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2023

## **From the Legal Literature: Extraterritorial Jurisdiction Over Abortion**

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# From the Legal Literature

Francesca Laguardia\*

## EXTRATERRITORIAL JURISDICTION OVER ABORTION

### I. INTRODUCTION

One year has passed since the draft opinion in *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> which overruled *Roe v. Wade*,<sup>2</sup> was leaked to news organizations.<sup>3</sup> In half that time, close to half of all U.S. states enacted either complete or pre-viability bans on abortion.<sup>4</sup> Over the course of the full year, hundreds of law review articles have been published that cite *Dobbs* while exploring the new landscape of reproductive access in the United States, or lack thereof, and ongoing legal battles concerning such access.<sup>5</sup>

One reason legal scholarship was able to respond to this tectonic shift so quickly is that the specter of *Roe*'s possible demise has hovered over the legal and policy realms for decades.<sup>6</sup> Scholars have long feared or hoped for this moment and, in that time, they

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<sup>1</sup> *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022).

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

<sup>3</sup> Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM EDT), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/Y4PL-V3CK>].

<sup>4</sup> MABEL FELIX, LAURIE SOBEL & ALINA SALGANICOFF, LEGAL CHALLENGES TO STATE ABORTION BANS SINCE THE *DOBBS* DECISION, KAISER FAM. FOUND. (Jan. 20, 2023), <https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/> [<https://perma.cc/3X8F-QKKX>].

<sup>5</sup> *Key Cite: Citing References*, WESTLAW (Apr. 6, 2023) (reporting 307 citations in response to a search for "142 S. Ct. 2228" in law reviews within ten months of the date of the decision) (on file with author).

<sup>6</sup> See, e.g., Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 91 n.76 (2001) ("Surely, any observer of presidential politics realizes that it is conceivable that *Roe* could be overturned (or at least that it was at the time *Casey* was decided.); C. Steven Bradford, *What Happens If Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 89 (1993) ("The uncertainty surrounding *Roe* makes this a propitious time to examine what might happen if *Roe* were overruled."); Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 133 (1989) ("Justice Scalia has an easy answer to the abortion

imagined what legal issues might arise after *Roe's* demise.<sup>7</sup> This preoccupation with the possibility of overturning *Roe* often arose in bursts, as highly publicized cases reached the level of the U.S. Supreme Court.<sup>8</sup> But regardless of the timing or the context of these prognostications, specific questions of criminal law arose over and over again, including the question of fetal personhood and comparative rights of pregnant people and fetuses.<sup>9</sup> Another issue that surfaced repeatedly concerns the extraterritorial application of laws criminalizing abortion.<sup>10</sup> With *Roe* now overturned, this question is no longer hypothetical.

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question: ‘anyone who can read and count’ knows that with three retirements (Chief Justice Burger and Justices Douglas and Stewart) and three appointments (Justices Scalia, Kennedy, and O’Connor) to join the two *Roe v. Wade* dissenters (Justice White and then Justice Rehnquist), provided no one defects, the five of them finally have the power to overrule *Roe v. Wade*.’); Allan E. Parker, Jr., *From the Wake of Gonzales v. Carhart*, 32 VT. L. REV. 657, 659 (2008) (“*Roe* is going to be reversed because it has failed to obtain a consensus of the American people after thirty years of law. It is not, and it will never be, accepted by a majority of Americans. The Court can no longer continue to keep the lid on this democratic opposition to abortion.”); Rachael N. Pine, *Envisioning A Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 410 (1992) (“*Webster* forecast the demise of *Roe*”); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 811 (2006) (discussing a likely backlash if *Roe* were overturned).

<sup>7</sup>E.g., Bradford, *supra* note 6; Pine, *supra* note 6; Rosenberg, *supra* note 6.

<sup>8</sup>E.g., Olsen, *supra* note 6 (responding to *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), and the then-imminent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); Pine, *supra* note 6 (same); see also Bradford, *supra* note 6 (responding to *Casey*); Parker, *supra* note 6 (responding to *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 20 A.L.R. Fed. 2d 673 (2007)); Rosenberg, *supra* note 6 (responding to *Casey*).

