EXTRATERRITORIALITY OF RESTRICTIVE STATE ABORTION LAWS: STATES CAN ABORT PLANS TO ABORT AT HOME BUT NOT ABROAD

The question of a state's authority to legislate abortion extraterritorially may appear largely academic because of the United States Supreme Court's holding in *Roe v. Wade*, in which the Court prohibited states from restricting abortions in the first trimester of pregnancy.[1] At first glance, the Supreme Court's recent decision in *Planned Parenthood v. Casey*[2] appears to remove further the issue of extraterritorial abortion legislation from the states because the decision purportedly reaffirmed *Roe*.[3] The *Casey* decision, however, does not preclude returning the abortion issue to the states. An extremely tenuous coalition of justices reaffirmed *Roe*, while a united group of dissenters argued that the Supreme Court should defer resolution of the abortion issue to state legislatures.[4] Furthermore, *Casey*'s "undue burden" standard allows states

1. 410 U.S. 113 (1973).

2. 112 S. Ct. 2791 (1992).

3. The Supreme Court's recent, and sharply divided decision in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), appears to uphold *Roe*. In *Casey*, the Court reaffirmed a woman's constitutional right to an abortion, but held that the state may regulate abortion if the regulation does not constitute an "undue burden" on the woman's constitutional right. *Id.* at 2820 (O'Connor, Kennedy, and Souter, J.J., joint opinion). The majority argued that overturning *Roe* would significantly undermine the legitimacy of the Court. *Id.* at 2816 (O'Connor, Kennedy, and Souter, J.J., joint opinion joined by Blackmun and Stevens, J.J.).

4. *Casey*'s reaffirmation of *Roe* is not as solid as the Court suggests. Four justices flatly stated that the Court should overturn *Roe*. *Id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("[W]e believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases.") (joined by Scalia, White, and Thomas, J.J.). Furthermore, Justice Blackmun stressed that, because he might resign soon from the court, the future of *Roe* may hinge on the vote of the next appointed Supreme Court Justice. *Id.* at 2854-55 (Blackmun, J., concurring). Many commentators argue that the Court should overturn *Roe* and return the abortion issue to the states. Howard Holme & Craig A. Umbaugh, *Abortion in Colorado: If* Roe v. Wade *is Reversed*, 19 COLO. LAW. 807 (1990) (noting that several justices indicated the Court could possibly overturn *Roe* in the near future). Although commentators agree that the Supreme Court will continue to modify the *Roe* decision, they differ over the form of the modification. *See* Clarke D. Forsythe, *A Legal Strategy to Overturn* Roe v. Wade *After* Webster; *Some Lessons from* Lincoln, 1991 B.Y.U. L. REV. 519, 520, 535 (1991) (arguing that incrementally overturning *Roe* is politically more astute than totally reversing it); Daniel A. Farber & John E. Nowak, *Beyond the* Roe *Debate: Judicial Experience with the 1980s "Reasonableness Test,"* 76 VA. L. REV. 519, 520 (1990) (arguing that rather than overturning *Roe*, the Court should adopt a compromise position allowing "reasonable" abortion regulation); Arnold H. Loewy, *Why* Roe v. Wade *Should be Overruled*, 67 N.C. L. REV. 939, 941 (1989) (arguing that the Court should overturn *Roe* because it has no "legitimate source" of constitutional support); Ruth Bader

significant latitude in restricting abortion, and the decision does not address extraterritoriality.[5] In the wake of the *Casey* decision, courts throughout the nation will have to confront the question of the legality of state-restrictive abortion laws.[6] The post-*Casey* abortion landscape will largely resemble the pre-*Roe* landscape: a patchwork of states either legalizing or significantly restricting abortion, with women traveling interstate to obtain abortions.[7]

This Note examines the power of states to enact extraterritorial criminal abortion laws. Previous attempts to address this issue have failed to recognize any limits on a state's authority to legislate restrictive abortion laws. This Note proposes a framework for addressing the legality of extraterritorial state legislation and for imposing restrictions on state extraterritorial legislative authority. Section I examines the timeliness of issues relating to extraterritorial criminal abortion legislation. Section II discusses possible sources for a state's authority to legislate beyond its borders, focusing on the Model Penal Code's discussion of extraterritoriality and the traditional international law bases for criminal jurisdiction. Section III addresses the applicability of international law principles to the separate states of the United States. Section IV applies the judicially

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Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985) (arguing that the Court incorrectly based *Roe* on the right to privacy and should have protected a woman's right to an abortion under the rubric of sex discrimination).

5. If *Casey*'s "undue burden" standard stands, the Court will remain involved in the issue of abortion. The Court ultimately will face the task of determining which state regulations unduly burden a woman's right to obtain an abortion. Tamar Lewin, *States Expected to Enforce Abortion Restrictions*, N.Y. TIMES, July 1, 1992, at A8. The central question of this Note, however, will still be at issue: whether women can travel to another state to avoid particular abortion regulations and whether a state has the power, through its criminal jurisdiction, to prevent the circumvention of its laws. *See infra* notes 147-51 and accompanying text.

In his concurring and dissenting opinion in *Casey*, Justice Blackmun recognized that the Court has not yet addressed the legality of extraterritorial state abortion laws. *Casey*, 112 S. Ct. at 2854 n.12. Blackmun argued that the Court will ultimately have to decide this issue even if *Roe* is overturned and the abortion issue returns to the states. *Id.*

6. The *Casey* decision did not address the legality of extraterritorial abortion laws. *See supra* note 5. The Court, therefore, did not preclude states from enacting state-restrictive abortion legislation. This Note presumes that states through legislation will attempt to prevent pregnant women from obtaining abortions in other states. Until the Supreme Court affirmatively resolves the issue, lower courts will bear the burden of assessing the legality of such state-restrictive abortion laws.

7. *See A Group Flight to Los Angeles to Get a Quick Abortion*, N.Y. TIMES, Apr. 17, 1972, at 28. The article discussed a weekly charter flight program from Dallas to Los Angeles, which allowed a women to purchase a 24-hour package combination of airfare and an abortion for $346. *Id.* While indigent women cannot afford such an expensive option, some women, who can afford the flight, will travel to other states to terminate their pregnancies.

recognized restrictions on a state's power to legislate extraterritorially to the specific issue of extraterritorial criminal abortion legislation.

I. THE PRE-*ROE* AND POST-*CASEY* ABORTION LANDSCAPES

The movement toward less restrictive abortion legislation began in the late 1950s.[8] Prior to 1970, however, states permitted abortions only in cases involving rape, incest, birth defects, or when carrying the child to term would threaten the mother's life.[9] In 1970, New York became one of the first states[10] to legalize abortion.[11] The New York legislature enacted a statute which allowed a woman to choose an abortion on demand during the first twenty-four weeks of her pregnancy.[12] Hawaii, Alaska and Washington also repealed criminal statutes[13] prohibiting abortion.[14]

8. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 35-45 (1990) (discussing the changes in the medical profession's views on abortion and reasoning that the changing social and economic conditions for women are contributing factors prompting increased efforts to liberalize state abortion statutes). *See also* JULES SALTMAN & STANLEY ZIMERING, ABORTION TODAY 69, 70 (1973).

9. TRIBE, *supra* note 8, at 42. In 1959, the American Law Institute revised the Model Penal Code to include exceptions to the criminal prohibition of abortion in cases involving rape, incest, or birth defects, or cases where the birth of the child threatened the mother's life. *Id.* at 36. These provisions of the Model Penal Code were widely followed by state legislatures seeking to reform restrictive anti-abortion statutes.

See also Roy Lucas, *Laws of the United States, in* 1 ABORTION IN A CHANGING WORLD 127, 130-35 (Robert E. Hall ed., 1970) (outlining the provisions of liberalized abortion laws in several states).

