To: Northwestern Readers:  
Re: Workshop Draft

Dear Readers,

Please find attached two draft chapters of my book in progress, *Patients with Passports: Medical Tourism, Ethics and Law* (under contract, Oxford University Press). This comes from Part II of the book that deals with medical tourism for services illegal a patient’s home country (Part I is about care such as hip replacement and bypass that is legal in both the patient’s home and destination country). I would recommend reading the chapter on abortion and assisted suicide first.

Please do not circulate or cite these chapters without permission.

I look forward to your comments and questions.

Sincerely yours,

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Medical Tourism and Ending Life: Travel for Assisted Suicide and Abortion.

For some travel is a matter of life and death, while for others it is only a matter of death. Consider the story of Daniel James.

Daniel played rugby for England Youth teams until he suffered a tragic injury during a training session in March 2007: spinal compression leading to dislocation of two vertebrae producing tetraplegia (paralysis from the chest down) and an inability to move his hand or fingers. Bringing some of the fortitude he had shown on the Rugby pitch, Daniel was determined to prove that the diagnosis was incorrect and to make substantial recovery. When he accepted the view of his doctors that such improvement was unlikely, he became suicidal, and began to express the wish that he had died in the accident. As his psychiatrist put it, as a “dynamic, active, sporty young man who loved travel and being independent, he could not envisage a worthwhile future for himself now.” He attempted suicide several times, and in February 2008 – after his third failed attempt – he contacted the Swiss Clinic, Dignitas, for assistance in dying.¹

Dignitas is a Swiss Clinic founded in 1998 that, in a 2010 publication, claims to have “helped a total of 1,062 people to end their lives gently, safely, without risk and usually in the presence of family members and/or friends.”² As one academic has summarized the process by which Dignitas assists with suicide:³

(i) The individual requesting an assisted suicide must become a member of the organisation.
(ii) S/he must send a letter to Dignitas stating the reason for requesting an assisted suicide, accompanied by a medical file/report regarding diagnosis, prognosis, etc.
(iii) There is an initial assessment of whether Dignitas’ guidelines are satisfied (the individual must be suffering from a fatal disease or have an unacceptable disability).
(iv) Dignitas finds one of their collaborating Swiss physicians who will state an initial willingness to write a prescription (usually about two and a half months after the initial request).
(v) An appointment with this physician is made and the physician conducts a detailed medical assessment of the individual. A period of around two months is usual between this and the next step.

¹ Except where otherwise noted, this description of Daniel James’ case is adapted from Alexandra Mullock, Commentary: Prosecutors Making (Bad) Law?, 17 MED. L. REV. 290, 291–93 (2009).
² DIGNITAS, How DIGNITAS Works, On What Philosophical Principles are the Activities of This Organization Based?, DIGNITAS, 2 (June 2010), http://www.dignitas.ch/images/stories/pdf/so-funktioniert-dignitas-e.pdf.
³ It is sometimes called “aid-in-dying”, though I will use the more familiar term “assisted suicide” also used by Dignitas itself, while recognizing that for some proponents and opponents the choice of term is significant, even if not for me.
(vi) A volunteer from Dignitas is present and assists during the final part of the assisted suicide process. Before the final act, the individual is asked again whether s/he still wishes to die and a declaration of suicide is signed.

(vii) The individual takes anti-vomiting medication, followed by Pentobarbital about half an hour later.

(viii) A representative of Dignitas informs the police that an assisted suicide has occurred.4

As of 2011 at least 107 British citizens (and as of 2007 more than 800 non-U.S. citizens altogether) have used the services of the Swiss group Dignitas to end their lives, with many more having become members.5 Why did James and so many others turn to Dignitas as the place to end their life? There are several places in the world where assisted suicide is legally permitted, including Belgium, Columbia, the Netherlands, Switzerland, and the U.S. states of Montana, Oregon, and Washington.6 What makes Switzerland unique is that certain Swiss cantons allow non-Swiss residents to use the assisted suicide services of organizations like Dignitas.7

But back to Daniel. In May 2008 Dignitas accepted his application and arranged for a Swiss doctor to write a barbiturate prescription for Daniel’s suicide. As required by Swiss law, prior to making that prescription, prior to the assisted suicide (planned for September 12 2008) Daniel arranged to meet the doctor for an evaluation, despite his parents attempt to dissuade him from going forward. In a July 2, 2008, report Daniel’s psychiatrist wrote that Daniel “clearly understood that no other parties, be they professionals or family members wished him to pursue this course of action and was clearly aware that he could reverse his decision at any point. He remained firmly of the opinion that support from any agency would not be helpful for him or change his decision.”8 Further, the psychiatrist concurred with an earlier report from March 11, 2008 by a Consultant Psychiatrist that Daniel “has full capacity. . . . He is fully aware of the reality and potential finality of his decision, displays clear, coherent, logical thinking processes in order to arrive at his decision and had clearly weighed alternatives in the


balance.” After repeated attempts to convince him to change his mind, Daniel’s parents eventually accepted that their son was resigned to ending his life and began assisting him in arranging the suicide abroad. An unnamed family friend who had originally offered to arrange travel abroad to let Daniel see specialists who might assist in his recovery ultimately assisted Daniel’s parents in arranging a flight to Zurich for suicide, although the friend also arranged a return flight to the U.K. in the case Daniel changed his mind. With the flights booked, Daniel signed a declaration on August 27, 2008, witnessed by his doctor, stating his wish to travel to Switzerland for assisted suicide and his desire that his body be returned to England after he ended his life. On September 12, 2008, accompanied by his parents, Daniel traveled to Zurich along with his parents, where (in the presence of his parents) a doctor assisted him in ending his life – apparently, according to post-mortem blood samples, using a fatal dose of a barbiturate.

In the wake of this case, the Director of Public Prosecutions in the U.K. declined to prosecute Daniel’s parents or the unnamed friend in assisting his suicide, despite a potential legal hook for doing so in English law. Were they right to do so? If assisting suicide is illegal in a patient’s home country can the home country prosecute someone who assists a patient to end his life in Switzerland, where the practice is legal? As a doctrinal matter? What about as a normative matter?

From the other end of the life cycle, consider this case.

Andrea, a twenty-one-year-old Irish woman, experiences an unwanted pregnancy. Abortion is illegal in Ireland. She therefore travels by boat to “Women on Waves,” a floating abortion clinic anchored in international waters off the coast of Ireland. Ships in international waters are governed by the law of the country whose flag they fly, and this ship flies the flag of the Netherlands, where abortion is legal. Nevertheless, on Andrea’s return to Dublin, the Irish government initiates criminal process against her. Can Ireland do so? As a doctrinal matter? What about as a normative matter?

This chapter is aimed at answering these questions. Each of these activities is a form of what I have elsewhere called “Circumvention Tourism” -- traveling abroad for the express purpose of doing something illegal in the home country but not the destination country, a kind of regulatory arbitrage. In the first Part of this chapter I describe the existing practice and case law of travel for assisted suicide and abortion more fully. The second part of this chapter argues that home countries clearly have the power to apply their domestic prohibitions on abortion and assisted suicide to patients who travel abroad for these services even to places where it is legal. The third part argues that in the case of abortion there is a strong moral argument for applying their criminal prohibition abroad,

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9 Mullock, supra note 1, at 292 (quoting Decision on Prosecution, supra note 8).
10 The facts of this hypothetical are stylized from a description of Women on Waves in Allison M. Clifford, Comment, Abortion in International Waters Off the Coast of Ireland: Avoiding a Collision Between Irish Moral Sovereignty and the European Community, 14 PACE INT’L L. REV. 385, 387–89 (2002).
11 See Cohen, supra note 7.
but that the case is somewhat weaker for assisted suicide. A final part of this chapter briefly examines other ways that home countries might attempt to control their citizens who travel abroad for abortion and assisted suicide – the regulation of home country physician speech.

I. The History and Current Practice of Traveling Abroad for Abortion and Assisted Suicide.

a. Abortion.

Women currently travel abroad to circumvent domestic criminal prohibitions on abortion in countries such as Ireland, Portugal, and Poland, and have been doing so for a long time, though we lack good numbers on exactly how many do so, in part due to the clandestine nature of the travel and the social stigma of the activities in their home countries.12

For almost as long as this form of circumvention tourism has taken place, these women’s home countries have struggled as to how and whether to regulate those abortions. Consider, for example, the case of West Germany before reunification. West German law, codified in 1976, made abortion a criminal offense unless the mother’s health was in danger or in cases involving “(1) pregnancies which result from criminal activity, (2) an ‘incurable defect’ in the unborn child [or] (3) overall poor social conditions which would adversely affect pregnancy.”13 This criminal law extended citizens’ abortions performed abroad (that is “extraterritorially” in legal parlance), with penalties resulting in up to three years of imprisonment unless the women previously received a “Beratungsschein,” a certificate from a West German doctor.14 Merely having such a prohibition on the books will deter some individuals from engaging in circumvention tourism, but the deterrence value is amplified when there is a real chance of detection and prosecution. For that reason, the West customs officials performed gynecological examinations on women reentering West Germany; for example, one such examination was prompted when an official spotted a nightgown and a brochure for a Dutch abortion clinic in a woman’s car.15

14 Id. at 222–23.
15 See id. at 222–23 & n.106; see also Tamara Jones, Wall Still Divides Germany on the Abortion Question, L.A. Times, Oct. 19, 1991, at A3, available at http://articles.latimes.com/1991-10-19/news/mn-515_1_legal-abortions (reporting that a woman was taken into custody when sanitary napkins and a brochure from a Dutch clinic were found in her car as she was returning to West Germany from the Netherlands). Since reunification, more expansive judicial interpretations of abortion law, combined with state insurance covering the procedure for low-income women, have likely reduced the need for German women to engage in travel abroad for abortion. See Martha F. Davis, Abortion Access in the Global Marketplace, 88 N.C. L. REV. 1657, 1682–83 (2010).
Ireland also has a long and complex history relating to its citizens traveling abroad for abortion. This development harks back to September 1983, when Ireland adopted the Eighth Amendment to the Irish Constitution, now codified in Article 40.3.3, which provides that “[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”\(^\text{16}\)

The Irish courts’ most important confrontation with the impact of this Constitutional Amendment on travel abroad occurred in 1992 in the case of *Attorney General v. X* (the “X case”).\(^\text{17}\) The case’s dramatic facts involved a fourteen-year-old rape victim sought to travel to England to obtain an abortion but, when the victim’s family contacted the Irish police to ask about collecting DNA evidence during the procedure to assist with the rape prosecution, the Attorney General petitioned for an injunction to prevent the travel.\(^\text{18}\) The patient argued that her life was at stake because the prospect of giving birth under the circumstances made her suicidal, and thus abortion was permissible under Article 40.3.3’s provision for “due regard to the equal right to life of the mother”\(^\text{19}\); however, the Irish High Court found that the prospect of suicide did not qualify as a threat to the mother’s life and enjoined the trip.\(^\text{20}\) The Supreme Court ultimately reversed on the grounds that suicide was a threat to the mother’s life, but the Court did not indicate whether the trip would have been permissible in the absence of a life-threatening condition.\(^\text{21}\)

In response to the *X Case* and the fear that the European Court of Justice or the European Court of Human Rights would rule against the Irish abortion law, the Irish people passed the Thirteenth Amendment (often called the “Travel Amendment”), which provides that Article 40.3.3 “shall not limit freedom to travel between the State and another state.”\(^\text{22}\) However, subsequent case law and commentary leaves unclear whether Ireland has the power to enjoin the travel of Irish citizens seeking abortion abroad outside the narrow case of threat to the mother’s life.\(^\text{23}\)

In the United States, the 1973 *Roe v. Wade* decision secured a constitutional right for American women to access abortions under certain circumstances and during certain periods of pregnancy.\(^\text{24}\) Prior to *Roe*, though, when abortion remained banned in several states, individual U.S. states faced the question of whether to criminalize abortions

\(^{16}\) *Ir. Const.*., 1937, art. 40.3.3.
\(^{17}\) *Id.* at 6–7.
\(^{18}\) *Id.* at 6–7.
\(^{19}\) *Ir. Const.*., 1937, art. 40.3.3.
\(^{22}\) *Ir. Const.*., 1937, art. 40.3.3; see Clifford, *supra* note 10, at 412.
\(^{23}\) Clifford, *supra* note 10, at 413–16 (discussing uncertainties in Irish abortion law). Ireland also has tried to control counselor and physician speech regarding the possibility of abortion outside of the country, giving rise to a separate line of cases I discuss below.
\(^{24}\) 410 U.S. 113, 166 (1973).
sought outside of the state. Most of the cases and the commentary on them (and the possible future should Roe be curtailed) have focused on intranational travel for abortion in the U.S. to more permissive U.S. states. My focus in this chapter is on travel abroad for abortion and assisted suicide rather than travel to more permissive parts of the same country, though, especially in the normative discussion, we will see that some of the issues are similar in the two contexts. But even as to international medical tourism, in the period prior to Roe at least one U.S. case considered the application of domestic criminal prohibitions on abortions performed outside of the United States. In People v. Buffum a California doctor arranged for an associate to transport pregnant women to Tijuana, Mexico, where another doctor performed abortions. The court ultimately reversed a conviction under California criminal law because the “statute makes no reference to the place of performance of an abortion, and we must assume that the Legislature did not intend to regulate conduct taking place outside the borders of the state”; the court further noted that the prosecution had not charged the defendant with a conspiracy to violate Mexican abortion law. Therefore, the court was able to resolve the question as a matter of statutory interpretation and prosecutorial charging decisions and not wade into the power of the California legislature to criminalize its citizens’ going abroad for abortions or the propriety of criminal charges for conspiracy in California to procure an abortion abroad.

b. Assisted Suicide.

Daniel James was just one of many non-Swiss citizens who have gone to Switzerland for assisted suicide; by one estimate from the U.K. alone there have been 107 U.K. citizens that have used Dignitas’ services to end their lives. The majority of the case law on the subject has emanated from the U.K.


27 256 P.2d 317, 319 (Cal. 1953).

28 Id. at 320–22.

29 See Smith, supra note 5, at 514 n.332. See also Hazel Biggs & Caroline Jones, Tourism: A Matter of Life and Death in the United Kingdom, in The Globalization of Health Care: Legal and Ethical Issues (I. Glenn Cohen ed. 2013) 164, 167 & n.10 (noting that it “is believed that upward of two hundred British citizens have travelled to Switzerland for an assisted suicide, and more than 650 British citizens have joined...
In one well-known European Court of Human Rights (ECHR) case, Dianne Pretty suffered from motor neuron disease, a degenerative illness that rendered her increasingly debilitated, and she sought confirmation from the Director of Public Prosecution (DPP) that her husband would not face prosecution were he to assist her in committing suicide by accompanying her to a Swiss suicide clinic. The relevant criminal offense fell under the English Suicide Act of 1961, which stated that “[a] person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.” When the DPP refused the confirmation, Pretty argued before the House of Lords and then before the ECHR that the DPP’s refusal infringed her rights under Article 8 of the European Convention of respect for private and family life. Both courts rejected Pretty’s claim: The Lords held that Article 8 did not include the right to control one’s own death, while the ECHR found that any infringement of Article 8 could be justified as necessary to protect the interests of the state in preventing terminally ill people from being taken advantage of by those with an interest in encouraging their suicide. The ECHR also found that a blanket ban was not disproportionate to the aim of public protection because past attempts to carve out exceptions had created the potential for abuse of the exception, particularly in cases with vulnerable individuals.

A more recent English case involved Deborah Purdy, a multiple sclerosis sufferer who anticipated a time when she would want to end her life and applied to the High Court seeking an order that the DPP issue guidance clarifying that her husband would not face charges under the Suicide Act if he assisted her travel to Switzerland to die. The High Court, noting the prior decision in Pretty, refused to issue the order, at which point Purdy took her case to the House of Lords. The Lords upheld the criminal prohibition on assisted suicide but found a problem under Article 8 of the European Convention of fair warning and consistency of application regarding the Code for Crown Prosecutors, which outlines the principles under which prosecutors exercise their discretion. They specifically found a failing in the fact that an individual assisting a loved one with suicide

Dignitas” but also recognizing that “accurate figures are difficult to obtain because these acts give rise to potential criminal liability in the United Kingdom and there is no mechanism for reporting them.”)

30 Pretty v. United Kingdom, 2002-III Eur. Ct. H.R. 155, 161; see also Mullock, supra note 7, at 443–45 (discussing Pretty and the resulting guidelines from the DPP).
31 Suicide Act, 1961, 10 Eliz. 2, c. 60, § 2 (Eng.).
36 See id. at [61]; Kate Greasley, R(Purdy) v DPP and the Case for Wilful Blindness, 30 OXFORD J. LEGAL STUD. 301, 305 (2010).
could not adequately determine from the Code before acting whether prosecutorial discretion would be exercised in favor or against the individual’s prosecution.\(^{38}\)

In response to the decision, in 2010, the DPP issued final guidelines listing sixteen factors in favor of and six against prosecution. Namely:

Public interest factors tending in favour of prosecution:
(1) The victim was under 18 years of age;
(2) The victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide;
(3) The victim had not reached a voluntary, clear, settled, and informed decision to commit suicide;
(4) The victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect;
(5) The victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative;
(6) The suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that he or she or a person closely connected to him or her stood to gain in some way from the death of the victim;
(7) The suspect pressured the victim to commit suicide;
(8) The suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide;
(9) The suspect had a history of violence or abuse against the victim;
(10) The victim was physically able to undertake the act that constituted the assistance him or herself;
(11) The suspect was unknown to the victim and encouraged or assisted the victim to commit suicide by providing specific information via, for example, a website or publication;
(12) The suspect gave encouragement or assistance to more than one victim who were not known to each other;
(13) The suspect was paid by the victim or those close to the victim for his or her encouragement or assistance;
(14) The suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, and the victim was in his or her care;
(15) The suspect was aware that the victim intended to commit suicide in a public place where it was reasonable to think that members of the public may be present;
(16) The suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide.

\(^{38}\) See R (Purdy), [2009] UKHL 45, [2010] 1 A.C. [73]-[74].
Public interest factors tending against prosecution:
(1) The victim had reached a voluntary, clear, settled, and informed decision to commit suicide;
(2) The suspect was wholly motivated by compassion;
(3) The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
(4) The suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
(5) The actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
(6) The suspect reported the victim’s suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.\(^{39}\)

It remains to be seen whether further litigation will find this guidance document sufficient under Article 8 of the European Convention.

In the next parts of this Chapter I consider whether as to abortion and assisted suicide, home countries have the power under international law to extend criminal law prohibitions in the home country (if they exist) to their citizens’ activities in the destination country where the act may be legal under destination country law.

II. Can Home Countries Criminalize the Acts of Their Citizens Seeking Assisted Suicide or Abortion in Destination Countries Where Those Acts Are Legal?

If a home country prohibits abortion or assisted suicide at home, then, as a matter of international law, is it forbidden, required, or permitted as a matter of discretion to criminalize those activities by its citizens when they occur in a destination country (such as Switzerland for assisted suicide) where the act is legal? In this Part I will show that home countries have discretion to do so and are neither forbidden nor required to do so under international law.

Before doing so it is important to be clear what question I am and am not answering. Imagine, like the U.K.’s Suicide Act we saw above, a home country had a statute prohibiting a citizen from assisting in a suicide or seeking an abortion. The question I am asking is whether, under international law, it is permissible for the home country to expand the geographic scope of that statute such that it claims prescriptive jurisdiction over the citizen’s doing the same domestically-prohibited activity in a destination country where the activity is permitted?

Thus I am focusing on what is called “jurisdiction to prescribe” or “prescriptive jurisdiction.”\(^{40}\) Such jurisdiction consists of the power “to prescribe rules” -- for example,

\(^{39}\) Mullock, supra note 7, at 444–45.
to make it a crime in Ireland for an Irish citizen to procure an abortion in the Netherlands -- where the local territorial law does not make the act illegal.\footnote{See, e.g., Comm. of Ministers, Recommendation of the Committee of Ministers to Members States on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law, Recommendation No. R (97) 11, 64 (1997) (describing jurisdiction of the state); Vaughan Lowe, \textit{Jurisdiction, in \textit{International Law} 335, 337, 340 (Malcolm D. Evans ed., 2d ed. 2006)}.} This jurisdiction is in contrast to “enforcement jurisdiction,” for example, the ability of Ireland in the same circumstance to violate Dutch sovereignty and march into the Netherlands to arrest the Irish citizen for a crime made illegal by Irish criminal law.\footnote{\textit{Id.}} Even when a country has and exercises its power to prescribe, it typically does not have jurisdiction to enforce and instead relies on extradition processes to get the offender back into the country’s sovereign territory and custody.\footnote{See \textit{id}.}

When I am discussing extraterritoriality here I am focusing on prescriptive jurisdiction. It is commonplace under existing international law doctrines for a country to have prescriptive jurisdiction to declare an extraterritorial activity of its citizen a crime under its domestic law but \textit{not} to have jurisdiction to enforce the law by arresting its citizen in the foreign country. Because many patients who travel abroad to have an abortion or to assist a loved one with a suicide intend to return to their home countries after engaging in prohibited activities, prescriptive jurisdiction, even unaccompanied by enforcement jurisdiction, remains a powerful tool for deterring and punishing circumvention tourism. While detection of and the ability to prove extraterritorial circumvention is imperfect, as the history of state attempts to regulate travel for abortion and assisted suicide discussed above show, many countries have been able to deter, detect, and punish these violations.