<sup>9</sup>See, e.g., *Women’s Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL’Y 89 (2000); Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 392 (2007); Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 LAW & ETHICS HUM. RTS. 189 (2017), reviewed in this journal by Francesca Laguardia, *From the Legal Literature: If The Fetus Is A Person—Is It Relevant?* 56 CRIM. L. BULL. 1013 (2020); Francesca Laguardia, *Pain that Only She Must Bear: On the Invisibility of Women in Judicial Abortion Rhetoric*, 9 J.L. & BIOSCI. ISAC003 (2022), <https://doi.org/10.1093/jlb/lsac003>; Mary Ziegler, *Abortion and the Law of Innocence*, 2021 U. ILL. L. REV. 865, 874 (2021).

<sup>10</sup>E.g., Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe’s End*, 51 ST. LOUIS U. L.J. 655 (2007) (generally discussing the idea of extraterritorial prosecutions and their complexities); Bradford, *supra* note 6, *passim* (generally exploring the threat of extraterritorial application of abortion laws in 1992); Lea Brilmeyer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993) (generally discussing the threat of extraterritorial regulation of abortion); Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 B.Y.U. L. REV. 1651 (2008) (generally discussing the issue of whether extraterritorial regulation of abortion would be possible); Richard H. Fallon Jr., *If Roe Were*

The vitality of the question of extraterritorial application of laws criminalizing abortion was highlighted recently in *Fund Texas Choice v. Paxton*.<sup>11</sup> In that case, petitioners (one physician and several non-profit organizations offering funds to support individuals traveling out of state to access abortion services) sued to enjoin Texas Attorney General Ken Paxton and a class of local prosecutors in Texas from enforcing several Texas statutes banning abortion—one recent, and others predating *Roe v. Wade*.<sup>12</sup> While the matter was largely avoided in the U.S. District Court opinion, which held that the pre-*Roe* statutes had been repealed by implication, and that the recent statute did not apply to abortions taking place outside of Texas,<sup>13</sup> this District level opinion is only the beginning of what is clearly an ongoing legal question.<sup>14</sup>

What does it mean if states are allowed to pursue criminal prosecutions based on activity occurring entirely outside of their own jurisdiction? This question is not just relevant in the sphere of abortion; instead, it goes to the very nature of our understanding of criminal law and state sovereignty. This “From the Legal Literature” commentary explores these questions. First, we will examine the co-authored work of Professors David Cohen, Greer Donley, and Rachel Rebouché, which specifically describes the current national landscape with respect to abortion regulation.<sup>15</sup> Then, we will supple-

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*Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 626–34 (2007) (discussing the possibility of extraterritorial regulation of abortion if *Roe* were overturned); Alan Howard, *Fundamental Rights Versus Fundamental Wrongs: What Does the U.S. Constitution Say About State Regulation of Out-Of-State Abortions?*, 51 ST. LOUIS U. L.J. 797 (2007) (responding to Professor Fallon on the issue of extraterritorial regulation of abortion); Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*” *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993) (discussing the threat of extraterritorial regulation of abortion and its limitation by the right to travel); Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567 (2007) (arguing that substantive due process principles require constitutional limits on personal jurisdiction); see also Alejandra Caraballo, Cynthia Conti-Cook, Yveka Pierre, Michelle McGrath & Hillary Aarons, *Extradition in Post-Roe America*, 26 CUNY L. REV. 1 (2023) (discussing the question of states’ ability to refuse to extradite).

<sup>11</sup> *Fund Texas Choice v. Paxton*, 2023 WL 2558143 (W.D. Tex. 2023).

<sup>12</sup> *Fund Texas Choice v. Paxton*, 2023 WL 2558143, at \*1–2 (W.D. Tex. 2023).

<sup>13</sup> *Fund Texas Choice*, 2023 WL 2558143, at \*1 (W.D. Tex. 2023).