10. TRIBE, *supra* note 8, at 46. Hawaii was the first state to legalize abortion. *Id.* at 47. The Hawaii statute legalized all abortions performed within the first 20 weeks of pregnancy. *Id.* For a comprehensive study of the enactment of Hawaii's liberalized abortion legislation, see PATRICIA G. STEINHOFF & MILTON DIAMOND, ABORTION POLITICS: THE HAWAII EXPERIENCE (1977). For a general history of abortion in the United States, see JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978).

11. TRIBE, *supra* note 8, at 47.

12. N.Y. PENAL LAW § 125.05 (Consol. 1970).

13. B. James George, Jr., *Current Abortion Laws: Proposals and Movements for Reform, in* ABORTION AND THE LAW 1, 5-16 (David T. Smith ed., 1967). State criminal abortion statutes fall within five main groups: (1) statutes penalizing abortion; (2) statutes prohibiting killing an unborn quick child; (3) statutes penalizing death of the pregnant woman resulting from abortion; (4) statutes penalizing the woman who seeks an abortion; and (5) statutes penalizing activity which facilitates performance of abortions. *Id.*

14. HAW. REV. STAT. § 453-16 (1985); ALASKA ADMIN. CODE, tit. 12, § 40.060-40.140 (1970); WASH. REV. CODE ANN. § 9.02.060 (West 1970).

The State of Washington required a woman to satisfy several requirements before obtaining legal abortion. A doctor could only perform an abortion on a woman "not quick with child" and within four months of conception. *Id.* In addition, the law required the woman to consent or provide consent from her husband or legal guardian if she was under 18. Moreover, a woman was required to live in the state for at least 90 days before she was eligible to obtain an abortion in an accredited hospital. *Id.* § 9.02.070. Interestingly, the Washington statute required ratification at a general

The proximity of this reform legislation gave rise to the belief that states across the country would follow suit and liberalize their criminal abortion laws.[15] Yet, an in-depth analysis of the three-year period between the abolition of several states' restrictive abortion laws, and the Supreme Court's decision in *Roe v. Wade* in 1973, reveals a different story.[16]

New York State's experience illustrates the political ramifications of legalized abortion. In 1970, by only one vote, the New York Assembly passed legislation legalizing abortion.[17] In the two years following the reform, New York anti-abortion forces mobilized enormous support and exerted intense political pressure on state legislators.[18] In 1972, the New York Assembly repealed the 1970 law by passing a new bill that permitted abortion only when it was necessary to save the life of the mother.[19] Admist the controversy, Governor Nelson Rockefeller vetoed the new bill, thus leaving New York's liberalized abortion law intact.[20]

Across the nation, similar controversies concerning abortion legislation developed.[21] By 1972, lawmakers in many states who publicly endorsed pro-abortion positions experienced political ramifications.[22] Legislators favoring legalized abortion were inundated with opposition letters, targeted in negative advertising campaigns,[23] and voted out of

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election to become effective. *Id.* § 9.02.090. Washington voters ratified the referendum in the November 3, 1970 general election. *See generally* SALTMAN & ZIMERING, *supra* note 8, at 70 (discussing abortion laws in the United States immediately prior to *Roe*).

15. TRIBE, *supra* note 8, at 49 (citing MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987)).

16. TRIBE, *supra* note 8, at 49-51 (questioning the belief that the trend toward legal abortion would have persisted, even if the Court had declined to provide for national legalized abortion, and noting that the movement for general repeal of anti-abortion laws was not "overwhelmingly victorious").

17. *Id.* at 48. When it appeared that the anti-abortion forces had defeated passage of the liberalized abortion law by a single vote, Assemblyman George M. Michaels switched his vote at the last minute, deciding to support the new law. Paying the price for his change of heart, he was not reelected to the New York Assembly. *Id.* at 47-49. *See also* William E. Farrell, *Women Protesting Easier Abortions Storm Assembly and Halt Proceedings*, N.Y. TIMES, Apr. 19, 1972, at 94.

18. Fred C. Shapiro, *"Right to Life" has a Message for New York State Legislators*, N.Y. TIMES, Aug. 20, 1972, § 6 (magazine), at 10, 34.

19. William E. Farrell, *Assembly Passes Bill to Repeal Liberalized Abortion Law*, N.Y. TIMES, May 10, 1972, at A1.

20. William E. Farrell, *Governor Vetoes Abortion Repeal as Not Justified*, N.Y. TIMES, May 14, 1972, at A1.

21. *Antiabortion Forces Demonstrate a Growing Influence in State Legislatures Across the Country*, N.Y. TIMES, June 28, 1972, at 21.

22. *Id.* Michigan Representative Richard J. Allen stated: "You can favor financial support for nonpublic schools and everything else, but you're done if you cross over their line on abortion." *Id.*

23. *Id.* An Illinois anti-abortion group attacked Illinois Representative Rayson, a long-time

office.[24] Anti-abortion backlash both precluded further change in states which had already passed less restrictive abortion laws and prevented the enactment of more permissive abortion laws in other states.[25]

In Connecticut, the conflict over abortion created a power struggle between the federal judiciary and the Connecticut legislature.[26] In 1972, a federal district court in Hartford found Connecticut's restrictive abortion law unconstitutional.[27] Notwithstanding this ruling, the Connecticut state legislature re-enacted essentially the same restrictive abortion law by revising only the statute's preamble.[28]

Shortly before the Supreme Court decided *Roe v. Wade,*[29] state legislatures experimented with ways to restrict access to abortions. Some states, for example, imposed residency requirements in response to fears among legislatures that their jurisdictions would turn into "abortion mills."[30] Statistics illustrated that in the first five months following the enactment of legislation legalizing abortion, doctors performed ten percent of all abortions on nonresidents.[31] Moreover, in the first two years of legal abortion in New York, doctors conducted slightly over fifty percent of abortions on out-of-state residents.[32]

States also experimented with other methods of restricting access to

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abortion rights advocate. The anti-abortion advocates flooded Rayson's district with leaflets picturing aborted fetuses in a bucket. *Id.*

24. *Id.* For example, in 1970, Michigan residents refused to re-elect N. Lorraine Beebe, a leader in the movement for abortion reform and the state's only woman state senator. When 22-year-old David Plawecki defeated Beebe, he became the youngest state senator in the country. *Id. See also supra* note 16.

25. *Antiabortion Forces Demonstrate a Growing Influence in State Legislatures Across the Country*, N.Y. TIMES, June 28, 1972, at 21.

26. Lawrence Fellows, *Connecticut Ban on Abortion Gains*, N.Y. TIMES, May 23, 1972, at A1.

27. *Id.*

28. *Id.*

29. *Roe*, 410 U.S. at 113.

30. Lucas, *supra* note 9, at 132. Lucas only discussed residency requirements in North Carolina, Georgia, and Colorado. None of these states provided for an abortion on demand. Interestingly, Hawaii and Washington, which both legalized abortion on demand, included residency requirements. TRIBE, *supra* note 8, at 47. *See also supra* note 14.

In 1973, in Doe v. Bolton, 410 U.S. 179 (1973), the Supreme Court struck down residency requirements. In *Doe*, the Court held that Georgia's residency requirement violated the Privileges and Immunities Clause of the Constitution. *Id.* at 200. *See also* Lucas, *supra* note 9, at 132; TRIBE, *supra* note 8, at 47 (noting that Hawaii's repeal measure contained a residency requirement to pacify fears that the state may eventually become an "abortion mill").

31. STEINHOFF & DIAMOND, *supra* note 10, at 1801. This figure dropped dramatically after New York and Washington repealed their abortion laws. Six months after New York legalized abortion, doctors in Hawaii performed only one percent of abortions on out-of-state women. *Id.*

32. *Abortions for Out-of-Staters Rise*, N.Y. TIMES, Oct. 10. 1972, at 49. In the first year of

abortions. Connecticut, for example, not only imposed criminal liability on physicians for performing abortions,[33] but also criminalized advertising the ability to conduct abortions or the sale of medicines or instruments necessary to perform abortions.[34] Given Connecticut's prohibition on abortion, the legislatures most likely intended to deter the solicitation of women who would consider leaving the state to obtain an abortion.