With those clarifications in mind, we are now ready to examine under what conditions the home country can assert extraterritorial criminal prescriptive jurisdiction over home country citizens in cases of travel abroad for abortion and assisted suicide.

\begin{itemize}
\item a. Bases for Prescriptive Jurisdiction.
\end{itemize}

Under customary international law, prescriptive jurisdiction may be premised on several different possible bases. The easiest basis for asserting that jurisdiction over a home country citizen who travels abroad for an abortion or to assist a suicide is the “Nationality Principle” -- permitting a state to assert jurisdiction over the acts of its citizens wherever they take place.\footnote{\textit{Id.}} Citizenship or nationality of a person might be the result of being born

\begin{footnotes}
\item[40] \textit{See, e.g.}, Comm. of Ministers, Recommendation of the Committee of Ministers to Members States on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law, Recommendation No. R (97) 11, 64 (1997) (describing jurisdiction of the state); Vaughan Lowe, \textit{Jurisdiction, in \textit{International Law} 335, 337, 340 (Malcolm D. Evans ed., 2d ed. 2006}).
\item[41] \textit{See, e.g.}, Lowe, \textit{supra} note 40, at 338.
\item[42] \textit{See id.}
\item[43] \textit{Id.} at 339. Sometimes these two jurisdictions are further contrasted with “jurisdiction to adjudicate,” or “curial jurisdiction,” which involves the right of courts to receive and try cases referred to them. \textit{Id.}
\end{footnotes}
in the country, having a parent who is a citizen, or being naturalized. As a leading treatise observes, “[f]or practical purposes, . . . States remain free to decide who are their nationals”; it notes, however, exceptions that prove the rule, such as “[t]he mass imposition of nationality upon unwilling people, or nationality obtained by fraud or corruption.”

In the cases of abortion and assisted suicide abroad I have discussed the Nationality Principle would be enough. My focus has been on prescriptive jurisdiction on home country citizen patients who travel abroad for abortion or home country citizens who assist a loved one in ending his or her life in the destination country. I am thus not focused on attempts to assert extraterritorial jurisdiction over the physician who provides the services. In the rare case where the physician who performs the procedure in question in the destination country happens to be a home country citizen the Nationality Principle will also support prescriptive jurisdiction. In the more common case where the physician is a citizen of the destination country (or a third country) it is much less likely that the assertion of extraterritorial prescriptive jurisdiction would be proper. Moreover, most extradition treaties prohibit a country from allowing the extradition of its own citizens, such that, in cases where the home country criminalizes the actions of the abortion provider or a provider who assists a suicide who is a destination country citizen, extradition will not be possible. Unlike the patients who travel abroad (or their family members), destination country physicians are not that likely to travel to the patients’ home countries, in particular if they know criminal charges are pending against them there, such that as a practical matter even if a home country could assert prescriptive jurisdiction over the destination country physician they are unlikely to be able to actually punish the foreign provider.

While for these reasons attempts to assert prescriptive criminal jurisdiction over foreign citizens who participate in performing abortion or assisting in suicide in the destination country are less likely to be fruitful, under international law there are several possible bases for asserting that jurisdiction I will briefly review. Moreover, these theories will also provide additional bases for prescriptive jurisdiction over home country citizens in these cases, though the Nationality principle will usually be sufficient and the most straightforward theory.

“Subjective territorial jurisdiction” comprehends crimes that are initiated in one’s home territory but completed in another territory, such as loading a bomb in the United States

45 Lowe, supra note 40, at 346–47.
46 Id. at 343.
48 See also Rohith Srinivas, Exploring the Potential for American Death Tourism, 13 MICH. ST. U. J. MED. & L. 91, 117 (2009) (arguing that home country prosecution of Swiss physicians is “implausible” because it “would damage diplomatic relations between interdependent countries”).
onto a plane that will explode in Israel. This basis may apply in our cases when referrals to foreign physicians are involved or when much of the planning and arrangements are done on home soil.

“Objective territorial jurisdiction” refers to the opposite case: a crime initiated abroad but completed in one’s home territory. Some countries, most notably the United States, have sought to extend this jurisdiction through an “effects doctrine,” especially asserting antitrust jurisdiction against foreign companies based on acts done entirely outside the United States that had economic repercussions on the price of a commodity in the United States. Perhaps prescriptive jurisdiction could be premised on this basis in some of our cases as well — one fewer child born in the home country or one fewer adult returning home and thus paying taxes, etc. — although admittedly this seems to be a stretch.

A third additional basis, “passive personality,” represents the flipside of the National Principle, stating that a home country has jurisdiction based on the fact that the victim (rather than perpetrator) is a national of that country. The principle is controversial, and a leading treatise suggests that its increased acceptance is category specific: while it is “widely tolerated when used to prosecute terrorists,” it is far from clear that it would be found “acceptable if used to prosecute, for example, adulterers and defamers.” Passive personality may be used to justify extending extraterritorially sanctions on assisting suicide on the theory that it protects the home country citizen whose life is ended. Relying on passive personality in the abortion case would be more controversial and would depend on treating the fetus as a citizen, a matter on which there is no established precedent. I return to a parallel issue on the normative side below.

49 Lowe, supra note 40, at 343; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).
50 United States v. Yousef, 327 F.3d 56, 91 n.24 (2d Cir. 2003); RESTATEMENT, supra note 49, §402; Lowe, supra note 40, at 343.
51 United States v. Aluminum Co. of Am., 148 F.2d 416, 443, 447–48 (2d Cir. 1945) (“On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders.”). Various foreign courts in other countries have resisted the extension of jurisdiction based on the effects doctrine. See, e.g., Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] 1 A.C. 434 (H.L.) 437–38 (appeal taken from Eng.).
52 Lowe, supra note 40, at 351.
53 Id. at 352.
54 Customary international law also recognizes two other bases for jurisdiction I think are less helpful here. First, it recognizes “universal jurisdiction” over crimes “so heinous as to be universally condemned by all civilized nations.” Yousef, 327 F.3d at 91 n.24; see Lowe, supra note 40, at 348. Piracy was the traditional example, though premised less on the heinous nature of the crime than on the idea that activities on the high seas made them likely to evade jurisdiction so any state that could apprehend the pirates could try them. See id. at 348. To simplify slightly, in recent years, this category has been extended to cases more along the “heinous” line, including slave trade, war crimes, and genocide. RESTATEMENT, supra note 49, § 404. The use of this basis in our cases seems unlikely.
b. Limitations on Jurisdiction to Prescribe.

As discussed, home countries will usually have a basis for prescriptive jurisdiction over extraterritorially performed abortions or assisted suicides on their citizens. However, that is not enough, as the Restatement (Third) of the Foreign Relations Law of the United States cautions, “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”55 The Restatement then suggests that whether jurisdiction is unreasonable should be determined by “evaluating all relevant factors, including, where appropriate” (thus not exhaustively), a set of eight factors.56 Although the outcome of any multifactor, highly standard-like test is hard to predict, there is a strong argument in each of my case studies that jurisdiction is reasonable. In the next few paragraphs, I explain factor by factor:

(1) “[T]he link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory.”57 While the health care activity itself takes place extraterritorially, abortions and assisted suicide result in one fewer member of society being born or staying alive.

(2) “[T]he connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect.”58 In all of these cases, the “perpetrator” (the person seeking the abortion, assisting the suicide) is a citizen and at least one “victim” is a home country citizen (though the abortion case is more controversial for reasons I discuss below).

(3) “[T]he character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree

While the termination of fetuses or those seeking assisted suicide may be seen as bad things, at most they seem more in line with “ordinary” murder than the especially heinous crime of genocide, for which universal jurisdiction has been (controversially) invoked. Second, the “protective principle” allows the state to assert jurisdiction when “essential interests of the State are at stake” and jurisdiction is necessary for the state to preserve itself. Lowe, supra note 40, at 347; see RESTATEMENT, supra note 49, §402(3); Yousef, 327 F.3d at 91 n.24. While its exact borders are fuzzy, and the United States has pushed its boundaries, see RESTATEMENT, supra note 49, § 402 cmt. f; Lowe, supra note 40, at 347–48, I do not think the principle can plausibly be used for prescriptive jurisdiction in our cases.

55 RESTATEMENT, supra note 49, §403(1).

56 Id. § 403(2).

57 Id. § 403(2)(a).

58 RESTATEMENT, supra note 49, § 403(2)(b).
to which the desirability of such regulation is generally accepted.\(^5\) The end of life, fetal or adult, is extremely important in most countries that have criminalized these acts and also heavily regulated by criminal law and health law regulating health care professionals, facilities, etc. How “desirable” such regulation would be is, of course, in the eyes of the beholding country, but even regimes that are relatively permissive with regard to abortion or assisted suicide typically regulate things like timing, information provision, age of consent, mental competency evaluation, and waiting periods.\(^6\)

(4) “[T]he existence of justified expectations that might be protected or hurt by the regulation.”\(^7\) Given that the activity is illegal at home, the circumventing patient is unlikely to have justified expectations in accessing the service.\(^8\) Also, unlike cases of medical tourism for legal services like hip replacements or cardiac bypass (and perhaps services illegal in some home countries like reproductive technologies), the destination country’s provider base is unlikely to plausibly claim that providing abortion or assisted suicide to foreigners is a significant part of the medical system’s total business.

(5) “[T]he importance of the regulation to the international political, legal, or economic system.”\(^9\) It is unclear what this means in our cases.

(6) “[T]he extent to which the regulation is consistent with the traditions of the international system.”\(^10\) The application of this factor to our cases is also not obvious. There have certainly been other instances in which the international system allowed home countries to criminalize the activities of their citizens in destination countries where the practice is legal.\(^11\) For example, the U.S. PROTECT Act levies either a fine, thirty years in prison, or both for any U.S. citizen or permanent resident “who travels in foreign

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\(^5\) **RESTATEMENT, supra** note 49, § 403(2)(c).


\(^7\) **RESTATEMENT, supra** note 49, § 403(2)(d).

\(^8\) This analysis is somewhat formalistic and circular: Until we know whether international travel to circumvent is permitted or prohibited, it is hard to say what patients reasonably expect.

\(^9\) **RESTATEMENT, supra** note 49, § 403(2)(e).

\(^10\) **RESTATEMENT, supra** note 49, § 403(2)(f).

\(^11\) Jeffrey Meyer has provided an illustrative list of the numerous instances where the United States has criminalized extraterritorial conduct on the basis of its citizens’ activity. Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 182–83 (2010). He also provided other lists premised on effects test prescriptive jurisdiction and still others that are “geoambiguous” in their scope. **See id.**
commerce, and engages in any illicit sexual conduct” including “any commercial sex act . . . with a person under 18 years of age.”

(7) “[T]he extent to which another state may have an interest in regulating the activity; and . . . [[8]] the likelihood of conflict with regulation by another state.” Of the factors, these two seem to provide the most likely basis for arguing against reasonableness, yet the argument does not seem strong. This is especially true when, as is my focus, the extraterritorial criminalization focuses the conduct of a home country citizen, not of the destination country doctor or other provider, which dilutes the interest of the destination country. Moreover, countries can avoid these conflicts by adopting the solution that all countries other than Switzerland have used regarding assisted suicide: requiring that the person seeking to use the service be a resident of the destination country. Unlike the extraterritorial extension of a country’s antitrust or fair labor standards, for example, these cases entail minimal interference with the existing practice in the destination country: One need not remake competition policy or wage and hour regulation in the destination country. The industry can persist as is; it merely becomes inaccessible to foreigners. In any event, given the extent to which the other factors favor reasonableness, even an adverse finding on this factor is unlikely to make a difference.

One useful point of comparison is the PROTECT Act covering child sex tourism, which has been upheld by several U.S. circuit courts as consonant with both U.S. and international law. Thus, I conclude that criminalizing circumvention tourism for abortion or assisted suicide will not run afoul of the balancing approach of the Restatement.

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67 RESTATEMENT, supra note 49, §§ 403(2)(g), (h).
68 See, e.g., Alexander R. Safyan, A Call for International Regulation of the Thriving “Industry” of Death Tourism, Loy. L.A. Int’l & Comp. L. Rev. 287, 304 (2010-2011) (discussing the residency requirements in place to use assisted suicide in the U.S. states of Oregon and Washington); id. at 307–08 (examining whether safeguards in place that appear to prevent foreigners from using assisted suicide in the Netherlands can be circumvented); cf. Brian Bix, Physician Assisted Suicide and Federalism, 17 NOTRE DAME L. J. ETHICS & PUB. POL’Y 53, 60 (2003) (noting in the intrastate context of travel from one U.S. state to another for assisted suicide that a “state might thus create a residency, or duration-of-residency requirement, both to prevent unwanted travel by outsiders merely to take advantage of an in-state benefit, and to less concerns and hostility of other states based on the way the state’s law and benefits might undermine the policies of other states”).
69 See cases cited supra note 51.
70 See United States v. Tykarsky, 446 F.3d 458, 470 (3d Cir. 2006); United States v. Clark, 435 F.3d 1100, 1103–04 (9th Cir. 2006); United States v. Bredimus, 352 F.3d 200, 205–07 (5th Cir. 2003); United States v. Han, 230 F.3d 560, 563–64 (2d Cir. 2000).
71 The same conclusion follows under the U.S. Supreme Court’s jurisprudence on the subject. At times, that jurisprudence sounded an even more permissive note than the
In sum, this analysis shows that existing customary international law will permit, but not require, home countries to criminalize circumvention tourism abortion and assisted suicide. There is also a separate question of whether, independent of international law, domestic (and in the case of the European Union, supranational) law obligates, forbids, or gives the home country discretion to criminalize the circumvention tourism of its home country citizens. This analysis can only be done on a country-by-country basis, but here I will just note my conclusions as to the United States (though I hope to publish that analysis on another occasion): the U.S. federal government faces no structural constitutional obstacles to criminalizing the circumvention tourism of its citizens. It is far less clear, though, whether an individual U.S. state could attach criminal liability to the activities of its citizens abroad that violate the state’s existing criminal prohibitions.72

III. The Normative Question: Should Home Countries Criminalize Their Citizens’ Abortion and Assisting Suicide When Done in Destination Countries Where the Act Is Legal?

Now that we know that home countries can extend prescriptive jurisdiction over home country citizens who pursue abortions or assist suicide abroad, in this Part of the chapter I want to examine whether they should do so as a matter of political philosophy and bioethics.

One way into this problem would be to take a stand on whether home countries should criminalize abortion or assisted suicide simpliciter, that is to treat the domestic and extraterritorial criminalization as presenting an identical question and resolving both in tandem. That is not my approach here – huge amounts of ink have been spilled on the balancing test. In Hartford Fire Insurance Co. v. California, the Court held that the Sherman Act applied extraterritorially to cover conspiracies by British reinsurance companies affecting the U.S. market that were not illegal in the United Kingdom. 509 U.S. 764, 769–70 (1993). The Court’s reasoning was that “[n]o conflict exists, for these purposes, ‘where a person subject to regulation by two states can comply with the laws of both,’” and the British companies could still comply with U.S. law without putting themselves in violation of British law. Id. at 798–99 (quoting RESTATEMENT, supra note _, § 403 cmt. e). Similarly, in the medical tourism context, it appears that no law requires destination country providers to provide abortions, FGC, assisted suicide, or reproductive technology services to noncitizens of the destination country. Later cases in this line, however, have clarified that the jurisprudence is meant to match the Restatement balancing test approach. See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S. A., 542 U.S. 155, 161–62 (2004) (applying the balancing test to analyze the extraterritorial reach of the Sherman Act).

72 By structural I have in mind the commerce clause, dormant commerce clause, Foreign Affairs preemption, etc. I say “structural” because for abortion in particular, other U.S. constitutional law doctrines might be relevant, but those would apply equally to criminalizing the conduct domestically. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (plurality opinion).
question, and I am not sure part of a book chapter in a book on medical tourism will convince many readers to change their mind on these matters. Instead, I want to take a different approach in this chapter asking readers to assume (for the sake of argument) that the domestic prohibition in each of these case studies is both legally and normatively well-grounded. My goal is to avoid “re-litigating” the validity of these domestic prohibitions in either a normative or doctrinal sense. Instead, I ask — conditional on the existence, lawfulness, and validity of these prohibitions — whether the home country should take the further step of criminalizing the use of these services by its citizens outside the home country. Of course, what makes a domestic criminal prohibition on something like abortion either unlawful or immoral is an extremely contested question, but one I purposefully bracket here. For readers with deep investments on this issue, it may require considerable mental effort to try to determine what they would think about extraterritorial application if they believed that something like the abortion prohibition really is normatively valid and lawful in the United States; nonetheless, I think the payoff is great enough to beg this forbearance.

I will argue that assuming their domestic prohibition is valid and lawful, there is a strong argument that countries with prohibitions on abortion should criminalize abortions by their citizens abroad, even where it would be legal in the destination country, and thus that these home countries ought to alter their laws to incorporate extraterritorial conduct to the extent those domestic laws are to the contrary (as is true in the case of Ireland, discussed above, among other countries). For assisted suicide I also think that those countries that criminalize providing that assistance at home should also criminalize it when done by a home country citizen in a destination country even where it is a destination country where that would be legal in that destination country. That said, I think the case against extraterritorial criminalization in the assisted suicide case is a little less strong than in the abortion case.

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73 See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) (plurality opinion) (“Men and women of good conscience can disagree, and we suppose some shall always disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.”).


75 To be clear, when I say “extend extraterritorially” or “criminalize the extraterritorial conduct of their citizens abroad,” I am imagining that the home country legislature will be explicitly extending its domestic prohibition extraterritorially by statute, as the U.S Congress did in the PROTECT Act criminalizing child sex tourism abroad. 18 U.S.C. § 2252(B)(b). This is a different question about whether construe an ambiguous statute as having extraterritorial scope; for that the Supreme Court appears to require “a clear statement of extraterritorial effect” in order to construe a statute as applying
I am one of the few bioethics and law scholars to have written on this issue. One of the others, who will serve as my intellectual interlocutor for this part of this chapter is Guido Pennings, whose work I always admire and learn from even where we disagree. Prof. Pennings has advocated for a notion which he calls “external tolerance” that he applies to travel abroad for abortion or assisted suicide; in this concept he argues that “a certain norm is applicable and applied in society as wanted by the majority while simultaneously the members of the minority can still act according to their moral view by going abroad,” that “[a]llowing people to look abroad demonstrates the absolute minimum of respect for their moral autonomy.”76 For Pennings, circumvention tourism becomes a kind of *modus vivendi*, which “prevents a frontal clash of opinions which may jeopardise social peace.”77 While the values of accommodation and social peace are seductive, I will ultimately argue against this approach and show why home countries with prohibitions on abortion and assisted suicide should apply those prohibitions to the same conduct when done in a destination country where the practice is legal.

In prior work, taking inspiration from interest-balancing approaches to civil conflict of laws, I have developed a more general framework for determining when a home country to extend extraterritorially its criminalization of a domestic medical procedure.78 I have argued a number of factors should be considered in constructing a rule-based approach. Central among them are: (1) What type(s) of criminal law justifications underlie the home country’s domestic prohibition? For example, is the prohibition aimed at physical-harm prevention, attitude modification, or distributive justice? (2) Is the “victim” the home country seeks to protect a citizen of the home country, the destination country, a third country, or a stateless person? (3) If the “victim” is a citizen of the destination country, is the victim represented in governance decisions?

In this chapter, though, I am focused only on extraterritorial criminalization as to circumvention tourism for abortion or assisted suicide. I will offer two separate but related arguments – one more directly grounded in political theory and one emanating


76 Guido Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337, 340 (2008). Richard Huxtable has made a similar argument as to travel for assisted suicide, explicitly relying on Pennings’ work, and arguing for non-prosecution in the name of “pluralism.” Huxtable, *supra* note 5, at 334 (“If we continue to presume that the originating state is broadly prohibitive, then that must constitute a considerable victory for opponents of the practice. Such a position necessarily excludes the proponents, including those who would themselves wish to take up the option if available. As assisted suicide is indeed available elsewhere (subject to the satisfaction of certain criteria) it seems unduly heavy-handed of the jurisdiction of origin to seek to prevent or penalise those who seek to take up the offer.”).

77 *Id.*

78 See generally Cohen, *supra* note 7.
from a thought experiment – for the following principle: If the home country criminalizes territorially (i.e. domestically) an act causing serious bodily harm and the reason for the prohibition is victim-protection, and the perpetrator and victim are both citizens, then the home country should extend its criminal prohibition extraterritorially to circumvention tourists even when the same conduct is permitted under the law of destination country. I will show that this principle provides a prima facie case for criminalizing circumvention tourism for abortion and assisted suicide.

To be sure, as I have argued elsewhere, this principle may not exhaust the cases where extraterritorial criminalization is normatively justified or mandated, but it does provide a sufficient condition for extraterritorial criminalization in these cases. After offering positive arguments for the principle, I consider some general exceptions to this principle (cases where even on my theory the general principle does not apply) and then consider arguments for exceptions/objections to the principle as applied to abortion and assisted suicide.

a. A Prima Facie Argument for Extraterritorial Criminalization of Abortion and Assisted Suicide.
   i. A Thought Experiment: Murder Island.

My first argument for the principle emanates from a thought experiment I call “Murder Island”.

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79 The motivation for offering the two separate arguments is not just that two arguments are better than one, but also because some are skeptical of thought experiments and intuition pumps as a tool of normative reasoning. Some have suggested that these methods risk giving normative weight to what may be mere artifacts of social norms. E.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 60–81 (2002). Although there is a long tradition of relying on this method in bioethics (and indeed common law reasoning), I recognize that this is a serious concern. I have partially addressed this risk here by not adopting thought experiments that are too outlandish, by testing the principles I derive against real world cases, but also by mixing in a second argument based on top-down political theorizing with the bottom-up casuistic reasoning.

80 While “Murder Island” is hypothetical, there is a family resemblance to a real world case: the U.S. has made certain activities that are criminal in its territory, such as murder by or against a U.S. citizen, also illegal in Antarctica where the U.S. has no territorial prescriptive jurisdiction. See Lowe, supra note 40, at 348–49. Apparently, however, the U.S. has not extended its prohibition against murder in the same way in another legal vacuum — outer space itself as opposed to “territorial space” or on an American shuttle or the International Space Station where there is governing criminal law. See James A. Beckman, Citizens Without a Forum: The Lack of an Appropriate and Consistent Remedy for United States Citizens Injured or Killed as the Result of Activity Above the Territorial Air Space, 22 B.C. INT’L & COMP. L. REV. 249, 253 (1999); R. Thomas Rankin, Note, Space Tourism: Fanny Packs, Ugly T-Shirts, and the Law in Outer Space, 36 SUFFOLK U. L. REV. 695, 716 (2003). Antarctica, however, is a place without a particular government or law, not a place where the territorial government has passed a law declaring murder is
Imagine there exists a foreign island nation called “Murder Island.” Murder Island has laws very similar to those in the United States, with one important exception: by an act of its parliament, Murder Island has decreed that murder is not a crime on Murder Island. Imagine that two U.S. citizens, Benjamin Linus and John Locke, travel together from the United States to Murder Island. After touring some of the ruins, Ben stabs John in the heart, killing him instantly.