<sup>14</sup> See, e.g., Terri Gross, *The U.S. Faces “Unprecedented Uncertainty” Regarding Abortion Law, Legal Scholar Says*, NPR (Jan. 18, 2023), <https://www.npr.org/sections/health-shots/2023/01/17/1149509246/the-u-s-faces-unprecedented-uncertainty-regarding-abortion-law-legal-scholar-say> [<https://perma.cc/NW6K-FY8D>].

<sup>15</sup> David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

ment their analysis by looking at the broader question of extraterritoriality and criminal law that Professor Emma Kaufman explored.<sup>16</sup>

## II. THE ARTICLES

Published in the immediate aftermath of *Dobbs*, Professors Cohen, Donley, and Rebouché wrote *The New Abortion Battleground* in order to offer an introduction to the “profound confusion” that became inevitable when *Roe* was overturned.<sup>17</sup> As they point out, almost immediately after *Dobbs* was decided, pro-life advocacy groups began experimenting with models of statutes that would criminalize assisting citizens to travel across state lines in order to avoid abortion bans, while pro-choice states began issuing statements and altering statutes to limit participation in out-of-state investigations of abortion or extradition for abortion prosecutions.<sup>18</sup> Acknowledging that access to abortion has long depended, in various ways, on where a person lives, Cohen and colleagues stated that abortion policy in a post-*Roe* world will introduce an even more extreme level of heterogeneity across the country.<sup>19</sup> Additionally, when these disparities are paired with the ways people access medications that induce abortion, abortion access might become disconnected from local abortion services—and local abortion statutes—entirely.<sup>20</sup>

Well before the *Dobbs* decision, interstate travel was a familiar aspect of the search for abortion services because so many states had already restricted abortion access and shut down clinics, making travel necessary for many of their citizens.<sup>21</sup> Only a month after the *Dobbs* decision was handed down, surviving clinics were overwhelmed by out-of-state patients.<sup>22</sup> Medication abortion—which was already widely used, available by prescription via telehealth, and accessed via mail delivery—is likely to become even more heavily used as well.<sup>23</sup> However, well before *Dobbs*, nineteen states had already banned the use of telemedicine to prescribe medication abortion.<sup>24</sup> Several non-profit organizations nonetheless attempt to make it easier for people in such states to obtain the medication, but Cohen and colleagues point to the fact that this may well lead to

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<sup>16</sup>Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353 (2022).

<sup>17</sup>Cohen et al., *supra* note 15, at 4.

<sup>18</sup>Cohen et al., *supra* note 15, at 4–5.

<sup>19</sup>Cohen et al., *supra* note 15, at 9.

<sup>20</sup>Cohen et al., *supra* note 15, at 9.

<sup>21</sup>Cohen et al., *supra* note 15, at 11–12.

<sup>22</sup>Cohen et al., *supra* note 15, at 12–13.

<sup>23</sup>Cohen et al., *supra* note 15, at 14–16.

<sup>24</sup>Cohen et al., *supra* note 15, at 16.

criminal charges.<sup>25</sup> It is also important to note that the availability of medication abortion has not actually stopped the use of more dangerous methods of self-managed abortion: “A study from 2021 found that 28% of people using Google to search for abortion care attempt self-managed abortion, and [of those] . . . 52% use supplements, herbs, or vitamins; 19% use contraceptive pills; and 18% use physical trauma . . . Only 18% used medication abortion.”<sup>26</sup>

With these stark risks in mind, Cohen, Donley, and Rebouché go on to address the prospect of cross-border abortion directly.<sup>27</sup> They recount efforts to criminalize aiding someone to travel to obtain an abortion by legislators in Missouri and Texas.<sup>28</sup> They also point out that courts have appeared very willing to find ways to allow anti-abortion legislation, and that Missouri’s effort in 2022 to create a statute that could apply extraterritorially was modeled on Texas’s SB8, which has managed, so far, to survive all challenges.<sup>29</sup> Moreover, prosecutions need not even occur to be successful; many people will be chilled from pursuing abortions by the threat of prosecution alone.<sup>30</sup> But if a state were to try, what would the parameters of the legal challenge be?