The Court's decision in *Roe* effectively nullified the politically conservative movement against supporters of legalized abortion and significantly diminished states' efforts to extend their criminal codes to restrict the number of situations in which a woman could seek an abortion.[35] Declaring that the right to have an abortion during the first trimester of a pregnancy constitutes a fundamental right,[36] the Supreme Court preempted the "laboratory of the states"[37] at a time when the isolating effects of restrictive abortion laws confronted states retaining criminal abortion statutes. In the wake of *Roe*, the question of whether a state which outlaws abortion could prevent its own citizens from obtaining an abortion in another state remained unresolved. In the post-*Casey* era, the "laboratory of the states" must address the question of state extraterritorial criminal abortion legislation.[38] Missouri, for example, which

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legalized abortion in New York, non-resident women received 46.5% of all abortions. During the second year of legal abortion, out-of-state women accounted for 54.4% of all abortions. *Id.*

33. CONN. GEN. STAT. ANN. § 53-30, 53-31 (repealed 1990).

34. CONN. GEN. STAT. ANN. § 53-31a (repealed 1990). The Connecticut legislature passed this addition to the state's abortion laws on May 23, 1972. *See supra* note 26.

35. This is not to suggest that the anti-abortion movement died after the *Roe* decision. Based on *Roe*, the anti-abortion forces could no longer affect the legal status of abortion on the state level, absent a compelling state interest. However, anti-abortion groups, such as Operation Rescue, still actively campaign to overturn *Roe*. *See* NOW v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.*, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

36. *Roe*, 410 U.S. at 163-64.

37. Justice O'Connor referred to the "laboratory of the states" in Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2859 (1990) (O'Connor, J., concurring). The "laboratory of the states," which imagines an environment of state experimentation with legal and constitutional issues, reflects the Supreme Court's preference to give states the opportunity to produce suitable solutions to legal issues. The Court will only intervene and address the issue when the states fail to adopt consistent resolutions. *See* Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253 (1991).

38. The European Community recently faced the extraterritorial abortion legislation issue in a widely publicized incident in Ireland. Although Ireland prohibits abortion, England permits the procedure during the first 24 weeks of a woman's pregnancy. Ireland's Attorney General barred a 14 year-old rape victim from traveling to England for an abortion. William E. Schmidt, *Girl, 14, Raped and Pregnant, Is Caught in Web of Irish Law*, N.Y. TIMES, Feb. 18, 1992, at A1. The Ireland Supreme Court allowed the girl to travel to England to obtain an abortion. *Life Before* Roe v. Wade, WASH. POST, Mar. 2, 1992, at A16.

produced the restrictive abortion legislation upheld in *Webster v. Reproductive Health Services*,[39] will probably not sit idle while pregnant women cross the Mississippi River to visit Illinois abortion clinics.[40]

II. STATES' AUTHORITY TO LEGISLATE EXTRATERRITORIALLY

A. *The Model Penal Code's Presumption of State Extraterritorial Authority*

In 1956, the drafters of the Model Penal Code, members of the American Law Institute, introduced a codification of common law criminal jurisdiction for discussion at the Institute's annual meeting.[41] In large part, the drafters followed the main tenet of common law criminal jurisdiction—territoriality.[42]

The doctrine of territoriality constitutes one of the oldest elements of

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39. 492 U.S. 490 (1989). In *Webster*, the Court upheld a Missouri statute that prohibited state employees and facilities from performing nontherapeutic abortions. *Id.* at 507. The Court also upheld the statute's requirement that doctors perform viability testing on fetuses of 20 or more weeks. *Id.* at 519. For an excellent discussion of the *Webster* decision, see Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989).

40. The Missouri state legislature is already rallying support for further abortion restrictions. Recently, a House Committee defeated a bill which would have imposed criminal liability upon doctors who perform any abortions, except to save the life of the mother. The bill failed to emerge from the committee by only one vote. David Aguillard, *Missouri Abortion Ban Blocked*, ST. LOUIS POST-DISPATCH, Mar. 3, 1992, at A1.

41. 22 A.L.I. Proc. 95, 96 (1956). *See* MODEL PENAL CODE § 1.03 (Tentative Draft No. 5, 1956) [hereinafter Draft]. Section 1.03(1), as finally adopted, states as follows:

> (1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if:
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> (a) either the conduct that is an element of the offense or the result that is such an element occurs within this State; or
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> (b) conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State; or
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> (c) conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State; or
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> (d) conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction that also is an offense under the law of this State; or
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> (e) the offense consists of the omission to perform a legal duty imposed by the law of this State with respect to domicile, residence or a relationship to a person, thing or transaction in the State; or
>
> (f) the offense is based on a statute of this State that expressly prohibits conduct outside the State, when 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.

MODEL PENAL CODE § 1.03 (rev. commentaries 1985).

42. 22 A.L.I. Proc. 96 (1956).

American and English criminal law.[43] The principle grants a state the authority to punish crimes committed within its territorial limits, but prohibits a state from controlling conduct that occurs outside its borders.[44] The territoriality doctrine derived from the notion that crimes constituted local affairs,[45] from practical concerns with regard to evidentiary issues,[46] and from the need to preserve fairness for defendants.[47] The Sixth Amendment's guarantee of a trial by a local jury reflects the constitutional root of these same fundamental principles.[48]

The Model Penal Code drafters, however, recognized the underlying difficulty with codifying the doctrine of strict territoriality to determine jurisdiction.[49] Specifically, the drafters recognized that a state employing the strict-territoriality principle could not exercise jurisdiction over multistate crimes or large criminal conspiracies.[50] To remedy this jurisdictional deficiency, the drafters departed from the common law in several respects.[51] Section 1.03(1)(f),[52] which authorizes states to reach conduct

43. MODEL PENAL CODE § 1.03 cmt., at 36 (rev. commentaries 1985). *See generally* Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44 (1974) (discussing the territorial doctrine); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960) (same).

44. MODEL PENAL CODE § 1.03 cmt., at 36 (rev. commentaries 1985).

45. *Id.* at 37.

46. Leflar, *supra* note 43, at 47 (discussing the numerous justifications for the territoriality principle).

47. *Id.*

48. U.S. CONST. amend. VI. *See also* Leflar, *supra* note 43, at 47.

49. Draft, *supra* note 41, § 1.03 cmt., at 3-4.

50. MODEL PENAL CODE § 1.03 cmt., at 38 (rev. commentaries 1985) ("[A]ncient common law found difficulty in seeing that a piece of mischief was triable anywhere if its component parts were divided between two jurisdictions.") (quoting Glanville Williams, *Venue and the Ambit of Criminal Law*, 81 L.Q. REV. 276, 526 (1965)). Under the strict territoriality principle, for a state to obtain jurisdiction, the perpetrator must have committed all the elements of a crime within the state seeking to punish the conduct. MODEL PENAL CODE § 1.03 cmt., at 38-39. Faced with increasing interstate criminal conduct, states enacted statutes creating jurisdiction over offenses committed at least partly outside the state. Draft, *supra* note 41, § 1.03 cmt., at 3. The drafters of the Model Penal Code codified legislative extensions of the territoriality principle. *Id. See also* Rotenberg, *supra* note 43, at 765 (discussing factors of American society that led states to legislatively extend their criminal jurisdiction, particularly "[t]he obvious conclusion that contemporary American society lends itself well to extraterritorial crime").

51. 22 A.L.I. Proc. 96 (1956). The Model Penal Code extended the common law territoriality principle in three ways. First, the drafters allowed states to punish conduct beyond the states borders which would constitute an attempt to commit the crime, if attempted within the state. *Id. See* Draft, *supra* note 41, § 1.03(1)(b). Judge Cardozo established the "attempt" extension in People v. Werblow, 148 N.E. 786 (N.Y. 1925). In *Werblow*, the New York Court of Appeals upheld the indictment of three brothers for grand larceny by false pretenses. The defendants conspired to defraud a New York bank's London branch. *Id.* at 788. The brothers committed no elements of the

occurring entirely outside the state, represents the most significant divergence from common law.[53] A state asserting jurisdiction under section 1.03(1)(f) must fulfill two conditions: (1) the state must have a statute expressly prohibiting the conduct outside the state; and (2) the criminal conduct must bear a reasonable relationship to a legitimate state interest.[54]

The drafters intended section 1.03(1)(f) to enable states to protect their interests.[55] As an extension of the territoriality principle, section 1.03(1)(f) raised questions concerning authority and constitutionality.[56] Members of the American Law Institute intensely debated these issues when the drafters introduced section 1.03(1)(f).[57] Two main points emerged from their discussion and from a careful reading of the draft comment which accompanied the original draft of section 1.03.