Let us stipulate that John’s presence on the Island was voluntary in at least a shallow sense – he was not transported there at gunpoint. Perhaps he was asleep when the boat docked or was merely unaware that the Island’s name was rather telling as to its legal system, although he certainly did not consent to being murdered. If you find it helps you to imagine that there was no meaningful consent, you can alter the thought experiment such that John was a very young child whose consent we would not typically count, or in a coma during the journey, etc. When I discuss assisted suicide, below, I will consider relaxing this condition with potentially more robust forms of voluntariness and consent. By contrast, in abortion we will see that there is no prospect for the consent/voluntariness of the victim.

Beckman, supra, at 253. It is to such a hypothetical jurisdiction that I now turn. I specify that this is the key divergence between the two country’s laws to focus the example, though it is possible there would also have to be attendant differences in conspiracy law, wrongful death law, etc. I do not think anything turns on whether those differences are there too. While I find that making the thought experiment turn on the divergence on whether murder is criminalized simpliciter produces a crisper thought experiment, some might worry about how such a society would function in the real world. For example, would its population annihilate itself? For those who are bothered by such practical questions, one can easily substitute a more elaborate version of Murder Island: Murder is allowed only on December 11 (my birthday), only of children under the age of four, only for person over the age of fifty-five, or only in the narrow context of the honor killing of young women. For my purposes, any of these variants will do in generating a strong intuition that the U.S. should criminalize extraterritorially when it a murder is committed by one U.S. citizen against another. For this reason, I will stick to the simpler and less elaborate version, but invite readers to substitute one of these variants if they prefer.

I am fully aware that Murder Island is about as easy a case as I could derive for extraterritorial application. My decision to begin by “stacking the deck” is neither accidental nor insidious. I begin with a kind of “pole star” case for two reasons. First, it immediately shows that an extreme pluralist or territorialist view that the home country is never justified in extending its prohibition in the face of a contrary rule of the destination country is incorrect. Second, by beginning with a case in which our normative intuitions are fairly certain, we can begin to map the ways in which the harder real world cases diverge from it and critically examine which divergences should matter.
Notwithstanding the fact that the action was lawful by Murder Island’s own legal code, I think we would all conclude that it would not be wrong for the United States to seek to extend its criminal law extraterritorially to cover Ben’s act in this instance. Indeed, I think our intuitions support the view that the United States should extend its criminal law to Ben’s actions. As I show in political theoretical analysis below, this intuition is very strong, in part because of what I will call the “double coincidence of citizenship”—that both the perpetrator and the victim are U.S. citizens.

The double coincidence of citizenship idea has a family resemblance to what Brainerd Currie called in civil conflict of laws a “false conflict” or “false problem” case in which both the plaintiff and defendant were domiciliaries of a common state and he believed that the state of their common domicile’s law should govern as the only state with a true interest. My claim about the importance of the double coincidence of citizenship persists even if we grant an objection made by Currie’s critics that the foreign state does have an interest in the availability of these procedures to noncitizens.

The underlying intuition about Murder Island should remain unchanged even if I embellish the thought experiment by imagining that the reason the Island has adopted its stance on murder is because of its religious and cultural tradition, which leads the Islanders (rather bizarrely from our point of view) to see murder as a way of reaching the Island’s spirits with honor for the murdered in the afterlife. That their lack of a prohibition is based on a different, benign, religiously motivated view of murder seems immaterial as to whether the home country should criminalize the murder of its citizen by another one of its citizens abroad. Indeed, it seems that this conclusion persists even if we specify that the Murder Island residents’ religious beliefs are such that they actively desire for the U.S. citizens to murder each other on the Island and that their theology dictates that the more murders are committed on the Island, the more the Island gods will bless them with health and good crops. Or perhaps the residents’ reasoning is more altruistic: they view Ben and John’s home country as denying an important way of worshipping G-d and wish to provide a refuge for U.S. citizens as well. These beliefs strike me as good reasons why Murder Island may not want the United States to extend its criminal prohibition extraterritorially, but they seem to fail as sufficient reasons why the United States, from its own perspective, should refrain from extending its criminal prohibition of murder to killings of one of its citizens by another.

82 See generally Brainerd Currie, Married Women’s Contracts: A Study in Conflict-of-Laws Method, 25 U. CHI. L. REV. 227 (1958) (discussing this concept). A good example of this approach in practice comes from the New York Court of Appeals’ decision in Neumeier v. Kuehner, which suggests that where the plaintiff and defendant shared a common domicile, its law as to guest-host immunity ought to apply even when the accident occurs in another state with the opposite rule in place. See 286 N.E.2d 454, 458 (1972). I prefer to use my term “double coincidence of citizenship” to emphasize that we are talking about criminal law, and that I am not intending to import all of the intellectual baggage of this choice-of-law approach. I also wish to connect this notion more deeply to political theories regarding the power of the state to criminalize conduct in the first place.
Thus, Murder Island presents a strong *prima facie* case that the home country should criminalize the circumvention tourism in the case of murder, subject to some exceptions discussed below.

ii. A Political Theoretical Account.

Let me complement the “Murder Island” thought experiment with a political theoretical argument for extraterritorial extension in the case of murder with a more political theoretical account.

At least one justification that underlies the home country’s prohibition on murder is that it is wrong for U.S. citizens to murder other citizens. The wrongfulness of that act (to speak retributively) and the desirability of preventing it (to speak in a key of deterrence) seem to attach irrespective of whether the murder takes place on U.S. territorial land, in outer space, or on Murder Island. Ben has done something wrong that deserves punishment, and John has wrongfully suffered injuries that we would have wished to prevent.

Ben benefits from U.S. diplomatic responsibility and U.S. laws that provide for his protection when abroad.\(^{83}\) Thus, there is nothing unfair about the United States asking him to abide by its law when abroad. Had Ben wanted to avoid the sanction, he had an “Exit” option in that he could have renounced his U.S. citizenship and taken up Murder Island citizenship. That he failed to do so and that he wants to enjoy the advantages of U.S. law in many regards demand that he agree to also be subject – at least prescriptively – to the United States’ criminal prohibition on murder. He must take the bitter with the sweet.

That is the argument in broad strokes. It can be reformulated more precisely in a more communitarian, liberal, or distributive justice version, though the strongest version of the argument would borrow from the various traditions and argue for an overlapping consensus between them.

**Communitarian:** For the communitarian, the key value is community membership, and it is contextualized community traditions rather than universalist reasoning that form the backbone of political principles and personal identity.\(^{84}\) For this reason, the propriety of

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\(^{83}\) Cf. Kreimer, *supra* note 26, at 923 (“Unlike the United States’ diplomatic responsibility to provide for [a U.S. citizen’s] protection when [that citizen] visit[s] Mexico, Pennsylvania has no similar responsibility—or capacity—to ensure [such] protection, whether by direct intervention or by threat of war, when [that citizen] visit[s] California.”).

\(^{84}\) See, e.g., **ALASDAIR MACINTYRE,** **WHOSE JUSTICE? WHICH RATIONALITY?** 6–11 (1988) (setting out the communitarian approach); **MICHAEL WALZER,** **SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY** 31–32 (1983) (similar); Lea Brilmayer, **Liberalism, Community, and State Borders,** 41 **DUKE L.J.** 1, 9–10 (1991) (discussing the view that “[t]he community is both the chief source of political norms and an important source of personal identity”) [hereinafter Brilmayer, *Liberalism*].
extending law on the basis of citizenship ties seems, if anything, more natural than doing so merely on the basis of territorial presence. As Lea Brilmayer puts it when discussing general jurisdiction in civil procedure in the intranational context, “[c]ommunitarianism leads naturally to a view that interstate authority should be based on community membership” because “the community would have an interest in regulating the individual regardless of the location in which the individual acts and without concern for the victim’s residence,” such that, “[a]s long as that individual is a member of the community, the communitarian should be satisfied that the state has a legitimate concern with the dispute.”

Indeed, the legal philosopher Antony Duff has suggested that a form of communitarianism underlies, as a jurisprudential matter, the sovereign’s right to punish at all. He argues that “national legislatures should not begin with the idea that they have good reason to criminalise all moral wrongdoing, and then see reasons to limit their jurisdictional ambitions”; rather, they should “begin with the idea that only a certain range of wrongdoings are even in principle their business” and that the key marker is citizenship: we “say that we are responsible as citizens, to our fellow citizens.” In other words, “[t]he wrongs that properly concern a political community, as a political community, are those committed within it by its own members.” On this account, the territorial coverage of domestic criminal law follows from the citizenship relation and not vice versa. That is, “in the case of crimes against [our] citizens, that the perpetrator is answerable to [our] polity for wrongs against [our] members; and, in the case of crimes [committed by our] citizens, that any member of [our] polity is responsible to [our] polity for any such wrongs that he commits.”

Indeed, as Duff’s statement suggests, the

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85 Brilmayer, Liberalism, supra note 84, at 11. Religious law presents a useful analogy in understanding the communitarian conception. In determining whether a person transgressed Jewish law, for example, what matters is that person’s membership in that religious community; the territorial location where the person committed the transgression is irrelevant. See, e.g., Yuval Merin, Anglo-American Choice of Law and the Recognition of Foreign Same-Sex Marriages in Israel—On Religious Norms and Secular Reforms, 36 BROOK. J. INT’L L. 509, 528 (2011).
87 Id. at 13.
88 Id. at 15. One challenge for Duff’s view is the protection of noncitizens in U.S. territory. Duff says that “the criminal law of any decent polity also covers visitors to, and temporary residents of, the polity as well as its citizens” and that saying so “is not to revert to a geographical or territorial account of jurisdiction” in that “what makes normative sense of jurisdiction is still the law’s character as the law of a particular polity, whose members are its primary addressees”; it is just that “its law can also bind and protect visitors to the polity and its territory.” Id. at 14–15. I am not sure that I am entirely convinced by this, but, for present purposes, I need not choose between the territorial and citizen conceptions; it is enough to sustain my argument that the citizenship strand standing alone can ground extraterritorial criminalization, even if it supplements rather than replaces the territorial conception. Further, even some
propriety of extraterritorial criminalization is at its zenith on this account when it is crimes by our citizens against our citizens—the double coincidence of citizenship.

**Liberal**: The more liberal version of the argument for extraterritoriality here might be put in terms of John Stuart Mills “Harm Principle,” a more social contractualist form, or some combination of the two.

The Harm Principle account is somewhat analogous to the international law doctrinal “effects test” reasoning (as well as its U.S. civil procedural equivalent). It emphasizes that a murder on Murder Island has negative effects within the United States’ territorial boundaries. The victim will typically have friends, family, and an employer at home; at the very least, the victim will have owed the United States duties relating to citizenship. While this approach would treat as a sufficient trigger the murder of one citizen by another citizen, the perpetrator’s citizenship is not strictly necessary, since the effects at and on the home country produce the tie.

The second more social contractualist liberal route focuses more clearly on the perpetrator’s citizenship. It follows a Lockean social contract theory mode “whereby one assents to cast his lot with others in accepting the burdens as well as the benefits of identification with a particular community” and therefore “cedes to its lawmaking agencies the authority to make judgments . . . [that] strik[e] the balance between his private substantive interests and competing ones of other members of the community.”

This double coincidence of citizenship implies conflicting claims of two U.S. citizens—Ben, who, despite the social contract, wants to be exempted by U.S. law, and John, who would like its protection. As I will discuss below this may be an important divergence from the assisted suicide case where the most direct “victim,” the one seeking aid in dying, does not want the benefit of the home country’s prohibition. Here, Ben can only be excused from the obligations of U.S. law by forcing John to forego that law’s benefit. On the other side of the ledger, Murder Island does have an interest in the matter—it just

proponents of the territorial conception think it might support extraterritorial application of domestic criminal law based on perpetrator or victim citizenship, although the logic is somewhat opaque. See Alejandro Chehtman, *Citizenship v. Territory: Explaining the Scope of Criminal Law*, 13 NEW CRIM. L. REV. 427, 442 (2010) (arguing that “universal jurisdiction over international crimes can also be satisfactorily explained on the basis of territorial considerations”).

89 **JOHN STUART MILL**, ON LIBERTY 13 (Elizabeth Rapaport ed., 1978) (1859) (“That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”).

90 Brilmayer, *Liberalism, supra* note 84, at 14–16 (discussing this possibility in relation to extraterritorial application of Title VII, which is the statute that covers employment discrimination in the U.S.).

seems like a relatively weak one. To use Hohfeld’s famous terminology, the imposition of a duty by the United States on its citizens not to murder one another clashes with Murder Island’s grant of a privilege to those within its territory to murder.92 Allowing the United States to extraterritorially apply its domestic law subordinates Murder Island’s grant of privilege as to American citizens present in its domestic territory who murder.

Indeed, as I suggested above, Murder Island may want to be a haven for those whom it views as refugees from unjust American laws prohibiting the proper worship of G-d through murder,93 or Murder Island may affirmatively enjoy economic benefits from the murder of U.S. citizens by U.S. citizens – perhaps the Island’s knife makers enjoy the extra revenue. But from the perspective of the United States, when the crime is murder and where there exists a double coincidence of citizenship, the Island’s claim that the interests behind its privilege ought to trump the duty of the United States seems unlikely to prevail. The United States has not sought to impose this duty on every person irrespective of citizenship. It has not sought to march in to Murder Island and seize its citizens. Instead, it has focused its prescriptive jurisdiction on U.S. citizens who murder other U.S. citizens.

Given the home country’s retributive and deterrence interests in punishing the murder, and given its political theoretical bona fides in demanding that Ben subordinate himself to its laws as its citizen, the case for extraterritorial application seems strong. As Gerald Neuman puts it with beautiful flourish, “[I]n the international context, there is a name (even mentioned in the Constitution) for giving the claims of territorial situs absolute priority over the claims of citizenship. The name is ‘treason.’”94

**Distributive Justice**: Apart from the liberal and communitarian approaches, there is also an argument for extraterritorial criminalization based on distributive justice concerns. To the extent that freedom from punishment for murder is a kind of “good” that particular individuals find desirable, it seems unfair to allocate it based on the ability to travel abroad to Murder Island.

In the reproductive tourism context, Guido Pennings has responded to this kind of argument by suggesting that “this is a strange argument when it is advanced by those who installed the restrictive legislation in the first place” because “[i]f the prohibitive laws

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92 See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) (describing as “jural opposites” the concepts of privilege and duty).

93 Cf. Brilmayer, *Interstate, supra* note 26, at 889–92 (arguing that a clash of interests occurs in the intrastate abortion context not only where one state requires and the other state forbids abortion but also where one state wants to promote autonomy by allowing women to choose abortion).

94 Neuman, *supra* note 26, at 944.
were abolished, neither poor nor rich people would need to go abroad.95 Huxtable has also relied on Pennings response to deflect similar claim as to assisted suicide.96

As the application to Murder Island shows, however, Penning’s response somewhat misses the point: it would be desirable from the home country’s perspective to end all instances of the prohibited activity, and it adds insult to injury that only the rich can circumvent.

Thus, at least as to murder, there is a strong political theoretical argument for extraterritorial criminalization. One might nonetheless object to this argument, especially the social contract elements, by suggesting that the voluntariness of the tacit consent underlying the argument may be questionable. As Seth Kreimer puts this kind of “voluntariness” objection in the intranational context, “[w]hen an impoverished woman in Mississippi declines the opportunity to escape Mississippi citizenship by abandoning her family, friends, community, and job, does she thereby ‘voluntarily’ consent to application of Mississippi’s law, or does she only bow to necessity?”97 This argument seems to prove too much for present purposes, however, in that it gives reason to cast doubt not only on the propriety of criminalizing the murder by one’s citizen of another of one’s citizens in the extraterritorial case but within the country’s territorial borders as well, since the hypothetical Mississippian cannot escape U.S. borders either.

Putting that to one side, in response to this “voluntariness” objection to actual consent, one standard political theory move is to shift to an account of hypothetical (or sometimes more accurately labeled “normative”) consent of the original contract entered into by the founders of the commonwealth: if a state “meets the terms of such a legitimate original contract, it has a claim to obedience.”98 As Joseph Raz has put it, “[i]f there is a common theme to liberal political theorizing on authority it is that the legitimacy of authority rests on the duty to support and uphold just institutions.”99 If citizens can justly be bound by a hypothetical social contract not to murder fellow citizens at home, why should that social contract not also apply to murders against fellow citizens abroad?

95 Pennings, supra note 76, at 122.
96 Huxtable, supra note 5, at 335.
97 Kreimer, supra note 26, at 928. The locus classicus of this argument is Hume, who wrote that “[w]e may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.” David Hume, Of the Original Contract, in Hume’s Moral and Political Philosophy 356, 363 (Henry D. Aiken ed., 1948); see also Ronald Dworkin, Law’s Empire 192–93 (1986) (rejecting the argument that “we have in fact agreed to a social contract . . . by just not emigrating when we reach the age of consent”).
98 Kreimer, supra note 26, at 929.
Against this kind of move, in the intranational context, Kreimer has objected that “the obligation to ‘support’ just institutions does not carry any necessary implications as to the geographical scope of the duty” and thus

[i]t is entirely consistent with the proposition that, as long as I do not actively seek to undermine the just institutions of my home state--as by committing treason or shooting a cannon into its territory or discharging noxious fumes across its border--my obligation to “support” my home institution is liquidated by my obedience to its laws within its boundaries and my payment of taxes while I reside there.\(^{100}\)

However, murdering one’s fellow citizen on Murder Island much more obviously undermines the hypothetical social contract: members of the society are being killed. Indeed, it seems mysterious why a social contract governing citizen murder of citizens within the territory would not extend to the same acts outside the territory, since our ties to one another as equal citizens seem like a firmer ground for an obligation not to murder than our mere transitory presence in the same territorial space. As I argue below, most of the abortion and assisted suicide circumvention tourism cases share this feature with Murder Island: the goal of prohibiting acts by citizens causing serious bodily harm to citizens.\(^{101}\)

Kreimer also has a second reply in the intranational context: “when a woman travels from Mississippi to California, this theory imposes upon her a duty to ‘support’ California as well” such that “[w]hen California tells her that abortions are a constitutional right, she owes deference to its ‘just judgments’ as well as those of her home”; in addition, “[t]he theory of just institutions provides no obvious way to decide which judgment is correct.” This argument trades on an artifact of the intranational case that seems largely absent for the international one: that in a federal system, one’s allegiance is split between the national and potentially multiple state sovereigns. By contrast, in our case, the U.S. citizen, while on Murder Island, may have actually consented not to violate the destination country’s laws but owes no allegiance to Murder Island to commit murder while there.

Still another response to the voluntariness objection focuses on reciprocity:\(^{102}\) criminalizing our citizens’ activities abroad can be justified by “general” reciprocity in the enjoyment of the benefits of one’s home country citizenship while abroad, including diplomatic protection. Indeed, the reciprocity claim is stronger still because here it is “specific” and symmetrical--a U.S. citizen may not murder or be murdered by another U.S. citizen while traveling abroad.

\(^{100}\) Kreimer, supra note 26, at 929–30.

\(^{101}\) Id. at 930.

\(^{102}\) Cf. Burnham v. Superior Court, 495 U.S. 604, 637–38 (1990) (Brennan, J., concurring) (suggesting that four days of enjoying California’s roads and other amenities was sufficient to justify a California court’s assertion of personal jurisdiction on a non-Californian plaintiff).
In the U.S. case, one could reach quite a different conclusion about the intranational medical tourism case as opposed to the international one for a number of additional reasons. The identification of a citizen of one of a series of coequal states is a much thinner conception for social contract or communitarian purposes than is the identification as a citizen of a nation; however, too strong a notion of state citizenship might undercut national citizenship in an undesirable way for a federalist model of a country like the United States.\textsuperscript{103} The reciprocity-based notion of one’s home country protecting one while traveling abroad is also more strained in the intrastate context. Pennsylvania does not have the same responsibility or capacity to protect its citizen while that citizen travels in California that the United States does when its citizen travels to Mexico.\textsuperscript{104}

Moreover, in the intrastate U.S. context, it might be thought that an explicit part of the vision of our horizontal federalism is that different states can reach different conclusions about the appropriate scope of criminal prohibition in the absence of a national consensus because it is desirable that states should act as laboratories in the sense that Justice Brandeis famous exposited unless and until the national government reaches a conclusion as to the “right” answer.\textsuperscript{105} Such a view may be rooted in the importance of providing opportunities to participate in subfederal democratic law making in areas important to the people or in its ability to make more room for diverse political commitments.\textsuperscript{106}

\textsuperscript{103} See Kreimer, \textit{supra} note 26, at 918, 927. On some contested accounts, the United States has no robust historical tradition regarding criminal activities done in another state, which might also be relevant. \textit{See, e.g., id.} at 925, 935, 936; Mark D. Rosen, \textit{“Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers}, 51 St. Louis U. L.J. 713, 738 (2007). The tradition of criminalizing activities done in other countries may be better established.

\textsuperscript{104} See Kreimer, \textit{supra} note 26, at 923. One colleague usefully suggested to me that the obligations of a citizen to her home country while abroad are like the obligations of individuals who put “away messages” on their e-mail to senders. I like this analogy because I think it nicely captures the notion that the obligations of citizenship fall on a continuum. While there are some duties that as a professor I could reasonably disclaim through an “away message” in my absence (e.g., meeting with groups of students for lunch or moderating a panel of outside speakers), there are other duties that I could not disclaim whether or not I am out of the office (e.g., entering grades for students in a timely fashion). The same is true when a citizen is out of the country; while there are some obligations of citizenship that the state might not reasonably demand its citizens comply with while abroad, the obligation not to impose serious physical harm on a fellow citizen seems to be one a state might reasonably demand, which is why extraterritorial application of these kinds of prohibitions is most justified.