Although there is a general assumption that states can only criminalize conduct that happens within their borders, this rule has weakened over the last century.<sup>31</sup> Professor Emma Kaufman explored this issue in depth by examining the health of the “territoriality principle”—the notion that “a government’s power to define and punish crime arises from its authority over a bounded geographic region; and . . . that criminal laws apply to any person within that region.”<sup>32</sup> She cites the Model Penal Code’s [MPC] description of the territoriality principle as a “maxim of American Jurisprudence,” adding references to legal and philosophical scholars, as well as the Supreme Court, to establish how rooted the assumption is that criminal law is based on territoriality.<sup>33</sup> As she acknowledges, many

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<sup>25</sup>Cohen et al., *supra* note 15, at 19–20.

<sup>26</sup>Cohen et al., *supra* note 15, at 21.

<sup>27</sup>Cohen et al., *supra* note 15, at 21.

<sup>28</sup>Cohen et al., *supra* note 15, at 25.

<sup>29</sup>Cohen et al., *supra* note 15, at 30.

<sup>30</sup>Cohen et al., *supra* note 15, at 30.

<sup>31</sup>Cohen et al., *supra* note 15, at 31–32; *see also* Kaufman, *supra* note 16, at 360, 373–391 (discussing the assumption and various areas where the limitation has weakened).

<sup>32</sup>Kaufman, *supra* note 16, at 361, 360–94 (describing the embeddedness of the territoriality principle and its weakening over time).

<sup>33</sup>Kaufman, *supra* note 16, at 355–56, 361–75 (citing MODEL PENAL CODE § 1.03 note (AM. L. INST., Proposed Official Draft 1962)).

of her examples are somewhat indirect.<sup>34</sup> Although the MPC describes a “maxim,” more often, scholars generally refer to their expectation of territoriality and their distaste at its violation.<sup>35</sup> Before offering examples, she recounts that constitutional cases “are full of rhetoric about the inherently local nature of criminal law.”<sup>36</sup> This includes eighteenth century rhetoric emphasizing that the Framers of the Constitution imagined criminal law as strictly local in nature.<sup>37</sup>

How, then, has the principle weakened? Cohen and colleagues point to a Pennsylvania statute that applies to any conduct that “bears a reasonable relation to a legitimate interest of [Pennsylvania].”<sup>38</sup> They suggest that such a statute might criminalize obtaining funds in state to fund an abortion that will happen out of state, as well as consuming medication abortion pills, perhaps even to a point where one’s out of state friend is pursued by the state for providing the pills.<sup>39</sup> Their main point here is not to cover every possible scenario, but to highlight the fact that the results would vary from state to state, and would be entirely inconsistent and unpredictable.<sup>40</sup> Professor Kaufman offers additional examples, such as inchoate offenses that allow for criminal responsibility wherever an overt act occurred, or continuing offense crimes, such as fraud, that may allow for criminal responsibility in multiple areas.<sup>41</sup> Criminal prosecutions might also be based on statutes allowing for jurisdiction when an out-of-state act has in-state effects.<sup>42</sup> She also points to similar developments expanding the reach of local police and prosecutors, and undermine the once-local nature of punishment.<sup>43</sup>

By no means, then, is such an extraterritorial criminal law unheard of. But given the extensively rooted nature of territoriality in criminal law, in constitutional and criminal law rhetoric and scholarship, is there no constitutional challenge to be brought to such statutes?

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<sup>34</sup>Kaufman, *supra* note 16, at 360.

<sup>35</sup>Kaufman, *supra* note 16, at 363 (“[T]here is something special about public law, and ‘penal’ law in particular, that makes it offensive and illegitimate to apply a criminal law outside the place it was enacted. It is not entirely clear why penal law is so special . . . The answer seems to lie in deeply held (if not especially concrete) beliefs about criminal law’s relationship to concepts like sovereignty and democracy.”).

<sup>36</sup>Kaufman, *supra* note 16, at 373.

<sup>37</sup>Kaufman, *supra* note 16, at 375.

<sup>38</sup>Cohen et al., *supra* note 15 at 32. This issue is explored in more depth in Kaufman, *supra* note 16, at 373–91.