First, although the drafters anticipated constitutional conflicts, they expressly refused to articulate any constitutional authority for a state

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crime in New York. *Id.* at 791. Creating the "attempt" extension and finding jurisdiction, Cardozo stated: "[A] crime is not committed, either wholly or partly in this state, unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt." *Id.* at 788. Concluding that the "attempt" standard was satisfied, the Court upheld the conviction. *Id.*

Second, the drafters provided authority to prohibit extra-state conspiracies to commit an offense within the state, as long as an act in furtherance of the conspiracy occurs within the state. 22 A.L.I. Proc. 96 (1956). See Draft, *supra* note 41, § 1.03(1)(c).

Finally, the drafters believed that states should be able to reach conduct wholly outside the state that hurts a state interest. 22 A.L.I. Proc. 96 (1956). *See* Draft, *supra* note 41, § 1.03(1)(c). For discussion of the third extension of the territoriality principle, see *infra* notes 54-69 and accompanying text.

The drafters intended that the extensions would give a state greater authority to protect its interests and the interests of its citizens. MODEL PENAL CODE § 1.03 cmt., at 40 (rev. commentaries 1985).

52. The drafters originally codified this section at § 1.03(1)(d). *See* Draft, *supra* note 41, § 1.03(1)(d). After numerous revisions to § 1.03, paragraph (d) became paragraph (f) in the final version of the Model Penal Code. Hereinafter, this Note will refer to this section as § 1.03(1)(f) or (1)(f). *See supra* note 41 for the text of § 1.03(1)(f).

53. Draft, *supra* note 41, § 1.03 cmt., at 12 (including a provision enabling state extraterritorial authority because the drafters anticipated that a state might have a "sufficient interest to punish for "conduct outside the state which is not otherwise provided for in the draft").

54. MODEL PENAL CODE § 1.03 (1)(f) (rev. commentaries 1985). In addition, before a state can exert jurisdiction, the criminal actor must know or should know the conduct affects the legitimate state interest. *See supra* note 41.

55. Draft, *supra* note 41, § 1.03 cmt., at 12. *See supra* note 53.

56. A.L.I. Proc. 96 (1956).

57. *Id.* at 96-115.

statute based on section 1.03(1)(f).[58] The drafters believed that courts should address constitutional issues when examining the validity of a specific statute which creates extraterritorial jurisdiction under section 1.03(1)(f).[59] This belief reflects the drafters' presumption that the constitutionality of extraterritorial statutes depends on the type of conduct prohibited by the legislation.[60] The question of a state's actual constitutional authority to enact a statute proscribing conduct outside the state's territorial boundaries did not concern the drafters.[61] For example, a state statute criminalizing charitable contributions to religious organizations located in another state raises constitutional issues. Under the drafter's view, the constitutional problems created by this statute stem from a conflict with the Establishment Clause of the Constitution, rather than from the state's authority to enact the statute at all.[62] The drafters of the Model Penal Code simply presumed states' authority to legislate extraterritorially.[63]

Second, the significance of the presumption of state extraterritorial power lies in the drafters' justification for departing from the common law. To support their presumption that a state has the authority to legislate beyond its borders, the drafters cited a Civil War case involving voter fraud.[64] In *State ex rel. Chandler v. Main*,[65] a candidate for public office challenged a Wisconsin statute that allowed soldiers to vote by absentee ballot, but penalized illegal voting by such soldiers.[66] The candi-

58. *Id.* at 97 (explaining that a state statute falling within § 1.03(1)(f) "has to run the constitutional gauntlet on its own").

59. *Id.* at 96.

60. *Id.* at 95-115. The drafters did not discuss the constitutionality of § 1.03(1)(f), except in connection with the possible content of a state statute which falls within § 1.03(1)(f). *See id.* (statement of Professor Wechster) ("But [§ 1.03(1)(f)] has no specific content as it stands. It doesn't legitimize anything. . . . It deliberately interposes no bar, relying on the constitutional bar.").

61. *Id.*

62. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." U.S. CONST. amend. I. The Supreme Court has held that this clause is applicable to the states. Cantwell v. Connecticut, 310 U.S. 246 (1940) (holding the free exercise clause applicable to the states); Everson v. Board of Education, 330 U.S. 1 (1947) (holding the establishment clause applicable to the states).

63. The drafters' belief that the detailing of constitutional arguments pertaining to § 1.03(1)(f) was unnecessary supports the notion that the drafters presumed constitutionality. *See* 22 A.L.I. Proc. 98 (1956). The argument that they assumed the section was constitutional is strengthened further given that the drafters intentionally moved beyond the common law on this point. *See supra* note 51 and accompanying text.

64. Draft, *supra* note 41, § 1.03 cmt., at 12. *See also* 22 A.L.I. Proc. 97 (1956).

65. 16 Wis. 398 (1863).

66. *Id.*

date challenged the statute, alleging that it gave extraterritorial effect to Wisconsin law by penalizing the out-of-state soldier who voted illegally.[67] The Wisconsin Supreme Court upheld the statute as a valid exercise of the state's sovereign power.[68] The court grounded its holding in international law principles recognizing a sovereign nation's extraterritorial authority to punish the criminal acts of its citizens in another state.[69] Interestingly, the drafters of the commentary to a preliminary version of the Model Penal Code quoted the *Chandler* court's analysis concerning the issue of a state's power to enact extraterritorial legislation and cited to codified international law principles of criminal jurisdiction.[70]

The drafters' reliance on principles of international law coincides with their stated intention for section 103(1)(f): to increase a state's ability to protect its interest, because international law theories of criminal jurisdiction recognize more jurisdictional options than simply the territoriality principle.[71] This reliance raises questions concerning the type of criminal jurisdiction principles recognized in international law,[72] and the applicability of these principles to the separate states of the United States.

B. Extraterritorial Legislation and International Law

International law recognizes five bases of jurisdiction for criminal legislation.[73] Although states rarely extend their jurisdiction based on all

67. *Id.* at 400. The candidate argued that the penal clause of the voting act violated the Constitution because the Constitution secures a right to a speedy trial in the district where the offense occurs. *Id.* at 404. *See* U.S. CONST. art. I, § 7. The candidate claimed that this requirement barred convictions under the penal clause of the law. *Chandler*, 16 Wis. at 400.

68. *Id.* at 420.

69. *Id.* The Wisconsin Supreme Court derived authority for the state's extraterritorial law from international law's nationality principle of criminal jurisdiction. *Id.* at 419. *See infra* notes 82-85 and accompanying text for a discussion of the nationality principle. The court did not consider whether this principle applied to the separate states of the Union. However, the court found that the Sixth Amendment did not bar the application of this theory. *Chandler*, 16 Wis. at 421-22.

70. Draft, *supra* note 41, § 1.03 cmt., at 12 (citing Art. 5-7 *Draft Convention on Jurisdiction with Respect to Crimes*, 29 AM. J. INT'L. L. 519-561 (Supp. 1935)).

71. Draft, *supra* note 41, § 1.03 cmt., at 12.

72. See *infra* notes 73-94 and accompanying text for discussion of the five jurisdictional options which international law recognizes.