\textsuperscript{105} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.”).

\textsuperscript{106} See Rosen, \textit{supra} note 103, at 749 (listing these “three distinct considerations that have been well rehearsed by federalism scholars”).
contrast, in the international context, no higher authority can tally the local experiments and decide when to step in to end them, and, given that the home country has already reached its own consensus domestically across its territory, it is not clear that the other points transfer.\(^{107}\) To be fair, however, there is also something cutting in the other direction: the costs of Exit are lower in the intrastate context, where one can relocate to another state and still maintain all the perquisites of national citizenship.

Still, both top-down political theoretical reasoning and bottom-up thought experiment reasoning seem to converge on the claim that the United States has very good reasons to extend its murder prohibition to murders by U.S. citizens of U.S. citizens taking place on Murder Island.

iii. When Extraterritorial Criminalization Is Inappropriate.

I have offered a *prima facie* case for extraterritorial criminalization of the crime of murder in my Murder Island hypothetical. Nevertheless in some instances, even as to this example, I think a home country would not want to criminalize the conduct of someone like Ben. In particular, in other work in greater depth I have suggested three types of cases where extraterritorial criminalization would be a bad idea: (1) retaliation, (2) safety valve, and (3) peripheral divergence.\(^{108}\) Here I will just briefly summarize these exceptions.

**Retaliation:** If an extraterritorial prohibition were in place and enforced in our hypothetical case, it is at least possible that prosecuting Ben upon his return to the home country would ruffle some feathers with the Island’s government and cause diplomatic tension. If the threat of retaliation were large enough, perhaps we might think differently. Imagine that Murder Island had nuclear weapons aimed at our capital and that the Island credibly threatened to launch if we prosecuted Ben. For the most extreme deontologists who would view us as duty-bound to punish Ben for what he has done, the fact may be immaterial. For those who have at least some consequentialist leanings for which the goods of retribution and deterrence have to be traded off against other goods, I suspect that we would think the home country should back down in such a case.

Our reactions to intermediate cases—the loss of cooperation with Murder Island’s authorities on hunting down wanted terrorists, significant trade sanctions on goods, the threat that the destination country will apply a reciprocal rule on their citizens’ activities in our country, etc.—are presumably also intermediate. The best we can say is that the

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\(^{107}\) While these distinctions are quite sharp when applied to the United States, they are less clear when applied to a home and destination country that are themselves part of a supranational governance structure, such as medical tourism from one European Union (EU) member state to another. As supranational governance ties between home and destination countries thicken, the distinction between the intra and international cases seems less sharp.

more serious the crime involved, the more serious a threat of retaliation would need to be to sway us *not* to extend the law extraterritorially.

To the extent that actual prosecution rather than the extraterritorial assertion of prescriptive jurisdiction would prompt retaliation, the home country might in theory assert prescriptive jurisdiction but reign it in through prosecutorial discretion rules keyed to the threat of retaliation. Doing so would achieve some of the deterrence value even if the discretion were not frequently used, especially if an “acoustic separation” were maintained where potential offenders would not know how much fear of retaliation would diminish actual prosecution.¹⁰⁹

**Safety Valve**: Second, imagine that the following (admittedly fanciful) state of the world is true: while we as the home country legislature are convinced that murder should be prohibited, our populace’s support of that prohibition is more fickle. It turns out that our well-heeled elites, who are able to spend on elections and lobbying, view murder much more favorably. Were the elites to face an outright prohibition on murder at home and abroad that stood inexorably together, they would direct their resources toward successfully reversing the domestic prohibition as well. However, because they are able to perform murders on Murder Island, they are willing to let the domestic prohibition remain in place and satisfy their desire by travel to Murder Island for the occasional murder.

I call this problem the “safety valve” effect because the existence of circumvention medical tourism acts as a safety valve that releases pressure to eliminate the domestic prohibition. Indeed, this is the exact kind of *modus vivendi* that Pennings and others discussed above advocate for some forms of circumvention tourism.

Again, for consequentialists the case is relatively straightforward: Imagine that, in a world in which the United States criminally prohibits murder but does not extraterritorially extend the prohibition to Murder Island, 100 American citizens are murdered each year. By contrast, if we eliminate the circumvention tourism loophole, the elites would abolish the domestic prohibition as well, and 1,000 (or 10,000 or 100,000) Americans would now be murdered. On standard consequentialist views, the numbers matter, and if our goal is to minimize the number of murders, we should oppose criminalizing circumvention tourism. On deontological views, as I have discussed in greater depth in other work, things are murkier. Further, on some political process theories, the fact that the domestic prohibition would itself be repealed if we forced its extension extraterritorially is not a good reason to oppose that extension.

Of course, it is hard to know when (if ever) safety valve effect will obtain. The transaction costs of lobbying the domestic government to change its position would have

to be lower than the cost of simply changing one’s citizenship to a country that does not prohibit the act; one has to know and be able to coordinate one’s desire to change the law with other like minded members of the elite far enough in advance of one’s desire to actually do the activity (which, in the cases of abortion and assisted suicide tourism seem less likely to obtain). Moreover, it is conceivable that allowing the procedures extraterritoriality might increase pressure rather than release it -- if enough citizens are travelling to permissive regime and becoming familiar with the way they function, this might undermine domestic home country support for the prohibition.110

Peripheral Divergences: The version of Murder Island I presented has a “core” or “central” conflict between the home country and the Island’s murder rule: whether murder will be criminalized vel non. We can imagine more “peripheral” differences too. Suppose that Murder Island’s rule on murder is just like the United States’ but with one exception: to succeed on self-defense defense, the United States requires an individual seeking to use the defense to take an opportunity to retreat before the use of deadly force, while the Island has carved out an exception to that rule when the setting is the physical home, such that one is under no obligation to escape one’s home.

Suppose that U.S. citizen Ana Lucia Cortez—despite having an opportunity to retreat—fatally wounds U.S. citizen Shannon Rutherford after Shannon attacks Ana Lucia in her vacation home on the Island. While the act would be criminal in the United States, it is explicitly excluded from criminal liability on Murder Island. Should the United States seek to prescriptively extend its criminal prohibition on murder to Ana Lucia in this instance? The intuition here is quite different from the starting Murder Island case for two related reasons.

First, I have not asserted that Murder Island has no interest in the United States refraining from criminalizing U.S. citizen’s actions in these cases; where the difference was between murder being lawful or not lawful, this interest was not enough to motivate the United States to refrain from protecting its citizen abroad. Where the difference is smaller, a detail in largely sympatico criminal schemes of the two jurisdictions, the home country is more likely, out of comity-like principles, to tolerate that difference. By “core” and “peripheral” here, I mean not just to invoke some notion of proportion but also of the type of divergence. Two countries may be committed to the same moral goals for their criminal law—to deter and punish the same acts—but differ in some of the details in how they think the criminal law should effectuate these goals.

110 See, e.g., Kimberly M. Mutcherson, Open Fertility Borders: Defending Access to Cross-Border Fertility Care in the United States, in THE GLOBALIZATION OF HEALTH CARE: LEGAL AND ETHICAL ISSUES (I. Glenn Cohen ed. 2013) 148, 161 (“If it is right that countries feel less constrained to liberalize their laws because they know that their citizens can access care elsewhere, in keeping with the earlier discussion about accessing CBFC as an act of resistance, the United States can think of its open borders as a safe haven for those who would be denied fairness and equality in their countries of origin.”).
Second, extending U.S. law to an assailant’s actions might in this case put U.S. citizens traveling abroad in the difficult position of having to evaluate the citizenship of their assailants and trying to conform their self-defense behavior to conflicting rules. That was, of course, true in the initial Ben-John version of Murder Island as well, but because in that scenario the home country disapproved of the activity (murder simpliciter) without reservation, imposition of that potentially chilling obligation did not seem problematic, unlike in the self-defense case.

To amplify this last point, the initial Ben-John variant of Murder Island (and abortion and assisted suicide) differ from the more standard kinds of extraterritoriality issues, such as wage and hour laws. In these other cases, there is a claim (facetious or otherwise) that, when local law permits an activity that the home country’s law prohibits, home country citizens will be put at a competitive disadvantage if they have to conform their behavior to the home country’s laws while doing business abroad. For example, if I need to pay my workers U.S. minimum wages or how to U.S. work hour restrictions for my factories abroad, I will not be able to compete in that textile market with the locals who can conform their behavior to their local law. This is a serious claim, even if we are not ultimately moved by it. By contrast, if a U.S. citizen says “I am put at a competitive disadvantage in committing murder of U.S. citizens on Murder Island compared to the Islanders,” that does not bother us because we believe it is wrong for the citizen to commit murder to begin with. The Ana Lucia-Shannon self-defense variant, by contrast, muddies the water and presents a case where, even as to murder, the “competitive disadvantage” argument has some teeth.

To close this discussion of the third exception, the more peripheral the divergence between the home and the destination country’s criminal law on the issue, the more apt we should be to defer to the destination country and refrain from extraterritorial application. This is especially true when we view the destination country’s interest as strong or where there are costs to our citizens of being governed by diverging laws that we think the citizens ought not to bear.

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I have used Murder Island to show that a home country with a criminal prohibition on murder ought to criminalize the murders of its citizens by its citizens on the Island, notwithstanding that the Island’s own law would render the murder entirely lawful, subject to some exceptions. Now I want to show how the philosophical analysis of Murder Island can help us better understand the real world cases of travel abroad to circumvent prohibitions on access to abortion and assisted suicide.

b. Travel for Abortion.

Having argued for extraterritorial criminalization in the case of Murder Island, my strategy in this section will be to examine in what ways travel for abortion is like and unlike the Murder Island hypothetical. Let us stipulate for the present (subject to some further nuances below) than Ireland prohibits abortion because it views fetuses as persons
and abortion as akin to murder. Rather than Ben killing John, here we have a citizen mother terminating the life of a fetus, which Ireland views as murder against the fetus that Ireland views as another citizen person (more on that point in a moment). In abortion tourism, as in Murder Island, the “victim” has not gone abroad to consent to the activity performed on it; indeed, one might think the fetus’ presence there is, if anything, less voluntary than in the prior cases. Moreover, just as the murder of a U.S. citizen abroad has effects within the United States, so too the termination of a fetus has effects within Ireland—at the very least, one fewer Irish person will exist.

One might respond that Ireland is mistaken, as a moral matter, about whether fetuses are persons and whether abortion is murder (in the sense that moral and legal condemnation is warranted for some killings). Once again, however, in this chapter I am not pressing that question but instead asking if the home country views its domestic prohibition as lawful and valid, then what should follow for its regulation of its citizens’ conduct abroad? I discuss below the possibility that the home country’s knowledge about the contestability of the norm within the home country should make a difference.

If the analogy Murder Island holds, then it seems that Ireland should extend its prohibition extraterritorially, to use one of the real-world examples discussed above. To defeat that claim one must argue that there is a morally relevant distinction between travel for abortion tourism and Murder Island. I will examine four such distinctions: motivations for criminalization other than protecting harm to fetuses, victim citizenship, the contestability of the underlying domestic prohibition, and timing. However, I ultimately find none of these distinctions persuasive.

i. Justifications Other than Harm to the Fetus.

The most straightforward justification for abortion criminalization is that the fetus is a person (or at least merits harm-protection rights associated with personhood) and therefore abortion is equivalent (or at least close) to murder.\(^{111}\) Alternatively, one could believe that fetuses are not actually persons but are sufficiently person-like that allowing their termination will cause our society to devalue life and put actual persons at risk.\(^{112}\) One could also potentially justify anti-abortion laws as “woman protective,” a view that has gained more traction in U.S. jurisprudence after Justice Anthony Kennedy’s opinion in \textit{Gonzales v. Carhart}, which banned a particular abortion procedure because “[w]omen who have abortions come to regret their choices, and consequently suffer from [s]evere

\(^{111}\) See, \textit{e.g.}, Michael J. Sandel, \textit{Justice: What’s the Right Thing to Do?}, 251 (2009) (“[I]f it’s true that the developing fetus is morally equivalent to a child, then abortion is morally equivalent to infanticide. And few would maintain that government should let parents decide for themselves whether to kill their children.”).

\(^{112}\) Justice Kennedy’s majority opinion in \textit{Gonzales v. Carhart} makes this point as to the dilation and extraction, or so-called “partial birth abortion,” procedure. 550 U.S. 124, 158 (2007) (“No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life.”).
depression and loss of esteem.” This justification has, of course, been subject to significant criticism, but, as I said before and as to all the potential justifications I am canvassing in this chapter, we are assuming they are valid and lawful from the home country’s perspective to examine what follows therefrom.

If woman-protective rationales underlie the home country’s prohibition on abortion, then the prohibition is either best understood as being aimed at maintaining a particular view of women’s roles and capacities in society or at protecting women notwithstanding their consent to the procedure. The latter tracks my discussion of the assisted suicide case later in this chapter, so I will postpone my discussion until then. The former tracks my discussion of one of the reasons to regulate reproductive technology use abroad by one’s home country citizen, which is discussed in-depth in the next chapter, as well as corruption arguments deployed in favor of prohibiting assisted suicide, which are discussed below. Therefore, I will postpone my discussion of these kinds of reasons for outlawing abortion until those sections and, in this section focus exclusively on fetal-protective justifications. Since the vast majority of arguments for criminalizing abortion are made on these fetal-protective grounds analyzing the issue through this lens is a rough approximation of the entire lay of the land.

ii. Victim Citizenship.

Another possible distinction from FGC and Murder Island pertains to victim citizenship, one which again echoes conflict-of-laws principles. As I noted above when discussing the international law question of passive personality jurisdiction based on fetus citizenship, one might argue that fetuses are not “citizens” of the home country for this purpose. While the state may often appear to be protecting the interests of its unborn citizens, these prohibitions might be overdetermined because they could also be justified in terms of territoriality—a desire to control the conduct of abortion within a state’s territory rather than to protect its citizens per se.

The matter is still more complex because many of the usual trappings of citizenship—the bearing of reciprocal obligations, the potential to Exit, and others—are not yet actualized in the case of fetuses, although that is also true of young children and the severely mentally disabled. Baldly claiming an interest in the fetus as a potential citizen proves too much in that the eventual child might renounce citizenship, and many existing adults are potential citizens for whom we would not give the home country preference in terms of regulating.

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113 Gonzales, 550 U.S. at 183 (Ginsburg, J., dissenting) (internal quotation marks omitted).
114 One need not adopt the view that being a citizen for these purposes entails being a citizen for all purposes—for example, being counted in the census or paying taxes. Cf. Peter Singer, All Animals Are Equal, in ANIMAL LIBERATION 1, 1–22 (2d ed. 1990) (making a similar point as to nonhuman animals).
115 One might also try to make something of the fact that if the destination country recognizes jus soli citizenship conferral, then had the woman given birth to the baby in
Lurking in the background is whether, in declaring a previability fetus a citizen for normative purposes, we also concede that it is a person in moral or legal terms. The fact that our hypothetical home country, with a criminal prohibition motivated by the view that abortion is murder, presumably does view the fetus at this stage as a person strongly indicates that the home country will also view the fetus as a citizen.

Further, the idea that a home country’s citizenship-type interest could precede, rather than follow, legal or moral personhood, even if that initially seems a little awkward, as I have argued in depth elsewhere.  

Even if one decides the fetus is not a home country citizen for these purposes, there is still a strong argument that the home country should extend its prohibition extraterritorially, although the argument is admittedly somewhat weaker because there is no longer a double coincidence of citizenship.

If the fetus is not a home country citizen, we could think of it as a kind of stateless person—persons not considered to be citizens of any country of which there are an estimated twelve million in the world today—in terms of the home country’s interests. To examine the question, let us return to Murder Island, but consider a different victim. Suppose Ben instead kills Richard Alpert, a stateless man not residing in and without any ties to the United States or any other country, after bringing him to Murder Island. Do we believe the United States should punish Ben for this action, knowing that if it does not prosecute its own citizen for the murder neither will anyone else? I think most of us have the intuition “yes.”

Why reach that conclusion? If Ben deserves punishment as retribution because he has done something we view as wrong, it seems immaterial that his victim is a stateless person. Our justification for punishing murder is that “absent a ground for excuse, murder (not only the murder of U.S. citizens) is wrong,” and on that rationale, it is not relevant that the murder took place on Murder Island.

On reflection, though, it is unclear that this claim has much argumentative purchase. Where recognized, such jus soli citizenship would add a second citizenship to the jus sanguinis citizenship from the home country. The home country’s protection of its citizen is not reduced; rather, a conflicting citizenship claim is added. More importantly, given that the mother is traveling to the destination country to terminate her pregnancy, not to give birth, it is unclear what importance it has that the destination country would have a stronger interest claim had she given birth there. In any event, as I explain in the main text, even if the fetus is not considered a citizen of the home country, there is a strong argument for extraterritorial application.

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116 See Cohen, supra note 7, at 1366-69.
If deterrence, not retribution, is (at least partially) the motivation for punishment, we can ask whether our goal is to deter our citizens murdering others or merely to deter our citizens murdering other U.S. citizens? I think it is the former.

One way to get at this is through a thought experiment. Imagine the following facts are true: if U.S. citizens are allowed to murder stateless individuals but not U.S. citizens on Murder Island, forty U.S. citizens are murdered while fifty stateless individuals are murdered; if U.S. citizens are prohibited from murdering either group abroad fifty U.S. citizens are murdered and ten stateless individuals are murdered. If we cared only about deterring the murders of our own citizens, we should prefer the first because it is pareto superior as to our citizens, even though much worse in terms of the total number of murders, but our intuitions are to the contrary.\(^\text{118}\)

Thus, on either retributivist or deterrence grounds, the home country that prohibits murder has a strong interest in punishing a citizen who commits murder against a stateless person on Murder Island. Under communitarian or liberal principles, the ties of U.S. citizenship seem strong enough to make Ben answerable to the United States for his crimes against a stateless person. It is the perpetrator’s, not the victim’s, ties to the home country that do much of the work, at least in cases where the victim is a stateless person (rather than, say, a member of the destination country).

Therefore, whether or not we view the fetus as a citizen, a state that views abortion as akin to murder should extend its domestic criminal prohibition of abortion to circumvention tourists, although it has stronger reason to do so if it views the fetus as its citizen.

iii. Contestability of the Norm, Exit, and Exit-Light.

Jurisdictions disagree on whether to criminally prohibit abortions at all, and if they do prohibit them, at what stage of fetal development, using what techniques, etc.\(^\text{119}\) Moreover, even in a home country, the abortion prohibition may be controversial. Should the contestability of the norm distinguish abortion tourism? I have already afforded some role to the contestability of the norm in the home country through the safety valve exception, but is there a further role for contestability to play? As I suggested above, both Pennings and Huxtable have treated this kind of contestability of the norm as important in determining whether criminal prohibitions should be extended extraterritorially for abortion and assisted suicide. Pennings advocates for notion he calls “external tolerance,”

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\(^{118}\) For some, I may need to increase the fifty murders of stateless individuals to 100, 1000, or 10,000 to pump the intuition. If the variable in that slot matters, it suggests that while we have an interest in deterring the murder of stateless individuals, it is not equal to the interest we have in deterring the murder of our citizens. That is consistent with my political theoretical claim that in the absence of the double coincidence of citizenship, our interest is weaker as to the stateless individual but still present.

\(^{119}\) See Kreimer, supra note 26, at 907–13 (discussing some differences among domestic and international abortion regulations).
which he applies to abortion and assisted suicide, wherein “a certain norm is applicable and applied in society as wanted by the majority while simultaneously the members of the minority can still act according to their moral view by going abroad,” and suggests that “[a]llowing people to look abroad demonstrates the absolute minimum of respect for their moral autonomy.”

As with travel abroad for the Female Genital Cutting of minors, which I have written about elsewhere, we can understand the demand made by those who seek to lawfully travel abroad to receive an abortion as a kind of accommodation claim. A state that has criminalized abortion domestically demands that “as a citizen, you are required to conform your behavior to our criminal prohibition by avoiding abortion and, if you are unwilling to do, so you may take up your Exit rights by renouncing your citizenship.” The woman seeking an abortion counter demands: “accept that this is a personal and difficult decision and one which, despite the existence of a criminal prohibition, our society is deeply divided on and honor my autonomy and that moral division by providing me an exemption to your otherwise applicable criminal prohibition.” The state refuses. This is just to say that despite the existing moral disagreement, the home country in question has criminalized abortion.

We can conceive of circumvention tourism as representing an intermediate or second-best counter demand on the part of the cultural defender: “I will refrain from engaging in the prohibited activity on your soil, but allow me at least to undertake it in another state where it is permitted.” Instead of imposing the huge cost of full Exit to undertake this activity, the cultural defender must only incur the lesser cost of travel in order to be able to perform FGC on the child. I will call this “Exit-light.”

This thinking would give a reason why the state could consistently prohibit the practice at home but not impose its criminalization extraterritorially. I do not, however, find it very persuasive.

For one thing, it would result in a kind of masking where what some might think of as an instance of child abuse or gender subordination continues to happen but we merely allow ourselves to avoid confronting it by making sure it happens outside our view.

Second, the accommodation privilege seems to be distributed in an at least partially morally arbitrary way that tracks whether the individual has the financial means to travel to the destination country at the right time. If we were serious about accommodation, we in theory should instead lottery state support to travel abroad for abortion among those who cannot afford, or lottery an equivalent number of permits to do it within our

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120 Pennings, supra note 76, at 340.
121 Cohen, supra note 7, at 1356–60.
122 Of course, this point has more force the more difficult or expensive it is to travel to the destination country. Compare flying from Bogotá to Switzerland to driving from Toronto to Buffalo in this regard. The fact that only some people can afford to use medical tourism extends beyond criminalized prohibitions as well.
territory. If this seems problematic, as I think it would to many, that might suggest that what lies behind the initial accommodation is an illusory state action/inaction distinction; in fact, the state is very much acting when it refuses to extend its domestic law extraterritorially.