<sup>39</sup>Cohen et al., *supra* note 15, at 33.

<sup>40</sup>Cohen et al., *supra* note 15, at 33.

<sup>41</sup>Kaufman, *supra* note 16, at 376–77.

<sup>42</sup>Kaufman, *supra* note 16, at 378–79.

<sup>43</sup>Kaufman, *supra* note 16, at 382–94.

Here, Professors Cohen, Donley, and Rebouché offer a brief literature review of the arguments that have been made regarding the constitutionality of extraterritorial abortion laws.<sup>44</sup> They recount the work of Seth Kreimer, who finds a strong constitutional commitment to territoriality in the Commerce Clause, the Privileges and Immunities Clause, and the Citizenship Clause.<sup>45</sup> They point also to Susan Lorde Martin, who finds a restriction on extraterritorial reach of state laws in the Dormant Commerce Clause.<sup>46</sup>

Professor Kaufman adds to these arguments. She locates a constitutional commitment to territoriality in the Venue Clause, written specifically in response to British laws that required colonists to travel back to England for criminal trials and seen by the Framers of the U.S. Constitution as undermining important legal and moral support for their defense.<sup>47</sup> She points, as well, to the Vicinage Clause of the Sixth Amendment, written to enforce the notion that criminal law should reflect the morality of the community and, therefore, that juries be drawn from the locality where the crime was committed.<sup>48</sup> State constitutions echo these requirements, reinforcing the idea (recognized by courts) that it is “a problem of *constitutional significance* when a crime is tried outside the place it was committed.”<sup>49</sup>

It is true that there is not uniform agreement on the question of the constitutionality of extraterritorial abortion bans. Professors Cohen, Donley, and Rebouché summarize several scholars who determine either that there is no ban on extraterritorial enforcement of abortion bans, or that there is little enough doctrine to reduce the question to one with no clear guidance whatsoever.<sup>50</sup> They argue that this third perspective is the most likely scenario in practice,<sup>51</sup> and note blatantly contradicting opinions on the current U.S. Supreme Court that were already evident in Justice Kavanaugh’s, Alito’s, and Thomas’s *Dobbs* opinions.<sup>52</sup> Professor Kaufman’s research, with its extensive explanation of both the deterioration of the territoriality principle and its fundamental and broad acceptance, certainly support this idea that the outcome of this battle will be exceptionally hard to predict.

A second, related crisis is the question of extradition. States have

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<sup>44</sup>Cohen et al., *supra* note 15, at 34–37.

<sup>45</sup>Cohen et al., *supra* note 15, at 35.

<sup>46</sup>Cohen et al., *supra* note 15, at 35–36.

<sup>47</sup>Kaufman, *supra* note 16, at 365–66.

<sup>48</sup>Kaufman, *supra* note 16, at 366–68.

<sup>49</sup>Kaufman, *supra* note 16, at 368–69.

<sup>50</sup>Cohen et al., *supra* note 15, at 36–42.

<sup>51</sup>Cohen et al., *supra* note 15, at 37–39.

<sup>52</sup>Cohen et al., *supra* note 15, at 39.

already begun to pass “shield” laws or executive orders refusing to cooperate with out-of-state investigations or prosecutions.<sup>53</sup> The characteristics of these laws range from prohibiting professional boards from penalizing members for out-of-state prosecutions to exempting abortion providers from complying with out of state subpoenas.<sup>54</sup> Completely exempting providers from (state) extradition laws remains a hypothetical to date, but might be possible in the case of individuals who do not “flee” (i.e. an abortion provider in a supportive state who provides aid to receiving an abortion via telemedicine, without ever leaving their own state).<sup>55</sup> The viability of such strategies is uncertain, but the battles are quite clearly inevitable.<sup>56</sup>

Interstate battles are not the only jurisdictional morass *Dobbs* opened; battles over federal land and federal preemption of state attempts to limit abortion are also impending.<sup>57</sup> Professors Cohen, Donley, and Rebouché explore these conflicts in depth, and this exploration comprises the remaining aspects of their article.<sup>58</sup> But as they describe the ongoing jurisdictional complexities of anti-abortion statutes with extraterritorial reach in general, they do not have the space to explore the specific threat to accepted understandings of criminal law that are introduced by criminal statutes, unbounded by territoriality. Professor Kaufman, however, offers insight into these issues.