73. *Introduction to Harvard Law School Research in Int'l Law, Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L. 435, 466 (Supp. 1935) [hereinafter *Draft Convention*]. *See also* Francis Wharton, *Extra-Territorial Crime*, 4 S. L. REV. 676 (1878); B. J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609 (1966); Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155 (1971); Larry Kramer, Note, *Jurisdiction Over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431 (1983).

five principles, a state may exercise all five principles or any one principle alone in defining the scope of its jurisdiction.[74]

Territoriality constitutes the first basis for criminal jurisdiction.[75] Under this principle, a nation may proscribe particular conduct occurring within the territorial limits of the state.[76] Only the territorial boundaries of the state limit the sovereign's authority.[77] Both English and American common law adopted the territoriality principle.[78]

Second, international law universally recognizes the nationality principle as a basis of criminal jurisdiction.[79] This theory asserts that jurisdiction flows from the nationality of the person committing the offense.[80] A state has virtually unlimited power over its citizens, and a nation can control its citizens' actions regardless of where the conduct occurs.[81] This authority stems from the allegiance which the citizen owes to the state.[82]

The protected-interest principle, the third basis of criminal jurisdiction, states that the national interest injured by the offense determines jurisdiction.[83] Therefore, a state can criminalize conduct beyond its bor-

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74. *Draft Convention*, *supra* note 73, at 446.

75. *Id.* at 445. *See also* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987). *See supra* notes 44-48 and accompanying text.

76. *Draft Convention*, *supra* note 73, at 445; George, *supra* note 73, at 613.

77. Kramer, *supra* note 73, at 1441 ("The common law approach regards the interests of a sovereign as circumscribed by its territorial limits and, as a corollary, as exclusive and absolute within those limits.").

78. *See supra* notes 44-48 and accompanying text.

79. Art. 5-7 *Draft Convention on Jurisdiction with Respect to Crimes*, 29 AM. J. INT'L. L. 519-61 (Supp. 1935).

80. *Id.*

81. *Id.* at 519-35 (discussing recognition of the nationality principle and its presence in legislation, treaties, resolutions and national penal codes).

82. *Id.* at 519. *See also* State *ex rel* Chandler v. Main, 16 Wis. 398, 419 (explaining that the nationality principle is "based upon the duty of allegiance"). In *Chandler*, the Wisconsin Supreme Court also discussed the nationality principle in connection with punishing treason. 16 Wis. at 420-21. Prosecution for treason generally rests on the nationality principle because treason constitutes a violation of the allegiance owed to the state. The federal government recognizes the nationality principle in its treason law. 18 U.S.C. § 2381 (1988) states:

> Whoever, owing *allegiance* to the United States, levies war against them or adheres to their enemies, giving them aid and comfort *within the United States or elsewhere*, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States.

18 U.S.C. § 2381 (1988) (emphasis added).

But see George, *supra* note 73, at 613 (noting that treason falls within the protected-interest principle of jurisdiction).

83. *Draft Convention*, *supra* note 73, at 445.

ders that negatively impacts a state interest.[84] To minimize this potentially expansive doctrine, international law only recognizes this theory when the national interest affected by the out-of-state crime concerns state security.[85]

Fourth, a state may assert jurisdiction under the universality principle.[86] This theory provides that a state can prosecute criminals who commit heinous crimes if the state can gain custody of the perpetrators.[87] The theory developed from nations' efforts to combat piracy on the high seas.[88] Yet, today, because terrorism constitutes the modern-day equivalent to piracy, the universality principle allows any nation to convict terrorists, regardless of their nationality.[89]

Finally, under the passive-personality principle, the nationality of the victim provides a basis for jurisdiction.[90] This doctrine grants a state jurisdiction when a criminal commits an out-of-state crime against one of the nation's citizens.[91] Although this corollary to the nationality principle has received wide acceptance, states often need not rely on it to obtain jurisdiction.[92] Instead, to gain jurisdiction, states usually apply the preceding four principles or the nationality-of-the-victim theory.[93]

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84. *Id.* *See also* George, *supra* note 73, at 613-14.

85. *Draft Convention, supra* note 73, at 543. The principle, incorporated into Article 7, "Protection-Security of the State," recognizes states' "competence to punish crimes committed abroad against their security, integrity, or independence." *Id.*

86. *Id.* at 445.

87. George, *supra* note 73, at 614; *Draft Convention*, *supra* note 73, at 563-72. The Draft Convention incorporated the universality principle into Article 9, "Universality-Piracy," of the draft. While the draft itself only granted states the power to reach piracy, nations extended the universality principle to encompass other similar offenses. *Draft Convention*, *supra* note 73, at 569-72. Under the universality principle, some nations reach counterfeiting monies, the slave trade, and narcotics trafficking. *Id.* at 570-71.

88. George, *supra* note 73, at 614; *Draft Convention, supra* note 73, at 563. The Constitution expressly grants this power to Congress. *See* U.S. Const. art. I, § 8 ("To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.").

89. Congress' recent efforts to stop terrorism resulted in the enactment of the Omnibus Diplomatic Security and Antiterrorism Act of 1986. P.L. No. 99-399, 100 Stat. 896 (codified at 18 U.S.C. § 2331-38 (Supp. 1992)). Although not expressly stated, the universality principle is inherent in portions of the Act. *See* Brandon S. Chabner, Note, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 U.C.L.A. L. REV. 985, 998-1001 (1990).

90. George, *supra* note 73, at 614; *Draft Convention, supra* note 73, at 445.

91. *Draft Convention*, *supra* note 73, at 445.

92. *Id.*

93. *Id.*

III. THE APPLICABILITY OF INTERNATIONAL LAW PRINCIPLES TO THE STATES

International law constitutes an appropriate source of authority for extraterritorial state legislation.[94] A nation possesses two types of sovereignty: external and internal.[95] A nation's external sovereignty includes the power to deal with other nations, participate in global affairs, and impact activity beyond its borders.[96] Internal sovereignty consists of the power a nation has over its internal affairs, such as its economy and other domestic issues.[97] International law does not address internal issues of the government of that nation,[98] but instead, primarily focuses on conflicts between sovereign nations and matters of external sovereignty.[99] Extraterritorial state legislation, by definition, constitutes an exercise of external sovereignty: a state can affect conduct occurring outside its territorial boundaries. Thus, international law serves as a basis for a state's authority to legislate extraterritorially.[100]

Although international law may provide an appropriate source of authority for extraterritorial legislation, it does not empower individual states to legislate beyond their borders. The precepts of international law focus on conflicts between nations exercising their external sovereignty and do not necessarily apply to the states.[101] For the principles of international law to apply to the separate states, the states must have the authority to exercise external sovereignty.[102] Whether the states may exercise such external sovereignty depends on the source of the national

94. Kramer, *supra* note 73, at 1447.

95. United States v. Curtiss-Wright Corp., 299 U.S. 304, 315-19 (1936) (distinguishing between internal and external sovereignty of a nation). *See infra* notes 108-21 and accompanying text for discussion of the *Curtiss-Wright* decision. *See also Draft Convention, supra* note 73, at 467 (distinguishing between subjects of internal, or domestic law, and subjects of international law).

96. *Curtiss-Wright*, 299 U.S. at 318 (external sovereign powers include "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties").

97. *Id.* at 315.

98. *Draft Convention, supra* note 73, at 467.

99. Kramer, *supra* note 73, at 1447 (international law weighs the "competing interests of several sovereign states").

100. *Id. See also* Wharton, *supra* note 73, at 682-98; George, *supra* note 73, at 613-17; Perkins, *supra* note 73, at 1155-71. Each of these authors focuses on international law jurisdiction principles when examining extraterritorial issues. Because they all seek to extend the jurisdictional reach of state criminal laws, they do not question the propriety of turning to international law to resolve state extraterritorial questions. This Note argues that previous commentators on extraterritorial issues inadequately analyzed the applicability of international law to the states.

101. *See supra* note 99 and accompanying text.