Finally, when the interest is in preventing harm to a person that has in no way consented, and the state has decided that this interest outweighs the demand for accommodation within its territorial space, the claim for an Exit-light approach of allowing circumvention tourism seems hard to justify. From the point of view of the fetus that would suffer termination it seems irrelevant that the abortion took place in a destination country rather than the patient’s home country. This is not to say it makes no difference that the action took place on the destination rather than the home country’s soil, but that the comity-like interests that would ordinarily push for deferring to the destination country’s laws in this regard seem inadequate when we are discussing serious bodily harm done by one of our citizens to another who has not meaningfully consented.

To buttress this, consider another common example taken from the debate between cultural defenders and liberals as to religious accommodation: suppose that a fourteen year old U.S. citizen girl who has lost her virginity is taken by her U.S. citizen father to a country where honor killings are treated as falling within a justification to murder, and she is killed there. If the United States will not recognize the need to maintain this justification for killing at home, the United States should not, in the name of cultural accommodation, refuse to criminalize the act when it takes place abroad. This fourteen-year-old girl, by virtue of her membership in our society, deserves the protection of our laws against murder by her citizen relative whether she is at home or abroad. For a country that believes that abortion is murder, why should things be any different for abortion? Indeed, one might think the case for accommodation is weaker with abortion since there is no religious or cultural claim made by the person who wants to travel abroad, so no plausible claim to “dual citizenship” in a secular national and religious pan-national community.

Of course, one major disagreement between those countries that do and do not criminalize abortion is whether fetuses are persons. But once the home country has decided fetuses are persons and enforces its criminal law to that effect domestically despite contestation, it seems strange to think that accommodation requires a different result extraterritorially? Just as it seems strange that we could believe that a citizen of African descent could cease being a person (as to the protection afforded by our law against murder by his fellow citizens) by leaving our territory, the same should be true regarding fetuses. Indeed, one would need a kind of “just-so story” to sensibly ban

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123 Until recently this was true in several Arab countries, with the details varying. See Lama Abu Odeh, Honor Killings and the Construction of Gender in Arab Societies, 58 AM. J. COMP. L. 911, 913–16 (2010).
124 Again, no one would countenance a kind of abortion lottery through which those who “win” are exempted from territorial application of the law or, worse yet, receive payment from the state to travel abroad.
abortion at home but not abroad to accommodate contestation: we are exactly sure enough of the personhood of fetuses to criminalize abortion at home but not quite sure enough to prevent the same act by our citizens abroad given the interests of the foreign state in being a haven for women who want to exercise this autonomy interest.

Does it matter if the home country’s legislation is the result of an amalgam of views, where a portion of the population is sure fetuses are persons, a portion is sure they are not, and the determinative center is unsure but thinks it just possible enough that a criminal prohibition is warranted? With this uncertainty, the home country may be in no hurry to go off and proselytize destination countries to change their abortion law. It is less clear, though, why this divergence of opinion would prompt the home country to defer to the destination country’s view on abortion as to abortion by home country citizens that take place abroad – and by deference here I mean in the form of the Exit Light solution. We would not expect deference with similar uncertainty about the moral status of other groups (say, the profoundly mentally disabled or one-day-old infants).125

To echo a point I made earlier, the international context differs from the U.S. intrastate context, where we view divergences in the law as Brandeisian experiments that will one day be resolved in favor of the “right” answer by a federal government.126 At the horizontal level, there is no obvious policy learning. If the question is the personhood of the fetus or the balance of conflicting rights claims between mother and fetus, it is not clear what can be learned from the destination country’s experience. Even in elements of the abortion debate where a home country could learn from other countries—for example, the risks of back-alley abortions when abortion is criminalized and the likelihood that women will seek them—it need not allow its citizens to travel abroad and circumvent our domestic laws in order to get that kind of learning. It can observe these lessons by looking at the destination country’s experience with their policy choice as to their own citizenry, and, if anything, the travel of its citizens into their legal culture muddies, rather than clarifies, the issue. If a home country learns from observing the destination country that they have the abortion issue “right,” it should change its law domestically and extraterritorially; if not, it should prohibit both.

Again, this is not to say that the contestability argument is a nullity. When faced with conditions of uncertainty or pervasive disagreement, home countries often “split the difference” to some extent in their domestic criminal law, for example, by building in some exceptions or defenses or by maintaining a criminal law on the books but investing

125 Cf. Singer, supra note 114, at 17–20 (questioning the personhood of children in vegetative states).
126 For cases in which both the home and destination countries share a supranational governance structure, such as travel from one EU member state to another, the argument is weaker. Even here, though, we imagine Ireland acting (perhaps counterfactually) in the shadow of doctrinal discretion, not restriction. The supranational regulator may be free to step in to resolve policy divergences between member states (that depends in part on the extent of its power), but, until it does so, it is not clear that this is really so different from the situation in which there is no supranational regulator.
few resources into its enforcements. Exit-light can be thought of as consistent with these practices as an accommodation device, though it is a particularly unappetizing one:

It benefits only select individuals based on wealth, expertise, and ability to travel. Unlike the use of prosecutorial discretion or built-in defenses and exceptions, Exit-light is not a flexible way of keying enforcement to the gravity of harm being done. Instead, it keys enforcement to where the harm is done, a facet that seems largely orthogonal to the wrongness of abortion. For those who hope that the confrontation with more liberal destination country norms will help educate those in the home country about why they are mistaken in their choices, the secretive do-it-but-don’t-tell-me nature of circumvention tourism impedes that goal and likely forestalls deeper reconsideration through the safety valve dynamic I discussed above.

While I reject the notion that contestability of the norm justifies Exit Light accommodations for abortion prohibitions premised on preventing harm to fetuses, I do not mean to suggest this will be true for every kind of circumvention tourism. If one really understands abortion as the murder of a person, though, as many home countries that outlaw abortion do, even the attractive possibility of accommodation must give way.

Yet, even as to abortion, some of the exceptions discussed above may continue to apply. In particular, whether divergences between the home and destination country laws are core or peripheral may have some role to play. If the clash were between whether to permit abortions or not, the obligation to criminalize extraterritorially in spite of the destination country’s claims would be at its zenith; the obligation seems weaker if the clash were regarding which abortion procedures would be available.

iv. Timing.

A different argument for distinguishing abortion tourism from the Murder Island reasoning stems from the lead time in which one knows one will want to use the service. True Exit through renouncing citizenship may be impossible from the time pregnancy is detected to the time at which it is still possible to have an abortion under the law of the destination country. Thus, the home country may be offering a false choice in the trilemma: Exit, do not have the abortion, or have an abortion and face the penalty—but only the latter two of those options may be realistically available.

Even if true, it is not entirely clear what relevance the timing issue ought to have. Return for the moment to Murder Island. Imagine that U.S. citizen Charles Whitmore, a big-time financier, usually travels with a retinue of bodyguards but dismisses them from his service for one long weekend when he vacations on Murder Island. U.S. citizen Benjamin Linus, who has wanted to kill Whitmore for a long time, learns of this fact only two weeks before the vacation such that he lacks the requisite time to renounce his U.S. citizenship before committing the murder. It does not seem that the United States should fail to extend its prescriptive jurisdiction to his murder just because Ben lacked sufficient

127 See Mutcherson, supra note 110, at 161.
time to disclaim his citizenship. If that is right, it is not clear why things should be different with abortion.

Here is an argument for that same conclusion from the political theoretical vantage point: on social contract theories, it cannot be that the obligation one has undertaken is what contract law terms an “[i]llusory promise[”]. 128 “I will refrain from legal access to abortion unless I find myself in need of it.” A contract is meaningful precisely because it binds us in spite of our later preference. 129

One might respond that abortion is different and the experience of pregnancy gives rise to a kind of changed-selves argument that alters its waiveability even for social contract theory purposes. I have explored this question in other work 130 but, for present purposes, I note that accepting this changed-selves argument implies that the domestic prohibition on abortion is also itself improper, and thus it does not explain why one might accept a different course only extraterritorially.

I am thus ultimately not persuaded by the timing argument. For those who remain unconvinced, I think the argument at most pushes us to a different kind of compromise: to escape the penalty associated with the unlawful act, the perpetrator is allowed to bindingly commit to Exit before the activity even if Exit will only actually occur after the fact. Thus, the individual who cannot accomplish Exit in a timely fashion before the abortion would be empowered to renounce citizenship after the abortion as a way of avoiding the criminal penalty. This regime would replace “Exit” with “Exile” in the choice set “Exit, refrain, or be punished.” 131 While theoretically pleasing, I am not sure this would work very well in practice.

In sum, most countries with abortion criminalization do not extend those prohibitions extraterritorially. My conclusion above is that international law would not prevent them from doing so. My conclusion in this section is that, as a normative matter, assuming these countries’ domestic prohibitions are valid and lawful, there is a strong argument that these countries should alter their laws to criminalize abortions by their citizens abroad.

129 The contract would not be illusory if the promise was to renounce one’s citizenship after-the-fact if one undertook the act; that would be a contract of mutual consideration. It is for that reason that in this instance I am more open to the notion of just such a scheme in the form of Exile as I discuss.
131 It is possible that a form of Exile is already indirectly accomplished in a system that affords extraterritorial prescriptive but not enforcement jurisdiction in that the individual who has committed the crime abroad may avoid punishment by never returning to the home country.
c. Travel for Assisted Suicide.

Should the United Kingdom have extended its domestic prohibition on assisted suicide to its citizens who assisted their friends or family (also citizens) to die in Switzerland, where such assistance is lawful even for nonresidents? Note that this issue lies behind the Purdy and Pretty cases discussed above (even if those cases actually turned on far narrower and more doctrinal issues) and behind the policy decisions of the vast majority of home countries that do not criminalize assisted suicide extraterritorially.

As with abortion, my approach will be to examine in what ways this case is like and unlike Murder Island. I will once again begin by unpacking the possible justifications for the domestic prohibition and to examine whether they justify extraterritorial extension to circumvention tourists. I begin by dividing the arguments in two, those concerned with protecting the patient who seeks to end his or her life and those concerned with changes in attitudes of society more generally.

i. Concerns about Protecting Patients and Consent.

One prominent reason offered for outlawing assisted suicide domestically is the desire to protect vulnerable patients whose lives will be terminated. Biggs and Jones make this point explicitly about the U.K. prohibition, noting that it was “clearly designed to safeguard those who might be vulnerable to coercion from being persuaded to kill themselves at the behest of someone who could benefit from their death.”132 At first glance, that might seem quite analogous to Murder Island (and at least for those who believe in fetal personhood the abortion case) in that the state’s interest is in preventing the killing of one of its citizens by another of its citizens. However, at least in the cases of mentally competent adults, the presence of consent to the end of one’s life might be thought to alter the analysis.

Should the possibility of consent lead us to a different conclusion?

Some, such as the Vatican, argue that in the domestic context, consent is irrelevant to negating the wrongfulness of the act of terminating the patient’s life: “no one is permitted to ask for this act of killing, either for himself or herself or for another person entrusted to his or her care, nor can he or she consent to it, either explicitly or implicitly. [N]or can any authority legitimately recommend or permit such an action. For it is a question of the violation of the divine law, an offense against the dignity of the human person, a crime against life, and an attack on humanity.”133 Others argue that consent is meaningless because the patient is being manipulated or coerced into choosing death, subtly or grossly,

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132 Biggs and Jones, supra note 29, at 168.
benignly or maliciously. Still others press a claim of false consciousness—the patient’s desire to die results from temporary depression or cognitive narrowing, and the unavailability of assisted suicide helps the patient to clarify what he or she “really” wants.

Once again, my aim is not to evaluate this dialectic but to ask what should follow about criminal prohibition of circumvention tourism on these patient-protective justifications.

Let me take each of these three variants in turn.

If the underlying reason for rejecting consent in the domestic context is that it is irrelevant in negating the wrongfulness of the act, then that reasoning would seem to hold irrespective of whether the assisted suicide occurs at home or abroad. The strongest argument to the contrary would incorporate what was said above in the abortion context about the contestability of the norm at home—the possibility of travel as Exit-light—but then press the way in which the assisted-suicide case is premised on paternalism and not the Harm Principle. If one thinks, as I do, that paternalism is a weaker basis for justifying criminal prohibition than the Harm Principle, then perhaps there is an argument for allowing Exit-light when paternalism underlies a contestable prohibition. Whether this argument would be persuasive, I think, will depend on (1) how attracted one is to paternalism as a moral basis for criminalization, and (2) how good the consent is. The second is a matter I discuss below while the first is more a general matter of criminal law theory. But if a home country believed that paternalism was as good a reason to criminalize conduct as a pure Harm Principle justification, it is unclear why it should make a difference that the act was committed abroad.

If the underlying reason for rejecting consent is fear of pressure or manipulation, then the home country has good reason to criminalize the act abroad. Indeed, it may seem that assisted-suicide tourism is worse in this regard because the state cannot use its existing laws relating to the supervision of its physicians (including licensure and disciplinary rules) as a bulwark against these undue influences. Because more of the assisted suicide takes place outside the gaze of the home country’s regulatory authority, the case for prohibition is stronger with citizens abroad rather than at home.

In the opposite direction, if false consciousness is the concern, there is at least one way in which assisted-suicide tourism may be less problematic than assisted suicide in the home country. To use an analogy to contract theory, we can think of the criminalization of

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134 See, e.g., James L. Underwood, *The Supreme Court’s Assisted Suicide Opinions in International Perspective: Avoiding a Bureaucracy of Death*, 73 N.D. L. Rev. 641, 669 (1997) (“The doctor can manipulate the determination that the patient’s condition is hopeless by controlling the information presented to consultants.”).

assisted suicide as a “default rule,” and the relevant question is what the “altering rule” should be to make that conduct no longer criminal.\footnote{Cf. Ian Ayres, \textit{Menus Matter}, 73 U. CHI. L. REV. 3, 6 (2006) (exploring the altering rule idea); I. Glenn Cohen, \textit{Protecting Patients with Passports: Medical Tourism, Medical Tourism and the Patient-Protective Argument}, 95 IOWA L. REV. 1467, 1532–33 (2010) (suggesting travel as a kind of altering rule for medical malpractice liability de facto waivers).}

In the domestic case, the person assisting suicide offers the patient’s consent as the altering rule that should make his or her assistance lawful, but the state rejects the offer. In the tourism case, both the consent and the patient’s travel are offered as altering rules. We might think of the time, expense, and preparation involved in traveling as somewhat analogous to the role played by formalities such as the writing requirement in Lon Fuller’s classic treatment of the cautionary function of contract law—that it forces the parties to undertake a minimal amount of reflection before being bound by a contract.\footnote{See Lon L. Fuller, \textit{Consideration and Form}, 41 COLUM. L. REV. 799, 800 (1941).}

This is a valid distinction between the domestic and international case, but I think it is a fairly thin reed on which to hang such a strong difference in the treatment of the domestic and extraterritorial practice, especially when, domestically, the state could achieve far more of a cautionary function by building requirements such as psychological evaluations and waiting periods into its \textit{domestic} regulation. Moreover, if the objection is false consciousness rather than mere lack of reflection, it is unclear that this “speed bump” is really responsive.

In sum, there are possible distinctions between the imperative to criminalize conduct domestically versus abroad in the assisted-suicide case on patient-protective grounds relating to consent, but they seem to be a fairly weak ground on which to justify differential treatment of the two cases; I think the better view is that, if patient protection is the motivation in the home country for criminalization, the home country has good reason to extend criminalization to the circumvention tourist as well.\footnote{I will note, though not fully resolve, an additional complication. While the perpetrator citizen who assists in suicide will presumably be able to effect Exit and renounce citizenship, that may not be true of every “victim” citizen who wants assistance, in that patients with disabilities may be unable to renounce their citizenship. In such a case, if there was also meaningful consent to the Exit by the “victim” but the inability to execute it, perhaps the analysis should be different? I would be more inclined to argue that, in such a case, the state should assist the patient’s Exit from citizenship, not render lawful assisting the patient’s exit from life while treating the patient still as a citizen, but the question seems somewhat close.}

ii. Concerns about Changes in Attitudes: Corruption of the Profession, Slippery Slopes, and the Devaluation of Life.
Aside from patient-protective arguments, there are a series of other arguments often raised in favor of criminalizing assisted suicide that focus on “victims” other than the patient who will receive the assistance. These arguments were nicely catalogued by the U.S. Supreme Court in its decision in *Washington v. Glucksberg*, a case in which it rejected a constitutional right to assisted suicide: First, the state has an “interest in protecting the integrity and ethics of the medical profession” because “physician assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time honored line between healing and harming.” Second, the state has an interest in “protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and ‘societal indifference,’” with the prohibition on assisted suicide “reflect[ing] and reinforc[ing] its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person’s suicidal impulses should be interpreted and treated the same way as anyone else’s.” Third, “the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia” such that “what is couched as a limited right to ‘physician assisted suicide’ is likely, in effect, a much broader license, which could prove extremely difficult to police and contain.”

Each of these is a type of what I have elsewhere called “corruption” or “attitude modification argument.” Corruption arguments claim that allowing a practice to go forward will do violence or denigrate our views of how goods are properly valued. As we will see in the next chapter, these arguments are frequently invoked as justifications for domestic reproductive technology prohibitions, especially for laws prohibiting compensation for selling sperm, egg, or surrogacy services. As I noted above, there is also a less prominent discourse arguing for abortion criminalization based on abortion’s effect on our valuation of the lives of actual (undisputed) persons rather than its effect on the fetus itself. What I say here is also responsive to a case where that justification underlies the domestic prohibition on abortion.

a. Extraterritoriality and Corruption Justifications Generally.

It is important to distinguish what I have called “consequentialist” and “intrinsic” corruption arguments. Consequentialist corruption justifies intervention to prevent changes to our attitudes or sensibilities that will occur if the practice is allowed, for

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140 Id. at 731–33.
example, that we will “regard each other as objects with prices rather than as persons.” \textsuperscript{143} Margaret Radin’s worry as to baby selling is representative of this strand:

If a baby is the object of a market exchange, there may be an effect on that child’s self conception when he or she grows up. You know your parents paid money for you, maybe enough to have bought a BMW, but not enough to have bought a house. . . . [K]ids talk to each other. . . . It’s possible, in other words, that this way of thinking about children could spread. . . . The question to ask is: How bad is this risk? If the risk is not very bad, then we could buy and sell babies all the time, and we could still have a non-market conception at the same time with the market conception and neither one would drive each other out. \textsuperscript{144}

This is a contingent critique: children may find out how much their parents paid for them and this knowledge may spread in society, undermining the nonmarket conception. By contrast, the more intrinsic form of the objection focuses on the “inherent incompatibility between an object and a mode of valuation,” where the wrongfulness of the action is completed at the moment of purchase irrespective of what follows; the intrinsic version of the objection obtains even if the act remains secret or has zero effect on anyone’s attitudes. \textsuperscript{145}

This distinction is important for extraterritoriality. If consequentialist corruption is the worry, then the home country has a stronger reason to prohibit the activity at home than abroad because there is likely a much stronger attitude-modifying effect. The domestic experience is “in your face” in a way that the extraterritorial circumvention is not, and one can ascribe the practice to “the Other.” \textsuperscript{146}

A contemporary example is offered by the Netherlands, which permits a regulated form of prostitution. \textsuperscript{147} Home countries that prohibit prostitution domestically do not typically extend their criminal law extraterritorially to cover it. The degree of corruption that occurs by a home country’s failure to criminalize its citizens engaging in prostitution in the Netherlands seems several orders of magnitude smaller than the degree of corruption that would occur if the home country made engaging the services of a prostitute legal domestically. Of course, there are many important differences between prostitution and the other medical practices I am discussing, but the comparison is meant simply to show

\textsuperscript{143} Scott Altman, \textit{(Com)modifying Experience}, 65 S. Cal. L. Rev. 293, 294–97 (1991) (calling these “modified-experience arguments”).

\textsuperscript{144} Margaret Jane Radin, \textit{What, If Anything, Is Wrong with Baby Selling?}, \textit{Address at the McGeorge School of Law} (Mar. 4, 1994), \textit{in 26 Pac. L.J.} 135, 144–45 (1995).

\textsuperscript{145} Cohen, \textit{The Price of Everything}, supra note 141, at 692 n.13.

\textsuperscript{146} The same intuition may underlie many parents’ attitude towards forbidding or punishing their children’s behavior—the “not in my house, mister” sort of refrain under which parents will turn a blind eye to their children’s activities out of, but not inside, their turf. Such a distinction might track the seriousness of the offense or its publicity.

that consequentialist corruption may be like a ripple on a pond—weakening as it radiates outwards from its point of contact. While the ripple analogy suggests geographic proximity, the extent of consequentialist corruption might instead turn on cultural (dis)similarities between the home and destination country. These are empirical questions, and hard ones to test, but, if validated, they may in principle give a reason why a home country should, on this justification, treat the domestic and extraterritorial cases differently.

However, there are at least two complications. First, if the home country sets a low enough threshold regarding how much attitude modification it is willing to risk, then even the lower amount stemming from circumvention tourism may be sufficient to justify extraterritorial criminalization. Second, to continue with the prostitution example for a moment, the United States may have an interest in the attitudes of Dutch individuals about women’s sexuality, and it is possible that criminalizing the conduct of U.S. citizens while in the Netherlands might further that interest. Because such a justification switches the “victim” class to be members of the destination country, we would be using the criminal law governing U.S. citizens to change the attitudes of the Netherlands’ subjects in a way contrary to the attitude that the Netherlands wishes to foster within its citizenry.

That seems quite encroaching, but, if we transposed the example to attitudes toward women’s rights to be part of the workforce in more repressive Middle Eastern countries, such attempts at attitude modification of those abroad might seem more palatable. Still, I think it safe to say that when the key concern is the corruption of the attitudes of non-citizens, the argument for extraterritorial criminalization is weakened.

What about intrinsic corruption? If we understand this as a more metaphysical objection—that something wrong has been done through the act of value denigration at the moment the act takes place irrespective of what follows thereafter—it seems that the home country has just as much of a reason to extend its criminal law to the actions of its citizen abroad as it does when the citizen acts at home. Wrong has been done at the moment the act is done (whatever its consequence), and the act of criminal condemnation is needed both to deter that act and, on retributivist or corrective justice type grounds, to re-right the balance.