Professor Kaufman summarizes three historical interests in limiting the reach of criminal law.<sup>59</sup> First, she argues, limiting the reach of the criminal law was meant to protect criminal defendants by maintaining their access to counsel, sympathetic juries, and their own witnesses.<sup>60</sup> Second, it maintains the distinction and independent sovereignty of independent states.<sup>61</sup> Third, she argues, the question of territoriality of criminal law is a question of legitimacy.<sup>62</sup> To subject a group of people to a criminal law that is entirely removed from their own (or at least their community’s democratically determined) morality is to flirt with complete illegitimacy and is

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<sup>53</sup>Cohen et al., *supra* note 15, at 41–43.

<sup>54</sup>Cohen et al., *supra* note 15, at 45–46.

<sup>55</sup>Cohen et al., *supra* note 15, at 47, 50–51.

<sup>56</sup>Cohen et al., *supra* note 15, at 51–52.

<sup>57</sup>Cohen et al., *supra* note 15, at 52.

<sup>58</sup>Cohen et al., *supra* note 15, at 52–99.

<sup>59</sup>Kaufman, *supra* note 16, at 400.

<sup>60</sup>Kaufman, *supra* note 16, at 400–01, 365–68.

<sup>61</sup>Kaufman, *supra* note 16, at 401.

<sup>62</sup>Kaufman, *supra* note 16, at 401.

fundamentally undemocratic.<sup>63</sup> But she also acknowledges that none of these interests is particularly well supported in current criminal law, making them weak arguments for embracing a limiting principle that has been so undermined over the course of the last century.<sup>64</sup>

In response, she offers her own arguments. She asserts that territorialism promotes policy variation, a key support for federalism more generally, but of particular import (she suggests) “in a field where . . . sanctions are harsh.”<sup>65</sup> Moreover, she argues that territorialism might well provide a more egalitarian way of determining when criminal law applies and when it does not, as it is better to determine the reach of criminal law by looking to *where it applies* than to *whom it applies*.<sup>66</sup> She suggests as well that a return to a strong reading of the Due Process Clause to prohibit extraterritorial application of criminal laws might well encourage “transparency and public deliberation about the permissible reach of domestic criminal laws.”<sup>67</sup>

### III. CONCLUSION

Professors Cohen, Donley, and Rebouché offer an incredibly useful blueprint for predicting and navigating the fallout of the *Dobbs* decision, from the specific perspective of reproductive rights. The current landscape is one of almost complete chaos, as they accurately described so early on, and it is unlikely to be resolved with any speed.

But it is important to remember that the chaos we are seeing now with respect to abortion access is not limited to the area of reproductive rights. Instead, it is emblematic of a problem in the realm of criminal law that has been quietly building for over a hundred years. The interests at stake here are significant, with implications for federalism and the democratic responsiveness of criminal laws, as is highlighted in Professor Kaufman’s research into territoriality in criminal law. It is important that politicians and researchers remember that the criminalization of abortion is not just a matter to be left in a silo of privacy or reproductive rights, but a fundamental question on the nature of citizenship and criminal law as well.

<sup>63</sup>Kaufman, *supra* note 16, at 401–02.

<sup>64</sup>Kaufman, *supra* note 16, at 402–04.

<sup>65</sup>Kaufman, *supra* note 16, at 405–06.

<sup>66</sup>As Kaufman stated,

[T]he key jurisdictional question in a territorial legal regime is *where* something happened rather than *who* committed or suffered a harm. As a result, territorial criminal law is agnostic about identity and status. Questions like whether an alleged criminal is a U.S. citizen or a legal resident are irrelevant in a territorial criminal law regime. And potential victims are protected by virtue of their presence, no matter when they arrived or how long they plan to stay.

Kaufman, *supra* note 16, at 406.

<sup>67</sup>Kaufman, *supra* note 16, at 406–07.