102. *See, e.g., Draft Convention, supra* note 73, at 467 (excluding the applicability of the draft

government's external sovereignty. The historical debate over the source of the nation's external powers divides into two primary schools of thought: the Sutherland School and the Delegation School.[103] The Sutherland School asserts that the federal government's external sovereignty vested in the states as a collective whole, not in individual states.[104] In contrast, proponents of the Delegation School believe that external sovereignty vested in the individual states, and that these states then delegated external sovereign authority to the federal government.[105]

A. The Sutherland School

In 1936, Justice Sutherland authored the Supreme Court's majority opinion in *U.S. v. Curtiss-Wright Corp.*[106] Rather than criticizing the actual decision, critics focused on Sutherland's interpretation of American history.[107] In *Curtiss-Wright*, the Court faced the issue of whether Congress had unconstitutionally delegated authority to the President.[108] In 1934, Congress passed a joint resolution authorizing the President to prohibit United States arms merchants from selling weapons to countries at war in South America.[109] Acting on the authority of the joint resolution, the President issued an embargo on weapons sales to Bolivia and Paraguay.[110] A grand jury indicted the defendants for selling arms in violation of the Presidential proclamation.[111] The Court upheld the validity both of the joint resolution and of the President's proclamation.[112]

In *Curtiss-Wright*, the Court embraced the theory that external sovereign powers vested in the states collectively by virtue of the Declaration of Independence.[113] Prior to the American Revolution, the colonies pos-

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conventions for criminal jurisdiction to states or other political subdivisions because the principles of constitutional or internal law govern such subdivisions).

103. Designating these historical conclusions as "schools" is merely a convenient shorthand for identification purposes.

104. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304, 316 (1936).

105. *See infra* notes 131-41 and accompanying text.

106. 299 U.S. 304 (1936).

107. *See, e.g.*, David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Hon. James Quarles, *The Federal Government: As to Foreign Affairs, Are its Powers Inherent as Distinguished From Delegated?*, 32 GEO. L.J. 375 (1944).

108. *Curtiss-Wright*, 299 U.S. at 322.

109. *Id.* at 311-12.

110. *Id.* at 312-13.

111. *Id.* at 311.

112. *Id.* at 329.

113. *Id.* at 316.

sessed no external sovereignty;[114] it belonged to the Crown in England.[115] In declaring independence from England, the newly formed states acted collectively.[116] Hence, external sovereignty vested in the United States, not the states as separate and individual entities.[117] In other words, the federal government received the power of external sovereignty directly from England. Because external sovereignty never resided in the states, they could not delegate external sovereignty to the federal government.[118] Therefore, the states do not possess any residual external sovereignty.[119]

Sutherland's theory derived from the works of Justice Story, a member of the Supreme Court during the nineteenth century.[120] Shortly after the Civil War, Justice Story advanced the position that before the American Revolution, the colonies were not independent sovereign states, from an international law perspective.[121] He argued that the American people constituted the true sovereigns.[122] External sovereignty, therefore, vested in the federal government because it represented all the people.[123] As a result, the individual states possessed no external sovereignty.[124]

Under Sutherland's view, because states do not possess external sover-

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114. *Id.* Justice Sutherland did not support this premise with any specific historical data. *See id.* at 317 n.1.

115. *Id.* at 316.

116. *Id.* Sutherland attached great significance to the fact that the states acted "through a common agency—namely the Continental Congress" rather than as independent sovereigns. *Id.* The Continental Congress exercised all the classic elements of external sovereignty: "That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence." *Id.*

117. *Id.* "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." *Id.*

118. *Id.* This is the most controversial aspect of Justice Sutherland's theory. Levitan, *supra* note 107, at 495-97. Sutherland argued that even absent the affirmative powers granted to the federal government by the Constitution, the federal government would have external sovereign powers. *Curtiss-Wright*, 299 U.S. at 318. This suggests that the national government has "extra-[c]onstitutional" powers. Extra-constitutional power contradicts the basic American belief that the Constitution established the division of powers between the states and the federal government. Levitan, *supra* note 107, at 490.

119. George, *supra* note 73, at 615-17.

120. *Curtiss-Wright*, 299 U.S. at 317 n.1.

121. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 147 (Thomas M. Cooley ed., 4th ed. 1873) ("[I]t is apparent that none of the colonies before the Revolution were . . . independent or sovereign communities.").

122. *Id.* at 149.

123. *Id.*

124. *Id.* at 148 ("[Colonies] could make no treaty, declare no war, send no ambassadors, regu-

eignty,[125] international law principles do not apply to the states. In fact, the Research in International Law Draft Convention[126] expressly refused to extend membership in the community of nations to the separate states.[127] The Draft Convention stated that its codification of international law does not apply to political subdivisions, such as the individual American states.[128] Because the states have no external sovereignty under the Sutherland School, they cannot derive authority from jurisdictional principles of international law to legislate extraterritorially.[129]

B. The Delegation School

After the *Curtiss-Wright* decision, commentators questioned Justice Sutherland's historical interpretations and conclusions.[130] In 1946, David Levitan published an analysis of Justice Sutherland's theory which interpreted the historical data of Colonial America and revealed widespread evidence that states exercised external sovereignty.[131] Levitan argued that during the period from 1783 to 1789, state constitutions, which contained clauses empowering state officials to start war or make peace only with the state legislature's consent, evidenced state sovereignty.[132] In addition, the commentator noted that because individual states engaged in treaty negotiations with foreign nations and borrowed money directly from foreign countries, the states themselves, and other nations, perceived them as sovereigns.[133]

Levitan convincingly demonstrated that states were independent, sov-

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late no intercourse or commerce, nor in any other shape act, as sovereigns, in the negotiations usual between independent states.").

Story and Sutherland's views have received some modern support. *See, e.g.*, EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 202 (Randall W. Bland et al. eds., 5th rev. ed. 1984) ("It must follow, then, that the Constitution, instead of being the immediate source of the external powers of the national government, is only their *mediate* source, and confers them simply in consequence of having established a nation truly sovereign in relation to other nations.").

125. *See supra* note 124 and accompanying text.

126. *See supra* note 73 and accompanying text.

127. *Draft Convention, supra* note 73, at 467. The Convention did suggest that the individual states of the United States could possibly employ international law principles by analogy. *Id.*

128. *Id.*

129. George, *supra* note 73, at 616-17.

130. *See supra* note 107.

131. Levitan, *supra* note 107, at 478 n.85, 478-90.

132. *Id.* at 485. For example, the South Carolina Constitution of 1778 provided: "[T]he governor and commander in chief shall have no power to commence war, or conclude peace, or enter into any final treaty without the consent of the senate and house of representatives." *Id.*

133. *Id.* at 485-87.

ereign nations, exercising inherent powers of external sovereignty.[134] States, therefore, possessed external sovereignty, and delegated a portion of this sovereignty to the national government by approving the Constitution.[135] According to the Delegation School, states still possess all the residual external sovereignty not delegated to the federal government.[136] Thus, because the states retained a degree of external sovereignty, the states could still derive authority from international law to legislate extraterritorially.[137]

Under the Delegation theory, two conditions attach to states' exercise of external sovereignty.[138] First, states may exercise external sovereignty only if the federal government does not occupy the field subjected to state legislation.[139] For example, states cannot negotiate treaties with foreign

134. *Id.* at 487. "In brief, state exercise of the external powers is to be seen throughout this period." *Id.* The Court was referring to the time prior to the establishment of the Confederation in 1783.

135. Quarles, *supra* note 107, at 382. The drafters enumerated Congress' foreign relations powers in the Constitution. Article I, § 8 grants power to Congress:

> To regulate Commerce with foreign Nations . . . ;
> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
> To declare War, grant letters of Marque and Reprisal, and make Rules concerning Capture on land and water;
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> To provide for calling forth the Militia to . . . repel Invasions;
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

136. George, *supra* note 73, at 617.

137. *Id.* *See* Coyle v. Smith, 221 U.S. 559, 567 (1910) (states are "competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself").