It would be a mistake to think that the home country has a greater interest in the intrinsic corruption of its citizens bodies, sexuality or reproductive labor than it does in protecting the intrinsic corruption of the destination country citizens in this way when the destination country does not view the activity as corrupting because the wrong is not done specifically to the person whose nature is corrupted—they are not alone in having standing. For those who believe that surrogacy is wrong because of intrinsic corruption, an issue I discuss in the next chapter, the surrogate’s consent, for example, does not diminish that corruption. The consent of the home country sovereign should, in that circumstance, also make no difference. Intrinsic corruption conceives of the wrong as free-floating in a way that frustrates the attempt to territorialize it.
Does this mean that a home country like Turkey ought to declare *universal* jurisdiction on commercial surrogacy and make it a crime under prescriptive Turkish jurisdiction for a citizen of any country to engage in commercial surrogacy anywhere? One might respond in several ways. First: yes, but so what? This is not a *terrible reductio ad absurdum*. Second: yes, but that just shows why intrinsic corruption is not such a good justification for acting in the first place, domestically or universally. Third: yes as a normative matter, but perhaps as a doctrinal matter of international law universal jurisdiction will not extend so far—though, as discussed above, its scope has expanded in recent years.

Finally, the answer I am most attracted to: no. Even if the free-floating wrong is the same in all instances for intrinsic corruption, it is a mistake to think that every sovereign is equally morally obligated to punish every wrong done in the world under an intrinsic corruption framework. Rather, as discussed above, the citizenship tie of the perpetrator to the home country is important in helping to justify the home country’s right to punish. By being a national and a member of the coercive structure of a country that both benefits and burdens a citizen, instead of choosing Exit, that citizen has accepted the sovereign’s authority to punish in a way that the citizen has not accepted that of other sovereigns.

Consider an analogy to parenting. Perhaps it is your goal that your son not cuss, and you want to deter him through punishment. It does not follow that you welcome random individuals on the street punishing your child. Rather, there is something about your relationship that empowers you to punish to the exclusion of others. If your son were sleeping over at a friend’s house and cussed, you might accept his being punished by the hosting parents as well (for example, by a half-hour time out). This shows that to accept both citizenship (roughly the parent-child relationship) and territoriality (roughly the sleeping over) as independent grounds for authorizing punishment does not imply that universal jurisdiction must follow (roughly the random stranger punishing your child).  

In sum, if the justification for the domestic prohibition is intrinsic corruption, I think the home country has good reason to punish the citizen who engages in the forbidden act.

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148 To be sure, that last answer depends in part on one’s starting point in terms of deep theory about criminal law. I have already noted above my partiality to Duff’s view of the matter, but there may be others for which the line between universal jurisdiction and nationality jurisdiction will be harder to draw. For example, Michael Moore has argued that “retributivism, when combined both with the principle of legality and the insight that law as law does not even prima facie obligate citizen obedience, yields the legal moralist theory of proper legislative aim: all and only moral wrongs should be prohibited by the criminal law, for the reason that such actions (or mental states) are wrongful (or culpable) and deserve punishment.” MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW 754 (1997). If there is a prima facie reason for a legislature to criminalize all wrongful conduct, then drawing a distinction between nationality and universal jurisdiction will turn on more second-order considerations, not the underlying obligation. In any event, even if one were more drawn to the Moore view, and there were not sufficient second-order reasons to distinguish the two types of jurisdictions, the other responses offered above to the universal jurisdiction reductio also apply.
abroad just as much as it does when the act takes place at home. By contrast, when the justification is consequentialist corruption, I think the home country may justifiably refuse to extend its prohibition to the extraterritorial conduct of its citizen. This conclusion seems appropriate for reproductive technology use, “devaluation” justifications for criminalizing abortions, and, as we will see in the next section, some reasons for outlawing assisted suicide.

b. Corruption and Assisted Suicide.

With that primer on corruption arguments more generally, we can understand the three objections I have highlighted as to assisted suicide – corruption of the profession, slippery slopes leading to pressing those with intellectual disabilities or the elderly to end their lives, and the devaluation of life more generally – as each offering a form of the corruption argument.

Let us being with the variant concerned with concerns about the way in which assisted suicide leads to a general devaluation of the value of life with spillovers in other domains that concern the home country. If this justification for prohibiting assisted suicide is understood as a form consequentialist corruption and the home state believes attitude modification is sharply reduced when the activity occurs abroad, the state has good reason to treat the extraterritorial and domestic cases differently. Thus, this raises an empirical question – how much attitude modification is likely to occur of the home country’s citizens’ attitudes – and also a question of thresholds – even if the attitude modification will be much less compared to permitting the practice domestically, it may be that even a little attitude modification as to the value of life is more than the home country can bear. When the justification for criminalization is instead intrinsic corruption, it is irrelevant whether negative effects are likely or unlikely to occur, because the wrong has been done to the value of life at the moment of the suicide, regardless of whatever effects follow. Thus, intrinsic corruption more easily justifies extraterritorial criminalization than does consequentialist corruption.

A similar analysis of consequentialist and intrinsic corruption and extraterritoriality applies when the concern is the corruption of the profession, with a twist: if the home country permits circumvention tourism to the destination country for assisted suicide, the corruption effects on the profession may depend on whether we are discussing the medical profession writ large, or whether the right unit of analysis is the home country versus the destination country medical profession. I suggested above that home countries plausibly should care more about attitude modification among their citizens than among those abroad. It seems to me that the same is true when the attitude-modification is of the medical profession. Therefore, home countries have a much stronger argument for extending extraterritorially a prohibition on assisted suicide when the corruption of the profession that will occur is that of home country health care providers as a profession rather than destination country ones. The same may be true as to intrinsic corruption, although here it seems somewhat less plausible to, as a metaphysical matter, distinguish (for example) the Swiss medical profession as distinct from the British one.
The slippery slope version of the corruption argument introduces still further complexities. For example, how likely is it, in attitude-modification terms, that beginning down the slope in Switzerland will cause a slide in Britain? One might reply that by allowing British citizens to go abroad for assisted suicide, the slope will slip to circumvention tourism for involuntary euthanasia—that is, a version where the slip is entirely directed toward our own patients—but this is perhaps less plausible than the typical slippery-slope argument. The approach the British have ultimately taken, discussed above, of having the DPP spell out the factors favoring prosecution might be thought to be some evidence against this kind of concern. Indeed, here the safety valve dynamic may mean that the ability to travel to Switzerland makes the British ground less slippery, not more.

Finally, even if the possibility of a slippery slope in Switzerland is relevant, it may be that the destination country is more resistant to slippage than the home country because of the place of religious institutions in its society or political system, its form of government, or other factors. If the destination country is less prone to slippage than the home country, that may be a reason to maintain the prohibition domestically but not extraterritorially.

In sum, while I think the case is somewhat less strong than for abortion, when the rationale is protecting a vulnerable patient whose life will be ended I think there is a strong argument normative for countries that prohibit assisted suicide domestically to criminalize that assistance-providing conduct by their own citizens extraterritorially. The case for extraterritorial criminalization might be buttressed by “corruption” type concerns— as to the profession, the general devaluation of life, and/or slippery slopes to pressuring other groups to end their lives. When the concern is consequentialist corruption, criminalization is only justified to the extent fears about attitude-modification can be substantiated rather than asserted, and even then the imperative to criminalize extraterritorially is much stronger when the changes in attitude that are feared are of the home country (and not the domestic) citizens’ attitudes. When the concern is intrinsic corruption, these same constraints do not apply. That said, many may find the intrinsic corruption argument, even as a justification for domestic criminalization, less persuasive (I will confess I am one of them) than the other possible arguments.

IV. Criminalizing Domestic Speech on Abortion and Assisted Suicide.

Extraterritorially criminalizing the activities of those who go abroad for abortion or to assist suicide represents the most direct way of attempting to prevent circumvention tourism. A less direct and complementary route is to criminalize the provision within the home country of information regarding the availability of prohibited services abroad. While I will not attempt to offer a full analysis of the clash between freedom of expression and circumvention tourism, I do want to briefly discuss the existing case law on the subject and my views of it.

Ireland, again, has wrestled with this precise question. In a series of cases culminating in Open Door Counselling Ltd. v. Ireland, the European Court of Human Rights was asked to determine whether Ireland, which prohibited abortion at home, could lawfully prohibit Irish non-profit organizations from “counselling pregnant women within the jurisdiction
of the court to travel abroad to obtain an abortion.” The European Court of Human Rights ultimately determined that while the prohibition barring advising on overseas option “could be regarded as prescribed by law – that is, grounded in the Eighth Amendment to the Irish Constitution – and necessary to pursue the legitimate aim of the Irish State to protect the life of the unborn,” that “the ‘absolute nature’ of the ‘restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued’ and was thus in violation of the right to freedom of information” as protected by the European Convention on Human Rights.

Significantly, though, for our purposes, the court emphasized that “it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion,” that “the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman’s health and well-being,” and that “[l]imitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.” Thus, the case involved speech about circumvention tourism where the home country had not extraterritorially criminalized the same act it prohibited at home.

In finding the prohibition unlawful, the Court also noted many ways in which the prohibition was both overbroad and ineffective, including: that the prohibition on speech applied even to counseling the small number of women who could lawfully have abortions in Ireland; that “there can be little doubt that following such counselling there were women who decided against a termination of pregnancy” such that “the link between the provision of information and the destruction of unborn life is not as definite as contended,”; that the government did not “seriously contest[]” that “information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories . . . or by persons with contacts in Great Britain” such that the information in question was “already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women’s health,” and the prohibition was likely to have “had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information.” Finally, and perhaps most damning, the court concluded that the prohibition appeared to “have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain.”

151 Open Door Counselling, 42 Eur. Ct. H.R. at ¶ 72.
152 Id. at ¶¶ 72–73.
153 Id.
Where circumvention tourism is *not* prohibited even though the activity is prohibited domestically, I think the *Open Door* largely gets it right as a normative and legal matter – home countries that do not prohibit their citizens from going abroad for abortion or assisted suicide should also not prohibit domestic providers from apprising potential patients of those options. The harder, and I think, more interesting question is what to do about a case where the home country *has* criminalized circumvention tourism and rendered it a crime to go abroad for the service in question, an issue the *Open Door* court explicitly does not reach.

This is an issue that is still not definitively answered under U.S. law. A mere two years after *Roe v. Wade*, in a case called *Bigelow v. Virginia*, the U.S. Supreme Court held unconstitutional the conviction of a Virginia newspaper editor for printing an advertisement for an abortion referral service in New York, observing (in a passage that scholars continue disagree on whether it was holding or dictum) that Virginia “could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State” nor “could Virginia prevent its residents from traveling to New York to obtain those services, or, as the state conceded, prosecute them for going there.”

But *Bigelow* was a case where one U.S. state was attempting to regulate the activities of another U.S. state, and the Court noted its view (perhaps dictum) that one state could not prohibit its citizen from traveling to another state for abortion. The question here is if a home country *has* lawfully made it a crime for a citizen to go abroad to get an abortion or assisted suicide, may it prosecute a citizen doctor for advising one of its citizens to do so?

This is not an issue that the U.S. Supreme Court has had the opportunity to weigh in on, though the lower courts have done so in somewhat analogous contexts. In 1997, the Fourth Circuit considered whether relatives and representatives of murder victims could bring state law wrongful death action against a publisher who published a “hit man” manual that assisted murderers in soliciting, preparing for, and committing murders. In summarizing its view of the case law to date, the court wrote that it had been “uniformly accepted” that “the provision of instructions that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment.” In reaching that conclusion, it cited cases from other Circuits upholding against a First Amendment challenge the charging of a publisher with “aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs,” and aiding and abetting evasion of tax laws by instructing individuals on how to fill in the requisite tax forms. Importantly, these cases distinguish something like “abstract criticism of

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156 *Id.* at 245.

157 *Id.* at 244–46 (citing United States v. Barnett, 667 F.2d 835 (9th Cir. 1982); United States v. Kelley, 769 F.2d 215 (4th Cir. 1985); United States v. Rowlee, 899 F.2d 1275
income tax laws,” or urging listeners “to seek congressional action to exempt wages from income taxation” from urging listeners to “file false returns, with every expectation that the advice would be heeded”; that is, the “cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law.”

While some of these lines are fuzzy, under existing U.S. Constitutional First Amendment case law, it appears to me that if abortion or assisted suicide were both constitutionally a crime domestically\(^{159}\) and criminalized extraterritorially, the U.S. could also criminalize speech by physicians or others advising patients on how to procure an abortion or assisted suicide abroad. Drafting a prohibition that was not overbroad and reached protected speech would be challenging but not necessarily insurmountable. For example, it is likely unconstitutional to prohibit a physician from simply informing a patient that abortion/assisted suicide “was legal in country X that does not have a residency requirement,” or even “the prohibition on abortion and assisted suicide in our jurisdiction is wrong-headed and should be unlawful, luckily patients can circumvent it by going to country X, which does not have a residency requirement” or even “in the past some of my patients have gone abroad to country X for abortions and assisted suicide.” What it could criminalize, though, is speech much more directly tied to the circumvention tourism activity. The easy case would be when a home country physician phones a clinic abroad and arranges for that clinic to take the patient in question for the prohibited activity. Closer to the line, but I think still constitutional, would be prohibiting a physician from recommending a particular foreign abortion clinic for termination of the pregnancy of the patient. Whether criminalizing this type of speech (or even more extensive criminalization) would be permissible in other home countries will depend on that home country’s case law relating to freedom of expression and the extent of the protection it offers.

Assume, though, for the moment that the home country could, as a matter of law criminalize this type of speech, should it do so? A full answer would require an in-depth analysis of the value of the criminalized speech. This includes the difficulties of enforcing such obligations and the difficult questions posed by “dual-use” speech – speech that is both promoting a crime but also serving advocacy or other core political speech goals. I do not purport to offer that in-depth analysis, which would take us a bit far afield from the topic of medical tourism that is our focus. Eugene Volokh, among others, has offered excellent work on this type of which I will draw.\(^{160}\) Instead I merely

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\(^{158}\) Rice, 128 F. 3d at 246, (quoting Kelley, 769 F.2d at 158–59).

\(^{159}\) Again, as I noted above, in the U.S. context the current Supreme Court doctrine would make it unconstitutional to criminalize pre-viability abortions within the U.S. What I say here still has application to circumvention tourism for any abortion that can be criminalized under U.S. law if it was hypothetically criminalized under federal law. It also has implications for a hypothetical but possible future where the abortion right in the U.S. is chipped away or eliminated.

want to explain why even if one thinks that a home country should criminalize extraterritorially that which it criminalizes domestically – abortion and assisted suicide in our cases – and presumably wants to reduce those activities as much as possible through the threat of criminal sanction, it does not necessarily follow that one should also want to criminalize the speech of doctors advising patients on the option of circumvention tourism.

First, the speech of physicians about options abroad has a series of positive uses that may balance the state’s interest in deterring circumvention tourism. It can educate doctors about the questions and issues their patients are thinking about, and also give them an opportunity to help those patients make choices least likely to threaten the patient’s health and safety. Allowing robust discussion of circumvention tourism options may also enable patients to engage in political debates at home regarding whether the domestic prohibition or the extraterritorial extension should be relaxed. A state might be committed to enabling that robust debate even while it zealously pursues the criminalization of circumvention tourism, or it might more cynically want to use some of this speech to deplete pressure to relax the domestic prohibition. This is somewhat analogous to the safety valve exception discussed above, although in that case the idea was that rendering abortion or assisted suicide achieved abroad legal would reduce pressure to reverse the domestic prohibition, whereas on this logic the domestic and extraterritorial versions remain criminal but allowing physicians to advise patients about the illegal option is what has the pressure-reducing force.

Second, speech regarding medical tourism may in some ways be a form of dual-use material, akin to guns, knives, videocassette recorders, alcohol, and the like, that is, “materials [that] can be used both in harmful ways – instructions and chemicals can equally be precursors to illegal bombs – and in legitimate ways” and for which “it’s usually impossible for the distributor to know whether a particular consumer will use the product harmfully or legally.” I think this is particularly likely as to fertility tourism, which is the subject of the next chapter; suppose the home country prohibits some forms of surrogacy agreements but not others. In this instance, the doctor’s advice recommending a foreign clinic may be “dual use” in that she will be unable to determine if the patient will be using the lawful or unlawful variety. Even as to abortion, though, there could be dual use cases. Suppose the home country only prohibits sex-selective or disability-selective abortions extraterritorially but prohibits all forms of abortion at home, for example. Here it may be that the doctor advising the patient on using a foreign clinic will not know whether the patient will use it for the lawful or unlawful service. That

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161 Cf. Volokh, supra note 160, at 1112–26 (discussing the way crime-facilitating speech “can educate readers, or give them practical information that they can use lawfully … [and] help[s] people evaluate and participate in public debates”).
162 Cf. Id. at 1127.
163 To the extent that retaining the possibility of true “Exit” (or potentially “Exile” as discussed above) is also important – that individuals who want to engage in the prohibited conduct be able to do so by renouncing their citizenship – then one might also
said, these fears relating to dual-use speech should not be exaggerated, one could try to accommodate these concerns by imposing on the doctor a duty of inquiry in giving the advice or a duty to not reference the unlawful services being offered while permitting a general description of the service. In theory statutes could be carefully tailored in that way, but in practice one may end up chilling more speech than one desires to chill.

This, however, leads into the final reason why I would be fairly cautious in criminalizing home country physician speech on circumvention tourism. This reason focuses on the kind of speech that is at issue here -- speech between partners in a fiduciary relationship where trust and openness is essential. The same reasons that underlie the legal protection offered by the physician-patient privilege also mitigate against too much policing of physician speech. To be sure, that privilege protects the patient’s communication and not the physician’s. Moreover, as I will discuss in greater depth in the chapter on stem cell therapies, we do already have in place robust reporting requirements for child abuse that may serve as a relevant analogy here be relevant to medical tourism as well. Still, given that fixing the lines between appropriate and inappropriate physician speech regarding circumvention tourism will be difficult and that there is a real risk of chilling appropriate communication in this relationship, as well as the attendant concern that this chilling will itself undermine trust and have bad spillovers for the relationship, I think there is good reason to be cautious about criminalizing physician speech regarding circumvention tourism even where it is lawful. The closer the speech comes to actually facilitating travel abroad for circumvention tourism, which might be thought as a kind of conspiracy liability, the greater the normative justification for criminalizing the physician speech. Even here, though, I would argue for treading lightly on the offending physician.

V. Conclusion.

Countries that prohibit abortion and assisted suicide face a policy question, should they criminalize the same behavior by their citizens when done extraterritorially or should they permit circumvention tourism? I have argued that countries that have what they believe is a lawful and normatively justified prohibition on abortion or assisted suicide (i) may as a matter of international law extend the prohibition such that they assert prescriptive extraterritorial jurisdiction over their citizens in these cases, and (ii) have strong normative and political theoretical reasons for doing so, especially as to abortion. On the other hand, I have suggested we should be far more cautious in concluding that countries that criminally prohibit circumvention tourism should also criminalize physician speech by home country physicians informing or advising patients on this option to go abroad for abortion or assisted suicide. The next chapter extends this discussion further by considering another area where patients use medical tourism to avoid home country rules (as well as for other reasons): fertility tourism.
Medical Tourism and the Creation of Life: A Study of Fertility Tourism

The last chapter examined the use of medical tourism to end life in the form of abortion and assisted suicide. In this chapter, I will discuss its use in creating life, the so-called “fertility tourism” industry, involving traveling abroad to use a variety of reproductive technologies such as artificial insemination, surrogacy, sex selection, etc.

In order to get a better handle on the industry, let me begin with some real life cases:

In late 2010, Lee Shau-kee was an eighty-two-year-old chairman of property development at Henderson Land Development Ltd., living in Hong Kong, and one of the richest men in Asia. He was also about to become the grandfather of triplets. In part because three is a particularly lucky number in Cantonese and sounds like the word for “birth,” the triplets were seen as an auspicious sign celebrated with great fanfare, media attention, and gifts. A press release was issued, a donation was made to a local hospital, and each of Henderson Land’s approximately 1300 employers were given a bonus of HK$10,000, or about $1,300. What was missing from all this celebration, was a mother.

While the children were born to Lee’s forty-seven-year-old bachelor son, Peter Lee, no mother was named, and local newspapers reported that the triplets were born to a paid surrogate mother in California. Under Hong Kong’s Reproductive Technology Ordinance, in effect since 2000, commercial surrogacy (among other practices) was rendered illegal. At a December 1, 2010 meeting of Hong Kong’s legislature, shortly after Lee’s announcement, lawmaker Cyd Ho – while refusing to name names – asked if authorities had looked into the case of a “male Hong Kong permanent resident” who “recently issued a press release on the triplets born to him.” Ho later commented that “‘Surrogacy with commercial interest is the same as the trade of organs[,] [i]t is still a trade, and women from poverty may be compelled into this transaction,’” and that she was wary that the press release “‘gives the message that anybody can violate the law in Hong Kong without getting caught.’”

A quick reading of the law suggests Lee may have been in violation. The law reads, “No person shall, whether in Hong Kong or elsewhere, make or receive any payment for initiating or taking part in any negotiations with a view to the making of a surrogacy arrangement,” and the reference to “or elsewhere” seems to suggest extraterritorial reach of the prohibition. Despite the law, though, the business of connecting Hong Kong nationals with foreign surrogates appears to be booming.

The Surrogacy Center Hong Kong, based in Laguna Niguel, California, profits by serving Hong Kong prospective parents looking for surrogate mothers in the U.S., particularly in U.S. states (like California) where the practice is legal and facilitated by contract law. Roughly 40% of the center’s clients are single men who pay between $20,000 and

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1 This account is drawn from Cathy Yan, Maternal Mystery: Babies Bring Joy, and Questions, in Hong Kong, WALL ST. J. (Dec. 14, 2010), available at http://online.wsj.com/article/SB10001424052748703471904576002913040745224.html
$35,000 for a surrogate. The clinic does the entire process for international patients in the U.S. – sperm donation, birth, and everything in between. As Cathy Yan recites in her story on the case: “Lawyers are called in for both parties, contracts are drawn up and requests (for example, that the mother eat only organic food) are laid out.” The story quotes Hilary Neiman, an attorney for the center, founded in 2004, as suggesting that they had yet to run into a legal problem (though one wonders whether the case ushered some!).

