procuring of abortion,” and observing that “[t]he Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State”).

*Bigelow* Court suggested that, without that context, a state's power to regulate may be more expansive: "No claim has been made . . . that the advertisement was deceptive or fraudulent, or that it related to a commodity or service that was then illegal in either Virginia or in New York, or that it otherwise furthered a criminal scheme in Virginia."<sup>138</sup> An implication one might draw from that language—no doubt a tempting one for Supreme Court justices inclined against abortion—could be that a state *does* have power to regulate out-of-state conduct if that conduct is covered by an offense defined in its own criminal code. At least when conduct causes effects in—or harms a legitimate interest of—the prosecuting state, *Bigelow*'s language could be read to undercut a requirement of dual criminality. Furthermore, if fetal life is recognized as a legitimate state interest that can be adversely affected by out-of-state conduct, that principle may be sufficient for an anti-abortion state to criminalize conduct of out-of-state actors who facilitate abortions for women who travel to states in which those services are legal.

#### CONCLUSION

There is substantial authority for extraterritorial application of criminal law in codes and case law of U.S. states. In many applications, the Constitution clearly permits states to exercise extraterritorial jurisdiction and punish actors whose conduct occurs in other states. But all that statutory law, common law, and constitutional law has largely evolved in a tradition of comity between states. Rarely have states aggressively applied their laws extraterritorially in ways that directly conflict with the policies of other states. That tradition seems to be eroding, especially but not solely with regard to states' stark policy differences on abortion policy. Some of that erosion is already codified in state law. If some states use extraterritorial jurisdiction aggressively and "offensively" to extend their anti-abortion policies into abortion-protective states, it seems inevitable both that other states will respond by withdrawing comity over extradition and witness subpoenas, and that the Supreme Court will be compelled to develop much more thoroughly the constitutional boundaries on state extraterritorial jurisdiction. There is reasonable cause for concern, given the current justices' views on abortion, that disputes over abortion-related laws are a far-from-ideal context in which to refine constitutional doctrines on extraterritorial jurisdiction.

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<sup>138</sup> *Id.* at 828 (emphasis added).