138. George, *supra* note 73, at 617. George discussed three limitations on a state regulating conduct beyond its borders: (1) the legislation cannot "conflict" with the federal government's plenary foreign relations power; (2) the legislation cannot attempt to regulate an area preempted by Congress; and (3) the legislation cannot impinge on another state's legislative policies. *Id.* The first category collapses into the second, leaving only two constraints: (1) the state cannot act if the federal government already occupies the field; and (2) the legislation cannot conflict with another state's sovereignty. *Id.*

139. *Id.* The Supreme Court's dormant commerce clause doctrine is consistent with this constraint on states' extraterritorial legislative authority. For a discussion of the dormant commerce clause, see generally Sam Kalen, *Reawakening the Dormant Commerce Clause in its First Century*, 13 U. DAYTON L. REV. 417 (1988). State regulation of interstate commerce constitutes an exercise of external sovereignty because the state attempts to influence conduct beyond its borders. Under the dormant commerce clause doctrine, states may regulate interstate commerce in the absence of federal regulation, or where federal law does not preempt state law. CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987) (upholding a state statute regulating purchase of corporate securities). *See* Don-

nations because the national government has plenary power over foreign relations.[140] A second condition restraining a state's exercise of external sovereignty stems from the nature of the federal union. States may only exercise external sovereignty if the state does not impinge on the internal sovereignty of another state.[141]

IV. CAN A STATE ENACT EXTRATERRITORIAL ABORTION LEGISLATION?

A. A Hypothetical Extraterritorial Criminal Abortion Statute

As discussed above, the *Casey* decision will force courts across the country to address the legality of state-restrictive abortion legislation.[142] Although *Casey* forbids a state from declaring abortion illegal, the Court's holding does not prohibit states from enacting restrictive abortion legislation.[143] Several states have already enacted such legislation.[144] Theoretically, a state opposed to abortion could enact a law prohibiting its female citizens from traveling to another jurisdiction to

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ald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987) (discussing *CTS Corp.* from two perspectives: (1) as a validation of the dormant commerce clause doctrine; and (2) as an example of extraterritorial state legislation). *See also* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569. The fact that the Delegation School's constraints on state exercise of extraterritorial power shadow similar restrictions on dormant commerce clause legislation lends support to the former's test for the validity of state extraterritorial legislation.

140. U.S. CONST. art. I, § 10, cl. 1, 3; art. II, § 2, cl. 2. *See also* Levitan, *supra* note 107, at 496 ("[T]here is general agreement that the national government does possess complete authority as to external affairs.").

141. George, *supra* note 73, at 617. George offered little guidance regarding what constitutes a conflict with another state's legislative policies. In Skiriotes v. Florida, 313 U.S. 69 (1941), the United States Supreme Court suggested that an extraterritorial state statute impinges on the internal sovereignty of another state when it conflicts with the rights of another state's citizens. *Id.* at 76-77. In *Skiriotes*, a jury convicted Skiriotes for using diving equipment to gather sponges off the coast of Florida in violation of a Florida statute. *Id.* at 69-70. The statute prohibited the use of diving equipment for the purpose of collecting sponges. *Id.* at 70. Florida's marine boundary was nine nautical miles from the coast. *Id.* The United States' boundary was three nautical miles from the coast. *Id.* Skiriotes challenged the statute on the grounds that Florida's criminal jurisdiction could not extend beyond America's boundary. *Id.* The Court upheld the statute because it neither conflicted with a congressional statute or policy nor with the rights of citizens of another state. *Id.* at 76.

142. *See supra* notes 2-5 and accompanying text.

143. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816 (1992).

144. Louisiana, for example, recently passed a resolution reaffirming the state's restrictive abortion laws and expressing its intent to assert those laws if the Supreme Court overturns *Roe*. The Louisiana resolution states:

obtain a legal abortion. For the purpose of this discussion, assume that one state, *Alpha*, has outlawed abortions except in the case of rape, incest, or for minors who obtain either parental consent or a judicial bypass.[145] At least one other state, *Beta*, permits legal abortions for all women, including minors without a consent requirement. Further assume that *Alpha* has enacted the following criminal abortion statute.

> A woman may be convicted under the laws of this State for obtaining an abortion beyond the territorial boundaries of this State. Abortion is viewed as taking the life of an unborn human being and this State asserts an interest in protecting all human life, except in the case of rape, incest, or for minors with the proper consent. Aborting an unborn human being that is being carried to term by a woman citizen of this State is an injury to this State's expressed interest. A woman violating this provision shall be sentenced to no more than five years in jail.[146]

B. Applicable International Law Principles

The hypothetical criminal abortion statute constitutes extraterritorial legislation by attempting to prohibit conduct considered legal outside the state boundaries.[147] An applicable international law principle must authorize jurisdiction for this type of statute.[148] Only one out of the five international law criminal jurisdiction principles allows a state to enact extraterritorial abortion legislation.

The nationality principle allows a state to proscribe certain out-of-state

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> WHEREAS, Louisiana's criminal abortion statutes, . . . remain a part of the Louisiana Revised Statutes of 1950; and
>
> WHEREAS, since the Roe v. Wade decision the Louisiana Legislature has passed a number of statutes designed both to restrict abortion to the maximum extent permitted by the United States Supreme Court and to protect the unborn as well as women, doctors, and nurses who do not wish to participate in abortion; and
>
> WHEREAS, the Louisiana Legislature has clearly stated its intent . . . that Louisiana's criminal statutes prohibiting abortion take priority over those statutes which only regulate abortion and that abortion should be prohibited as soon as permitted by federal courts.
>
> THEREFORE, BE IT RESOLVED that it is the intent of the Legislature of Louisiana that the district attorneys of this state shall enforce the criminal statutes pertaining to abortion . . . to the fullest extent permitted by and consistent with the Constitution of the United States as interpreted by the United States Supreme Court.

House Concurrent Resolution No. 10 of 1989, *reprinted in* LA. REV. STAT. ANN. § 1299.35.0 (West 1991) (historical and statutory note).

145. In *Casey*, the Court found that these consent requirements did not unduly burden a woman's right to an abortion. 112 S. Ct. at 2830.

146. This hypothetical statute is modeled after the MODEL PENAL CODE § 1.03(1)(f). *See supra* note 41 for the text of § 1.03(1)(f).

147. For purposes of this discussion, assume that other states protect a woman's right to have an abortion and some states provide some degree of legalized abortion.

148. *See supra* notes 100-105 and accompanying text.

conduct for its own citizens because the citizen owes a duty of allegiance to the state.[149] This principle legitimates the hypothetical statute because adherence to the law furthers the state's purpose of protecting life.[150] Thus, by adhering to the statute, the women citizens abide by their duty of allegiance, which they purportedly owe to the state.[151]

The universality theory does not authorize extraterritorial abortion legislation.[152] The universality principle allows a state to punish out-of-state conduct, but Congress has restricted its application to crimes which threaten ordered liberty.[153] Historically, piracy fell within the category of heinous crimes which states could reach under the universality principle.[154] Because the hypothetical model assumes that some states permit legal abortions, abortion cannot qualify as a universally recognized threat to ordered liberty. Because abortion does not constitute a heinous crime, the universality principle does not provide a state with the power to enact extraterritorial abortion legislation.

Similar to the universality principle, states should not rely on the protected-interest principle in order to enforce extraterritorial abortion legislation. Under this principle, a state may criminalize out-of-state conduct if the conduct negatively impacts an interest of the state and threatens state security.[155] For example, states have employed the protected-interest principle to punish voter-fraud schemes.[156] A voter-fraud scheme legitimately threatens the security of the state by rendering the state's very means of governance illegitimate. In contrast, abortion does not endanger state security because aborting fetuses does not threaten the very existence of the state.

Finally, the nationality-of-the-victim principle similarly does not apply to extraterritorial abortion legislation. Under this theory, a state obtains jurisdiction when a perpetrator commits an out-of-state crime against a

149. *See supra* notes 79-82 and accompanying text. This principle applies both to the federal government and to state governments. *See, e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1908) (recognizing that some national interest will support extraterritorial jurisdiction); United States v. Bowman, 260 U.S. 94, 97-99 (1922) (recognizing the applicability of the nationality principle to a class of criminal offenses); Skiriotes v. Florida, 313 U.S. 69, 73-75 (1940) (applying the nationality principle to state legislation). For a discussion of *Skiriotes*, see *supra* note 141.