The Surrogacy Center Hong Kong clinic is not alone in catering to fertility tourists from outside the U.S. Another U.S. surrogacy program, Surrogacy Source, based in Irvine, California, reported that one-third of its international clients are from Hong Kong. A third clinic, Fertility Miracles, in Beverly Hills, California, stated that 65% of its business came from international prospective parents, with many coming from Asia (including Hong Kong).

What should we make of this trade? To ask a question that parallels that which was discussed in the last chapter, is Hong Kong justified in extending its prohibition on commercial surrogacy to its citizens when they pursue the practice abroad? Does it matter that the surrogates themselves in this case are U.S. and not Hong Kong citizens? Does it matter if our concern is exploitation of the surrogate or harm to the resulting children or corruption of attitudes? Should the U.S. prohibit its own citizens from engaging in surrogacy with Hong Kong nationals out of respect for Hong Kong’s sovereignty?

While the U.S. is one major site for medical tourism for surrogacy, it is not the only one. In particular, as we will see below, India is a prime destination, with price being a major motivating factor. Should our analysis of surrogacy tourism change if instead of Californian clinics, surrogacy takes place in the developing world?

Consider the Akanksha Infertility Clinic, centered in the village of Anand, India, run by Doctor Nanya Patel, and featured on The Oprah Winfrey Show, which gives a good sense of travel for surrogacy in India today.2

The clinic only employs women who have been married and have had at least one child. In 2008, there were forty-five surrogates on the payroll who lived away from their families in a compound, which one author described as a “classroom-size space . . . dominated by a maze of iron cots that spills out into a hallway.”3 Surrogates receive $50 a month, plus $500 at the end of each trimester, and the balance upon delivery. A


3 Carney, supra note 2.
successful Akanksha surrogate makes between $5,000 and $6,000 (slightly more if she bears twins), an amount that exceeds a typical salary for several years of ordinary labor in India. If a woman miscarries, she keeps what she has been paid up to that point. If she chooses to abort—an option the contract allows—she must reimburse the clinic and the client for all expenses. The clinic charges American medical tourists $15,000 to $20,000 for the entire process, which includes in vitro fertilization, somewhere between a third and a fifth of what clients would pay for a similar service in the United States. Similar to U.S. pricing, the surrogate receives roughly a quarter of the total fees. There have been reports that the Ankanksha clinic routinely implants five or more embryos at a time, considerably more than the one or two implanted embryos recommended by the American Society for Reproductive Medicine. Under guidelines issued by the Indian Council of Medical Research, surrogate mothers sign away their rights to any children, and the surrogate’s name is not even put on the birth certificate.

Writing in 2008, Smerdon gives more details about the origin of the clinic, its philosophy and the attitudes of some of the surrogates:

Dr. Patel’s first surrogacy effort was in 2003 when she assisted the surrogacy of a local forty-four year old woman who wished to bear a child for her daughter who was living in the United Kingdom. A snapshot of the company shows that in August 2006, the clinic had nine IVF surrogates pregnant with babies for Indian and foreign couples. By 2007, the clinic had twenty surrogates contracted for couples abroad, a waiting list of 250 couples worldwide, and over forty total babies born to surrogates. In March of 2008, over fifty surrogates were carrying children for foreign clientele.

At Dr. Patel’s clinic, babies are given up one to two days after birth. Dr. Patel claimed that no problems have arisen with surrogates bonding emotionally with the babies. She is quoted as saying, “[t]he first question is, ‘[i]s the baby OK?’ The second is, ‘[i]s the couple happy?’ And then they say, ‘Thank God,’ And then they don’t think about it after that.” As with other ART [Assisted Reproductive Technology] practitioners, Dr. Patel highlights the surrogate’s altruistic motivations. She said, “If you say it’s a business of emotions, I would say yes. It’s not a business of economics and finances. There are a lot of emotions involved in this. And if a female is just doing this for business, I think this is not the right thing to do.” Dr. Patel finds that convincing a woman to become a surrogate is the most difficult part: “[w]hen they come first to me they are really a desperate lot because this is the last thing they would want to try. It’s not easy carrying a baby for 9 months for someone else.”

Dr. Patel only provides services for couples who have a medical reason for turning to surrogacy. Citing her conservative cultural beliefs, she will not accept gay couples as clients. Dr. Patel permits commissioning couples to converse with the surrogates at the clinic; in fact, many commissioning couples shower the surrogate with attention and gifts. Some couples continue to stay in touch with the surrogate via the internet even after the birth.
Dr. Patel advertises, locates the surrogates, and matches them with commissioning couples herself. Most women live locally but some travel from far away places, lured by the money to be earned. Anand has a population of roughly 150,000, so it is not unusual for surrogacy for hire to be spread by word of mouth. There are instances of families in which several of the women have served as surrogates. For example, in one family, a mother and her three daughters served as surrogates, and in another, three sisters and a sister-in-law. Dr. Patel does acknowledge the difficulties faced by surrogates: “[y]ou see, Indian society is still quite conservative and questions get asked. So often these women will just move out of the local area to have the child.” One surrogate mother recounted: “Madam told me I should become a surrogate and if I do, all my worries will go away.” She told the women to “think of the pregnancy as ‘someone’s child comes to stay at your place for nine months.’”

In Dr. Patel’s operation, several surrogates live together in a rented home near the clinic and some live on the third floor of the clinic itself, which has been converted into a dormitory. The surrogates’ husbands and children may visit during the day, and some take classes such as English or computer skills.

Surrogates at Dr. Patel’s clinic are paid on the upper end of the Indian surrogacy market scale . . . Many of the surrogates also donate eggs but are not allowed to serve as traditional surrogates. Dr. Patel herself retains control over the fee paid to surrogates, indicating that the clinic will hold the money for the surrogate if she wants to use it for a house purchase or that the clinic will accompany the surrogate to the bank to establish an account in her own name.4

Should our analysis of any of these questions change if the medical tourist is traveling to this clinic rather than one in the U.S.?

Consider a second case, the “Baby Manji” case:5

Two Japanese intended parents (i.e., parents seeking to produce a child through reproductive technology), Ikufumi and Yuki Yamada, went to the town of Anand in India to have a “traditional” surrogacy6: that is, the father’s sperm was used, making him the genetic father, but his wife’s eggs were not used; instead, the surrogate was both the

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6 Nelson, supra note 5, at 241.
genetic and gestational mother of the child. After insemination, but before birth, the intended parents divorced, with the father wishing to raise the child but his wife not wishing to do so. When, on July 25, 2008, the baby girl known as “Manji” was born, the wife “disowned the child.” When the father sought a passport from the Japanese embassy in Delhi to bring the child back to Japan, the Japanese embassy refused, claiming that because the child was born in India she needed an Indian passport and a “no-objection” certificate to enable the infant to leave the country. However, under Indian law, a passport may only be issued to an infant along with the passport of the mother because no female infant may leave India without the mother’s consent, even if she is leaving with her genetic father. Both Yuki and the surrogate mother refused to take custody of baby Manji, so the child was left in legal limbo.

Ultimately, a solution was found after a number of court applications and the handling of further immigration issues, not completed until four months after Manji’s birth. The Japanese grandmother of baby Manji, Emiko Yamada, arrived in India to claim the baby. She was eventually given custody of the baby and issued what is called a “certificate of identity,” a document given to stateless individuals or those who cannot get a passport from their home country. The certificate issued to Manji was only valid for Japan and omitted any mention of the name or nationality of the mother of the child. Using the document, Emiko Yamada was able to bring the baby girl back to Japan. Japan then granted a visa to permit Manji to remain in Japan for one year, at which point the Japanese authorities signaled a willingness to allow the genetic father to adopt the child, since they would have formed a sufficient relationship.\(^8\)

While the four-month delay in bringing Baby Manji home was sad, other parents have waited longer still. In another infamous case, a German couple employed a gestational surrogate (i.e., the German man and woman were both the intended parents and the source of sperm and egg, making them genetic parents while the Indian surrogate carried the child). Though the birth certificate listed the Germans as mother and father, German law would not grant the children (twins) citizenship because they were conceived through a surrogacy agreement that was illegal in Germany. Indian law, in addition, would not recognize the twins as Indian citizens because Indian law requires that one of the parents must be an Indian citizen at the time of birth. After two years of litigation, the German couple was able to get the Indian Supreme Court to direct the Indian Central Adoption Resources Agency to allow the Germans to adopt the children and take them back to Germany.\(^9\)

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\(^7\) Parks, *supra* note 5, at 333.

\(^8\) Nelson, *supra* note 5, at 252 n. 90.

These problems have also occurred in destination countries other than India. Lin recounts the story of baby Samuel Ghilain, who was born in Ukraine to a surrogate commissioned by his intended parents, Laurent Ghilain and Peter Meurrens. The men were married in Belgium, which permits same-sex couples to adopt, but faced administrative difficulties that led them to surrogacy. They hired a gestational surrogate to carry a child created from Ghilain’s sperm and the egg of an anonymous egg provider. Upon the birth of their son in November 2008, Samuel’s parents went to the Belgian embassy in Kiev, Ukraine, which refused to recognize the child as a citizen of Belgium. Because Belgian law was silent on the legality of surrogacy, the Belgian government denied Samuel citizenship, reasoning that it had no legal basis to recognize the Ukrainian birth certificate, despite the fact that the child’s genetic father was a Belgian citizen. In what will now, sadly, become a common refrain, Samuel also could not be a Ukrainian citizen because Ukrainian law recognizes the intended parents as the child’s legal parents, so Samuel was neither a Ukrainian nor a Belgian citizen. Without citizenship Samuel could not get a passport and thus could not leave the Ukraine. It took two years and three months to resolve the issue, with Samuel placed first with a foster family and then a Ukrainian orphanage, until a Belgian court ruled in favor of Samuel’s parents, whereon the Belgian Foreign Ministry finally agreed to give him a passport. At that point, after a long odyssey, Samuel was finally brought back to Belgium. At the same time, his case did not set a precedent for the future: following the resolution of Samuel’s citizenship, the Belgian Foreign Ministry issued a press release advising against the hiring of foreign nationals because of difficulties in recognizing the citizenship of the children abroad, and, as of this writing, Belgium has still not passed a law on surrogacy.\(^{10}\)

How should home countries treat children born through surrogacy or egg or sperm donation abroad when their citizens are the intended parents? If the home country prohibits the form of reproductive technology at use, for example, commercial surrogacy, it is appropriate for it to refuse to grant citizenship to the resulting child to try to deter its citizens from engaging in fertility tourism? Or does that approach unfairly penalize the child that is born?

I seek to answer these and other questions relating to fertility tourism in this Chapter, which proceeds as follows. Part I of this chapter explains the major forms of reproductive technology used as part of fertility tourism and also sketches what we know about the current flow of patients, doctors, surrogates, and egg and sperm donors in the trade. The next part of the chapter continues the discussion from the immediately prior chapter and examines under what circumstances home countries that prohibit particular reproductive technologies from being used by their citizens in the home country should extend that prohibition to those citizens who go abroad to a country where the practice is legal in order to pursue pregnancy. Among other things, I discuss the question of whether fertility tourism involving surrogacy is a morally problematic form of exploitation – a discussion that builds on a similar discussion in Chapter Seven as to organ sale – and, even if a

\(^{10}\) This account is taken from Tina Lin, Note, *Born Lost: Stateless Children In International Surrogacy Arrangements*, 21 CARDOZO J. INT’L & COMP. L. 545, 546–548 (2013).
home country concludes it is a morally problematic form of exploitation that justifies domestic criminal prohibition, whether that analysis also mandates extending the prohibition extraterritorially. The third part of this Chapter examines the question of nationality and immigration for the children born through fertility tourism.

Fertility tourism is a large and complex phenomenon, and even merely as to its ethical and legal elements I cannot exhaustively deal with all the issues it raises in a chapter. Some of the additional issues that other authors identify – risk for home country patients of poor-quality treatment, risk of poor medical malpractice recovery should something go wrong, the effect on health care access for the destination country’s poor\(^\text{11}\) – are dealt with more comprehensively as to all forms of medical tourism in other chapters in this book, and readers interested in these aspects of fertility tourism can read my analysis there. In this chapter, I focus on issues more unique to fertility tourism.

I. What Is Known About Fertility Tourism?

a. Types of Technology for Which Fertility Tourism Is Sought.

Since the 1880s, modern medicine has added a number of methods for treating infertility.\(^\text{12}\) Fertility tourism involves traveling abroad to use one of a series of different reproductive technologies. Let me review some of the main treatments in a non-technical way as background for readers unfamiliar with these technologies.

In vitro fertilization, or “IVF,” was first successfully used in Oldham, England in 1978 to produce Louise Brown. IVF proceeds in four stages. First, the woman who will provide eggs is administered ovulation-stimulating hormones, which cause multiple egg-containing follicles to mature so that up to several dozen eggs can be harvested in a single treatment cycle. Second, just prior to ovulation, the eggs are removed by a minor surgical procedure; today, this is usually done by an ultrasound-guided needle inserted through the vaginal wall into a developed ovarian follicle through which, by suction, the egg is harvested. Third, sperm is introduced into individual culture dishes, each of which contains a culture medium and one egg with the culture dish monitored after the first day to determine if fertilization occurs. Finally, if fertilization occurs, the preembryos are allowed to mature in the medium, usually for two to three days after egg retrieval, until the preembryos reach the four or eight cell stage when some or all of them are transferred into the woman’s uterus to attempt implantation. Ten to fourteen days after embryo transfer, the woman will undergo a pregnancy test to determine if the transfer was successful. IVF can also be done using frozen eggs (i.e., those frozen between the second and third step), or using frozen preembryos (i.e., preembryos frozen after the third step.

\(^{11}\) See, e.g., Andrea Whittaker, Cross-Border Assisted Reproductive Care: Global Quests for a Child, in Risks and Challenges in Medical Tourism: Understanding the Dynamics of the Global Market for Health Services 167, 169, 174–80 (Jill Hodges et al. eds., 2012); Lin, supra note 9; Smerdon, supra note 1.

\(^{12}\) For a good guide through the history, see Judith F. Daar, Reproductive Technologies and the Law 26–40 (2d ed. 2013).
but before the fourth step). In the United States in 2010, the average cost per cycle of IVF was $12,400, and it has been estimated that actually producing a live birth through IVF would cost an individual (on average) between $66,667 and $114,286. Most individuals will not have these costs covered by their health insurance.13

Artificial insemination’s history goes back much further still. Artificial insemination of dogs began in 1780 (in Italy by the priest Lazzaro Spallanzani) and then began in humans in 1785 (by the Scottish surgeon John Hunter). Artificial insemination using donor sperm occurred for the first time in 1884 by Doctor William Pancoast in Philadelphia.14 In its modern form, semen is obtained from the male (usually through masturbation) and then injected into the woman’s reproductive track in one of three ways: 1) intravaginal insemination, involving placing semen in the vagina near the cervical opening and then placing a device in the cervix to hold the semen there, (2) intracervical assisted insemination where a tube is inserted into the cervical opening to place a small amount of semen in the cervix, and (3) intrauterine insemination, in which the sperm is washed and bacteria removed and then injected through a narrow tube threaded through the cervix, vagina, and uterus.15 When the insemination is done with donor sperm, it is referred to as artificial insemination by donor, or “AID.” Artificial insemination can also be accomplished by Intracytoplasmic Sperm Injection (“ICSI”) in which a single sperm cell is injected directly into the egg. This is done by placing sperm in a solution that slows their movement, selecting and immobilizing a single sperm, and using a slim pipette to insert it directly into the cytoplasm of the egg, which is the material surrounding the nucleus.16

Surrogacy comes in two forms. The first is called “full” or “traditional” and involves artificial insemination of the surrogate with sperm, after which the surrogate carries the baby – her genetic child – to term as she would in a normal pregnancy. In “gestational” surrogacy, IVF is used to implant a fertilized embryo into the surrogate who carries it to term. Hence, the child is not the surrogate’s genetic offspring. Rather, it is the genetic offspring of the intended parents.17

14 Id. at 490.
15 DAAR, supra note 12, at 39.
16 Id. at 850. There are other technologies such as Gamete and Zygote Intrafallopian transfer (“GIFT” and “ZIFT”) that I will not discuss here, but for more discussion, see id. at 850–852.
17 Things can get more complicated, of course. Two parents can approach a surrogate to serve as a gestational surrogate, but get a separate sperm and egg provider, such that there are five parents involved in the reproduction: two intended parents, a sperm provider, an egg provider, and a gestational surrogate. For a legal case with facts like this, see In re Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998).
Preimplantation Genetic Diagnosis (“PGD”), first introduced in the early 1990s as an experimental procedure, is used to screen embryos fertilized as part of IVF. The embryo (or “preembryo” as it is sometimes called – there are disputes about the nomenclature that are sometimes political) is allowed to grow to the eight-cell stage and then one cell (known as a blastomere) is removed using an injection pipette. This one cell is tested and, in the process, destroyed, because it is glued to a glass slide and repeatedly heated and cooled. Importantly, all current data indicates that removing the single cell causes no damage to the developing embryo (although it is hypothetically possible future science will prove this wrong) since the remaining seven fetal cells retain significant totipotency (the ability to divide and differentiate into different cell types) and can, unaffected, develop into a fully-formed human being.

In current clinical practice, PGD has been used for so-called “medical selection,” in which embryos that are aneuploidic (having particular genes or chromosomal regions present in extra or fewer copies than in the normal type) or contain genetic mutations likely to lead to serious diseases are discarded. It has also been used for “sex selection,” discussed below, in which parents choose to implant embryos only of the desired gender. Less commonly, but in a few reported cases, it has been used to create children with a particular “disability” shared by the parents such as deafness or achondroplasia (being a “dwarf”), or to create so-called “savior siblings” – children capable, because of matching tissue, of being stem cell or bone marrow donors to an ill, already-existing child in a family.

Sex selection is a practice that has been going on for centuries across the world, frequently through selective abortion. Diagnostic technologies such as amniocentesis and chorionic villus sampling (“CVS”), and better ultrasound machines have facilitated the practice by enabling detection of sex much earlier in pregnancy. In particular, they have helped contribute to the practice of sex-selective abortions by making it easier for parents to detect the sex of the fetus early in the pregnancy. Hence, the emerging technologies of noninvasive prenatal diagnosis will mean much earlier detection of sex (as well as other facts about the fetus) and earlier abortions.

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18 This description of the process is drawn from Judith F. Daar, ART and the Search For Perfectionism: On Selecting Gender, Genes, and Gametes, 9 J. GENDER RACE & JUST. 241, 248–50 (2005).
To the extent sex selection is accomplished by abortion, it is more in keeping with the discussion of travel abroad for abortion discussed in the last chapter. There are, however, two forms of sex selection that constitute fertility tourism. The first uses PGD to determine the sex of embryos being considered for implantation. The second is “sperm sorting,” a technology originally developed for sorting the sperm of bulls, which in its human commercial form is called “MicroSort,” and “separates male and female sperm by using flow cytometry (a process involving the use of a special fluorescent stain that attaches temporarily to the DNA contained in the spermatozoa to determine the sex of the sperm) and then injecting sperm with the chromosome of the desired sex” through artificial insemination or ICSI. MicroSort improves the chances of having a female child by approximately ninety percent and a male by approximately seventy-five to eighty-five percent. However, due to difficulties MicroSort’s parent company (the Genetics & IVF Institute) faced when trying to get FDA approval for use in the U.S., the company “decided not to further pursue FDA approval of MicroSort in the United States [although] the MicroSort technology is available for American patients through laboratories located in Mexico City, Guadalajara, and North Cyprus.” While the U.S., because of its lax regulatory structure over these services, is often a destination country for many of these forms of reproductive technology (as we will see below), MicroSort is the exception, requiring U.S. citizens to be the ones traveling abroad.

b. Data on Fertility Tourism.

i. Shenfield et al.’s study of Europe.

In a 2010 study by the European Society of Human Reproduction and Embryology (“ESHRE”), Shenfield and colleagues collected information on female patients seeking reproductive technology services through medical tourism at forty-six clinics over a one month period in six European countries thought of as prime destinations for fertility tourism – Belgium, Czech Republic, Denmark, Slovenia, Spain, and Switzerland – for a total of 1230 patients filling out their forms. The researchers extrapolated, based on the schedules of the clinics, that the clinics would perform around 12,000–15,000 cycles of treatment for fertility tourists annually, yielding an estimate of 11,000–14,000 distinct patients per year.

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22 Id. at 423 (internal quotation marks omitted).
23 All of the following data comes from F. Shenfield et al., Cross Border Reproductive Care in Six European Countries, 25 HUM. REPROD. 1361 (2010).
24 One cannot immediate extrapolate to 12,000–15,000 patients annually, since some patients may have more than one cycle done, though it is unlikely that many would have had multiple cycles in the same month (i.e., over the period in which the data was collected).
While the patients came from forty-nine different countries, there were four home countries that were heavy senders, collectively making up the country of origin for almost two thirds of the medical tourists: Italy (31.8%), Germany (14.4%), the Netherlands (12.1%), and France (8.7%). In terms of where patients went, 29.7% of the patients went to clinics in Belgium, 20.5% to the Czech Republic, 12.5% to Denmark, 5.3% to Slovenia, 15.7% to Spain, and 16.3% to Switzerland. There were significant correlation between home and destination countries, suggesting the formation of reputational and referral pathways: the majority of Italians went to Switzerland and Spain, while the majority of Germans went to the Czech Republic. Most Dutch and French patients went to Belgium (with a smaller proportion going to Spain), and most Norwegians and Swedes went to Denmark.