150. *See supra* text accompanying note 140.

151. *See supra* note 81 and accompanying text.

152. *See supra* notes 87-89 and accompanying text.

153. *See supra* notes 86-89 and accompanying text.

154. *See supra* note 88.

155. *See supra* notes 82-85 and accompanying text.

156. *See supra* notes 64-68 and accompanying text.

citizen of the state.[157] In the hypothetical statute, the state is the victim of the crime.[158] However, the nationality-of-the-victim principle only contemplates redressing crimes against the state's citizens.[159]

Thus, the preceding analysis demonstrates that only the nationality principle expressly authorizes the hypothetically proposed extraterritorial abortion legislation. Even with the nationality principle, a state must overcome significant hurdles. Specifically, before a state may utilize the nationality theory, it must possess some degree of external sovereignty.

C. *Restrictions on External Sovereignty*

1. *The Sutherland School*

According to the Sutherland School, states do not possess any external sovereignty,[160] because all external sovereignty was vested in the national government when the colonies declared independence.[161] Therefore, states cannot rely on any principle of international law to authorize extraterritorial legislation.[162] Under this theory, the hypothetical abortion

157. *See supra* notes 90-93 and accompanying text.

158. A state conceivably could assert jurisdiction under the nationality-of-the-victim principle on the basis of the injury to the fetus. For the states to have this ability, the Supreme Court, in overturning *Roe*, would have to declare that fetuses constitute "persons" under the Fourteenth Amendment. However, in overruling *Roe*, the Court will probably decline to take this path. Declaring fetuses "persons" would present a host of other problems, ranging from altering the legal age for driving, voting, and drinking alcohol to cruel and unusual punishment challenges from pregnant incarcerated women. Most recently, in *Casey*, the Court declined to declare fetuses persons under the Fourteenth Amendment. Rather, the joint opinion referred to fetuses as "potential life." *Casey*, 112 S. Ct. at 2817. Although the constitutional safeguards afforded a "potential life" are ambiguous, the Constitution clearly offers more protection to a "person" than to a "potential life."

159. *See supra* note 91 and accompanying text.

160. *See supra* notes 113-19 and accompanying text.

161. *See supra* note 113.

162. Following the logic of the Sutherland School, a state could never legislate extraterritorially. States must possess some residual external sovereignty to have the authority to enact extraterritorial state legislation. Sutherland's theory denies that states ever possessed any external sovereignty. *See supra* notes 113-29 and accompanying text. This position is untenable, however, given the weight of authority supporting a state's ability to regulate conduct occurring outside its boundaries, at least in some circumstances. *See* Skiriotes v. Florida, 313 U.S. 69 (1941) (recognizing that states can employ the nationality principle).

The Sutherland School's absolute ban on extraterritorial state legislation is not only untenable but perhaps even undesirable. Circumstances exist when a state should have the power to protect its interests and the interests of its citizens. Voter-fraud schemes aimed at disrupting a state's internal functioning constitute one circumstance under which a state requires the power to protect its interests. *See, e.g.*, State *ex rel* Chandler v. Main, 16 Wis. 388 (1863). States should be empowered to protect the very existence of the state. Because the Sutherland School's result precludes a middle ground position, its practical importance is quite limited.

statute does not withstand constitutional scrutiny because the state exceeded its authority in enacting the statute.

2. The Delegation School

In contrast to the Sutherland School, the Delegation School holds that states retain some residual external sovereignty not delegated to the national government by the Constitution.[163] Under this theory, states can legislate extraterritorially, if two conditions exist. First, the national government cannot occupy the field subject to the legislation by either possessing plenary power over, or by having legislated in, a given area.[164] The hypothetical statute assumes that the national government returned the abortion issue to the states. The first condition, thus, does not bar the state from enacting extraterritorial abortion legislation.

Second, the state's extraterritorial statute cannot infringe on another state's internal sovereignty.[165] State *Alpha*'s proposed abortion statute seeks only to punish a woman upon her return to the state. The statute does not attempt to punish State *Beta*'s citizens for engaging in conduct that is legal in *Beta*. These facts, however, do not save this statute from impinging on *Beta*'s sovereignty. The law existing in *Beta* allows its citizens to obtain and perform abortions. The Full Faith and Credit Clause requires all other states to respect and honor the "acts" of *Beta*.[166] By enacting an extraterritorial restrictive abortion statute, *Alpha* is attempting to regulate the actions of *Beta*'s citizens. It is doubtful that a doctor in the state of *Beta* would perform an abortion on a woman in the state of *Alpha* knowing that his action may subject his patient to a possible jail sentence. *Alpha*'s extraterritorial abortion statute undermines *Beta*'s abortion policy and infringes on a *Beta* citizen's right to practice a profession. Thus, *Alpha*'s abortion statute violates the Full Faith and Credit Clause and impedes *Beta*'s internal sovereign powers.[167]

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163. *See supra* notes 134-37 and accompanying text.

164. *See supra* notes 138-39 and accompanying text.

165. *See supra* note 141 and accompanying text.

166. U.S. CONST. art. IV, § 1. *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943) ("The full faith and credit clause, like the commerce clause, thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the other, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application."); Williams v. North Carolina, 317 U.S. 287, 295 (1942).

167. *See supra* note 141 and accompanying text. *See also* Bigelow v. Virginia, 421 U.S. 809, 827-28 (1974) (striking down a Virginia statute which prohibited a Virginia citizen or publication from advertising about legal abortion in New York).

According to the tenets of the Delegation School, a state does not have sufficient residual external sovereignty to employ the nationality principle to authorize the state's extraterritorial abortion legislation. The proposed legislation would effectively interfere with another state's internal sovereignty; thus, the Constitution would render the statute invalid.

V. CONCLUSION

A state would exceed the limits of its sovereignty if it attempted to punish citizens who obtained abortions in other states. However, as the preceding analysis suggests, extraterritorial state legislation is clearly permissible under some circumstances. Hence, the Model Penal Code drafters' presumption that, depending on the circumstances, extraterritorial state legislation law can constitute either a constitutional or an unconstitutional exercise of state power is correct.[168] Because extraterritorial abortion legislation is on the horizon,[169] future courts and legislatures need a more comprehensive framework, such as the one detailed in this Note, in order to adequately address extraterritorial state legislation questions and propose acceptable constraints on state external sovereignty.[170]

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168. *See supra* notes 57-61 and accompanying text.

169. The issue of extraterritorial state legislation is also implicated when discussing the legality of "Right-to-Die" and the surrogate-parenting statutes. *See In re* Busalacchi, No. 59582 (Mo. App. Mar. 5, 1991) (discussing a father's desire to move his incapacitated daughter to a state permitting removal of feeding tubes). *See also* Susan F. Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 444-452 (discussing extraterritorial criminal sanctions and surrogacy).

170. Most commentators cited in this work assert that a state needs greater ability to protect its interests. From this vantage point, moving beyond the territoriality principle is beneficial. States require the ability to protect themselves from harmful conduct aimed at the state from beyond its borders. Yet, this power should be limited. A state's extraterritorial needs are reduced significantly when the state attempts to invade the private lives or personal autonomy of its citizens. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (arguing that increased state sovereignty has negatively affected civil rights and reduced constitutional guarantees).

In addition, a state statute similar to the hypothetical abortion statute punishes individuals for a status or physical condition. In this case, the statute punishes pregnant women. In Robinson v. California, the Supreme Court held that criminalizing status constitutes an unconstitutional violation of the Eighth and Fourteenth Amendments. 370 U.S. 660 (1962). Interestingly, the Model Penal Code drafters proposed § 1.03 prior to the *Robinson* decision. The drafters did not consider the possibility that future courts could view § 1.03(1)(f) as a criminalization of status or physical condition. *See* Draft, *supra* note 41, § 1.03 cmt., at 12.