In terms of the demographics of who uses fertility tourism, the authors found the mean age to be 37.3 years (with a range of 21–51 years), and that most prospective parents (69.9%) were married and the vast majority (90%) were heterosexuals, although there was some variance by country of origin here – for example, 82% of Italians were married while 43.4% of the Swedish women who used fertility tourism were single, and the percentage of users who identified as bisexual or homosexual varied from a high of 39.2% of the French to a low of 1.5% of the Italians and zero percent for those who listed their home country as the U.K.

In terms of what services they sought, 22.2% of patients were seeking only intrauterine insemination, while the remainder wanted other reproductive technologies such as IVF. Significant portions of fertility tourists were using gametes (sperm and egg) or embryos from third-parties, with 18.3% of patients seeking sperm donation, 22.8% seeking egg donation, and 3.4% seeking embryo donation. Again, there were considerable differences in the country of origin, with French, Norwegian, and Swedish women using sperm donation more often than others, whereas German and British women were more often seeking to use the eggs of third-parties.

The motivations identified by respondents (and respondents were allowed to list more than one motivation, and many did) for using fertility tourism also varied substantially based on the patient’s home country: “legal reasons were predominant for patients travelling from Italy (70.6%), Germany (80.2%), France (64.5%) and Norway (71.6%),” while “[d]ifficulties accessing treatment were more often noted by UK patients (34.0%) than by patients from other countries, and expected quality was an important factor for most patients,” and “on average 17.9% patients indicated a ‘wish for anonymous donation’, in particular the French (42.1%), British (26.4%), Germans (25.4%), Swedes (18.9%) and Norwegians (16.4%).”

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25 While I use the term “donation” here to follow the authors usage, in at least some jurisdictions, there is compensation of some form for sperm and eggs, such that donation may sometimes be a misnomer.

26 Shenfield, supra note 23, at 1363.
Delving a little deeper into these reasons, these authors – as I do in the book – divide the world of fertility tourism between those engaged in forms of circumvention tourism and those who travel for cost or quality reasons for services that are otherwise legal. Most of the patients in their study suggested “legal reasons,” what I would call circumvention tourism. As they report:

Italian law banned all donor gametes and [Preimplantation Genetic Diagnosis] techniques in 2004, sending a wave of patients to neighbouring countries: Switzerland received 51% of the Italian patients, mostly for sperm donation and Spain received 31.7%, mostly for [egg donation]. German law bans [egg donation] and 44.6% of the German patients in this study were requesting [egg donation] . . . , although French law bans ‘private’ advertising for recruiting, leading to a dearth of donors, and 20.6% of our French patients requested [egg donation]. Another legal barrier, which increases the number of movements across border for donor insemination is the regulation regarding donor anonymity. Scandinavian patients often go to Denmark for donor insemination where anonymity is compulsory in the medical setting. In this study, 18.9% of Swedish and 16.4% of Norwegian patients stated they did not merely want donor insemination, but that they sought anonymous donation. Thus, for Sweden and Norway, this flow is most likely related to the legislation requiring nonanonymouse donation. Another important legal reason is related to the civil status and sexual orientation of the patient.

In Sweden only couples have access, whether homosexual or heterosexual, which explains the high proportion of single Swedish women (43.4%) seeking treatment abroad. Also, until recently, donor insemination was unavailable to lesbian couples in Norway, where the reversal of this ban thanks to legislation on non-discrimination on the grounds of sexual orientation in early 2009 has not yet been followed by improved access, explaining why 20% of Norwegian participants were lesbians. In France, assisted conception for single women or same sex couples is illegal. Thus in our sample, almost 39.2% of the French women were lesbians and 16.4% were single. In contrast, none travelled from the UK for these reasons, as access to treatment for single or homosexual women has never been forbidden and the legislation is one of the most open and tolerant to differences in Europe (HFEAct, 2008). Indeed, for the patients originating from the UK, legal reasons were the lowest of our sample, with only 9.4%. Furthermore, lesbian couples going through ART have recently . . . been given equal parenting rights and responsibilities to heterosexual couples.

Thus, statutory limits concerning access to ART vary widely between European countries, and this may partially explain some of the movements. Additionally some countries have regulations that limit reimbursement of ART to a maximum age. For instance, in France state funding to reimburse costs if women are aged 43 years or over [is forbidden], and in the Netherlands treatment is forbidden after 41 years.
The lack of access to donor gametes may also be linked to the regulatory limits of compensation to donors. Examples of this are the UK allowing a very limited compensation and France where compensation is forbidden whereas in Spain (about 900 euros) and the Czech Republic (~500 euros) more compensation is allowed. The significance of this is supported by the observation that in our study 62.2% of foreign patients treated in Spain and 62.4% in Czech Republic requested OD. However, the degree of the compensation may not be the only cause of the high number of gamete recipients in these countries, since in Spain there is a strong tradition of donation reflected in the high rate of organ donation.  

For the smaller set of fertility tourists who were not traveling for circumvention tourism, insurance coverage in the home country was a major driver. The authors observe that for Germans, a recent decrease in the insurance funding of reproductive technology cycles may have prompted patients to go across the border to the Czech Republic where it was much cheaper. For the UK, they also detected intra-national differences in circumvention tourism stemming from the fact that individual regions have autonomy as to how much they fund IVF, “resulting in vastly different waiting lists and inequity of access, particularly in the number of cycles reimbursed.” By contrast, the authors conclude that the generous reimbursement for these services offered by Nordic countries helps explain why few patients identify these barriers to access as a prime motivation for fertility tourism. That said, as the authors recognize, because none of the study’s sites were within Eastern Europe or India where prices for these services tend to be much cheaper, the study may underrepresent the number of Europeans traveling for cost reasons.

Though limited in the scope of countries it covered, the Shenfield and colleagues study discussed above is by far the gold standard in measuring fertility tourism ii.

ii. Hughes and Dejean’s Study of U.S. and Canadian Clinics.

In a study published in 2010, Edward Hughes and Deirdre DeJean, mailed paper and online surveys of cross-border fertility care activity were sent to thirty-four Canadian and 392 U.S. fertility clinics and clinicians in cooperation with the Research Committee of the Society for Assisted Reproductive Technology (“SART”), a subsociety of the American Society for Reproductive Medicine (“ASRM”).  

First, they looked at travel to and from Canada for fertility services. They found that the most common service sought by Canadians out-of-country was IVF with an anonymous egg (363 out of 452 respondents, or 80%). When clinicians in Canada were asked if they

27 Id. at 1367.
28 Id. at 1365.
recommended particular destination countries or providers to Canadian patients, 52% always recommended a destination country while only 21% always recommend a specific provider. When asked what factors they considered to be “very important” in making recommendations to Canadian patients regarding foreign treatment, the clinicians listed “confidence in effectiveness (88%), confidence in safety (80%), past experience of patients receiving care at the destination clinic (64%), strong regulatory control (40%), and language (40%).” In terms of what information clinics provided, only 29% of responding clinicians said that they felt that a referral letter was always necessary, and 88% said that they provided whatever information was requested by the destination country clinic. In terms of what information they would like to receive for patients who traveled abroad and returned to their care, they listed as most important complications of treatment, number of embryos transferred, and, as less important, the ongoing treatment recommendation. Looking at patients who chose Canada as their destination country, they found that standard IVF was the most commonly sought procedure (106 out of 146, or 73%). 54% of these patients came from the U.S.

Second, they looked at data from U.S. clinics. Looking at fertility tourists from across the world who came to U.S. clinics in their sample, their clinics reported that a total of 1,399 women entered the U.S. to receive various types of IVF, representing 4% of the total number of IVF cycles provided by those clinics. They found that most out-of-country patients coming to the U.S. sought standard IVF (927 out of 1,809, 51%), with most of these patients coming from Europe (25%) and Latin America (39%). They also found that of U.S. patients who went abroad for IVF or donor-egg IVF treatment, most (41% and 52% respectfully) travelled to India or parts of Asia. When asked what factors they considered to be “very important” in prompting non-U.S. patients to come to them for care, they listed “confidence in treatment effectiveness (64%), safety (55%), and information from former patients (56%).” When asked what information they would like to receive from home country clinics whose patients came to them for treatment, 84% of clinicians responded that track sheets from previous cycles should always be provided, as well as recent laboratory results (85%) and complete medical records (67%).

iii. Other Data.

The other data that exists, while less complete, can help to somewhat flesh out the picture of what is going on with other destination countries and in regions not covered by these studies.

In 2008, Blyth conducted an online patient survey targeting both patients and potential patients (which he described as “individuals who have either experienced cross-border reproductive care, or have considered doing so”). He posted the survey on the websites of three patient organizations, one in Australia and two in Canada. There were ninety-five

30 Id. at e18.
usable responses, of which twenty-eight were from individuals who had participated in fertility tourism. When asked why they had engaged in fertility tourism, the most common reason provided by respondents was lack of availability of eggs and sperm (75%) – of the 28, 54% reported to had gone abroad seeking eggs, while 7% had gone abroad to get both sperm and egg. Twenty-one of the twenty-eight respondents provided their country of origin, with thirteen indicating that they were Canadian. The Canadians seeking eggs listed India, Mexico, and the U.S. as their destination countries, while the one Canadian seeking both sperm and egg listed the Czech Republic.

Writing on the Asian market for fertility tourism, Andrea Whittaker suggests that patients travel to Thailand for IVF in part because of its price advantage, with its leading Hospitals charging between 80,000 baht (US$2,000) and 160,000 baht (US$4,000) per full cycle. She suggests that Thailand has become a “popular destination for non-medical sex selection through preimplantation genetic diagnosis and microsorting,” and that, while the industry had been relatively self-regulated until 2011, the “introduction of a new Reproductive Health Bill will affect the trade in Thailand, as it will include legal restrictions on clinical practices, such as the banning of nonmedical sex selection and commercial surrogacy,” thus changing the market. In some parts of the market, the illegal nature of the trade resembles more closely trafficking and the organ trade discussed in Chapter Seven. For example, a February 2011 media report suggested that Thai police were investigating allegations that fourteen Vietnamese women – seven of whom were pregnant at the time – had “been trafficked to act as surrogates for a Taiwanese company” and forced into the trade.

Turning to India, Whittaker posits that the advent of legalized commercial surrogacy in 2002 led to the establishment of a number of clinics in India in Gujarat, Delhi, and Mumbai, that specialized in providing commercial surrogacy or egg donation for foreign clients from the U.S., the U.K., and elsewhere, including some recipients who are themselves Indian expatriates. Under the guidelines put in place by the Indian Council for Medical Research, the surrogate could not also donate the eggs when donor eggs were required – they could only serve as gestational not full surrogates – such that an egg donor was required in addition to the surrogate.

Whittaker also reports on the results of a PhD thesis that studied forty-two surrogates in

32 All of this is drawn from Andrea Whittaker, Cross-border Assisted Reproduction Care in Asia: Implications for Access, Equity and Regulations, 19 REPROD. HEALTH MATTERS 107 (2011).
33 Id. at 112 (citing Thai Police Free Women from Surrogate Baby Ring, AGENCE FRANCE-PRESSE (Fe. 24, 2011), http://www.google.com/hostednews/afp/article/ALeqM5gXBt7gEuqdniI4KYH2zcvjZvsFpQ?docId=CNG.e4206a773b164839c18a6b3802794fe5.6d1.
Anand, India, from 2006–2008 and found that the surrogates had a median family income of $60 USD a month with thirty-four of the forty-two women falling below the poverty level. For these women, surrogacy offered a significant incentives – approximately 300,000 rupees ($7500 USD), which is roughly one third of what the prospective parents pay the agency or individuals who organize the surrogacy venture. Whittaker suggests that “such commercial inducements may entice women to disregard the risks involved and face pressure from their family to be involved.” She also notes that “[a] number of surrogates report having no contracts and no third party legal representation,” and that “[w]hile they receive medical care for the term of their surrogate pregnancies, this is not offered for any of their own subsequent pregnancies, despite the increased risks to their health.” Finally, she suggests that there are parallel concerns raised as to egg donation in “developing countries [as to] whether women donors are fully informed of the risks involved or whether financial inducements encourage them to overlook the risks, including the possible over-stimulation of their ovaries to maximise egg production.”

Other data from India estimates that the reproductive tourism sector is a $500 million industry with approximately 3000 surrogacy clinics in India and 2000 children born to surrogates each year in India, though, as always, we need to be somewhat skeptical about the accuracy of such estimates.

As with other parts of the industry, medical tourism to India for surrogacy is heavily marketed and coordinated by intermediaries. For example, in a 2008 article, Smerdon gives the following examples of marketing websites:

The birth mother will deliver her baby at an excellent private hospital. If the surrogate is carrying twins, the mother will undergo caesarean delivery. The mother will not bond with the child but breast milk from the mother will be given to the baby (or babies).

PlanetHospital takes a lot of the guess work, stress and confusion out of the equation. Based on your medical history and doctor recommendation we prepare everything you need to make your surrogacy journey stress-free – from ordering your tests to arranging passports and visas for your children. . . .

When you arrive at the destination, a PlanetHospital concierge will be there to

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35 Id. at 111 (citing A. Pande, Commercial surrogate mothering in India: nine months of labor? PhD thesis, Amherst: University of Massachusetts (2009)).
36 Id. at 112.
37 Id. (citing Vora K. Selling Potential: Surplus Fertility and Biocapital in the Production of Transnational Indian Surrogacy. Paper presented at AMERICAN ANTHROPOLOGICAL ASSOCIATION 107TH ANNUAL MEETING. San Francisco (Nov. 2008), and A. Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, 35 SIGNS 969 (2009)).
38 Id.
assist you every step of the way (for a small additional fee). So with PlanetHospital, all you have to do is show up.\(^\text{40}\)

In commenting on the number of children who find themselves denied citizenship in their parents’ home country, Storrow writes in 2012 that in “France alone, these refusals befall an estimated 400 French couples each year, leading lawyer Valérie Depadt-Sebag to designate the children ‘a new category of pariahs’ that reintroduces a distinction between legitimate and illegitimate long ago expunged from the law.”\(^\text{41}\)

These studies help paint a picture of what is going on with medical tourism for reproductive technology services, but we still have much to learn at the descriptive level. With this background, though, we are now ready to consider our two major legal and ethical issues, relating to criminalization and citizenship.

II. Extraterritorial Criminalization: Should Home Countries Criminalize Circumvention Fertility Tourism?

As we have seen, many home countries prohibit domestically activities like egg and sperm sale, commercial surrogacy, anonymous sperm donation, and sex selection. As the existing empirical data we have reviewed on the trade shows, these domestic prohibitions are a major motivator for fertility tourism in that home citizens are seeking to circumvent domestic prohibitions on certain reproductive technologies, much as the populations discussed in the last chapter travelled abroad to access abortion and assisted suicide procedures that were illegal at home.

Thus, we face the same policy question in this domain that we wrestled with in the previous chapter: should home countries seek to criminalize circumvention fertility tourism by extending their domestic prohibitions extraterritorially?

At the current moment, few home countries do so, and it is the exceptions that prove the rule: Turkey makes it a crime punishable by one to three years in prison to use third party donated eggs or sperm because it is illegal to “change or obscure a child’s ancestry,”\(^\text{42}\) and the Australian states of New South Wales and Queensland extend their prohibition on

\(^{40}\) Smerdon, \textit{supra} note 4, at 31.


commercial surrogacy to citizens who travel abroad. However, most countries do not make it a crime to use reproductive technologies on foreign soil. The French have extended their criminal prohibition on commercial surrogacy to citizens who travel abroad to use surrogacy services. In a recent article, Jocelyn Downie and Françoise Baylis have suggested that Canada’s Assisted Human Reproduction (“AHR”) Act, which “prohibits purchasing, ordering to purchase, and advertising for the purchase of eggs and, arguably, also prohibits purchasing, offering to purchase, and advertising for the purchase of egg production services” has some extraterritorial application. They argue that “[w]hen all of the prohibited activities associated with the transnational trade in eggs take place in Canada, then the AHR Act applies directly (e.g., the egg provider comes to Canada for the egg retrieval),” but go further and suggest that when “the activities take place in whole or in part outside Canada (e.g., the egg retrieval happens in India), the AHR Act may nonetheless apply through the ‘qualified territorial application’ of law.” But, as they admit, this theory of interpretation is as yet untested and would depend on the specific nexus between Canada and the form of fertility tourism in a particular case, and is even more uncertain at the present moment because many of the implementing regulations for the Act have not been promulgated and no prosecutions have been brought.

But while the current modal regulatory approach is not to criminalize circumvention fertility tourism, as the doctrinal arguments I offered in the last chapter show (as well as the practice of the few outlier countries that have gone there): home countries could extend their criminal prohibitions in this regard. The real question is whether they should do so.

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45 Downie & Baylis, supra note 31, at 227.
46 Id.
47 See id. at 230 (noting that “[w]ith respect to the trade in human eggs, it is not clear when the nexus between the conduct and Canada would be sufficient to trigger qualified territorial application of the AHR Act. Is ovarian stimulation in Canada (followed by travel to another country for egg retrieval) sufficient to trigger application of the law? Is e-mail or telephone communication from an intermediary in California to a woman in Canada seeking human eggs sufficient to trigger application of the law? Has the law been broken if a company in California arranges a contract between a couple in Canada, an egg provider in the Czech Republic, and a fertility clinic in India and the couple goes to India and receives IVF using the Czech woman’s eggs? Is it legal for a Canadian company to advertise on the internet for women in India to become egg providers for reproductive purposes? Is a woman in Canada legally permitted to arrange to pay an egg bank in the U.S. to send frozen eggs to Canada for reproductive purposes?”).
Both the doctrinal and normative questions were recently front and center in the European Court of Human Rights’ 2011 decision in *S.H. v. Austria*. There, the court considered a challenge to Austria’s 1992 Artificial Procreation Act, which prohibited egg or sperm donation for the purpose of IVF entirely. After a thirteen-year litigation, the Grand Chamber of the European Court of Human Rights ultimately upheld the Austrian prohibition, finding it within the margin of appreciation granted to European legislatures. For our purposes, the most important discussion in the opinion is its treatment of fertility tourism, on which the Grand Chamber majority and dissent disagreed. The majority thought the possibility of Austrians traveling abroad for services illegal in Austria helped support the rationality and justifiability of Austria’s domestic reproductive technology restrictions (which applied domestically only and not extraterritorially). As the Grand Chamber’s majority wrote, this policy “shows . . . the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field . . . that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents.” By contrast, the dissent replied that “[t]he argument that couples can go abroad . . . does not address the real question, which is that of interference with the applicants’ private life as a result of the absolute prohibition in Austria” and that “if the concern for the child’s best interests – allegedly endangered by recourse to prohibited means of reproduction – disappear as a result of crossing the border, the same is true of the concerns relating to the mother’s health referred to several times by the respondent Government to justify the prohibition.”

One way to frame the question of extraterritorial extension is whether the failure to criminalize these activities of one’s citizen abroad shores up the justifiability of the domestic prohibition (by leaving a safety valve) or whether it instead should cause us to doubt the domestic prohibition’s justification (by suggesting that the home country does not really mean it, is acting irrationally, or is actually victimizing the citizens of other countries by creating the conditions for the transnational market and allowing them to suffer the very harms that it seeks to shield its own citizens from).

The answer I will offer is “it is complicated.” In particular, building on the analysis I

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49 *S.H. v. Austria*, ¶¶ 115–16.

50 *Id.*, ¶ 114.

51 *Id.*, Dissent, ¶ 13.
offered in the last chapter, I want to suggest that whether home countries should assert prescriptive criminal jurisdiction extraterritorially as to the reproductive technology practices they criminalize at home depends on the justification for that domestic prohibition. The most illuminating analysis will not go practice-by-practice (distinguishing commercial surrogacy from egg sale from sex selection), but will instead recognize that many of these practices have multiple justifications, and whether extraterritorial criminalization is warranted will depend on which of the justifications one views as supporting the criminalization of the practice. In particular, I think it useful to divide potential justifications into three that I will discuss in the following order: harm to resulting children, corruption/commodification concerns, and exploitation of destination country citizens.


Prohibitions on sperm donor anonymity, on commercial surrogacy, and on single parent or LGBT access to reproductive technologies are frequently premised on child-welfare or best-interests justifications – or Best Interests of the Resulting Child ("BIRC") justifications as I have called them. I have catalogued this tendency in great depth elsewhere;52 for now I will just mention a few examples:

Italy’s Law 40/2004 confines use of reproductive technologies to infertile women of “potentially fertile age” who are married or part of a “stable” heterosexual couple, and, hence, indirectly burdens LGBT Assistive Reproductive Technology (ART) users by prohibiting the use of donated sperm or eggs.53 The BIRC-roots of the legislation are evident in the Italian Parliamentary Commission for Social Affairs’ review of the then-proposed legislation, which expressed concern for “avoiding psycho-social damage to the child, which can result from parenting models which are not socially consolidated,”54 a view also espoused by more recent Italian governments.55 The Australian states of Western Australia, South Australia and Victoria have all enacted similar legislation forbidding access to ART by LGBT and single individuals and permitting use only where the reason for infertility is not age.56 The statutes explicitly adopt BIRC language: the Western Australian version requires “that the prospective welfare of any child to be born

54 Id. at 88.
55 Id.
consequent upon a procedure to which this Act relates is properly taken into consideration.”

Iceland’s Act no. 55/1996 provides that “Artificial fertilisation may only be carried out if . . . the child to be conceived by the procedure may be deemed to be ensured good conditions in which to grow up.” Laws prohibiting sperm donor anonymity, which began in Sweden but have now spread more widely, stem from studies of the welfare of adopted children, which the Swedes extrapolated to donor-conceived children. A number of jurisdictions followed suit, including, most recently, the United Kingdom and New Zealand, both adopting similar policies in 2004 and, in both cases, justifying the approach on BIRC grounds. In the United Kingdom, the Human Fertilisation and Embryology Act (“HFEA”) of 1990 specifies that “a woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of the treatment (including the need of that child for a father).” The HFEA Act of 2008 recently liberalized that policy by substituting “supportive parenting” for “a father” in the parenthetical, after legislators decided that the requirement discriminated against single mothers and lesbians; however, the “duty . . . to consider the welfare of any child who may be born as a result of the treatment . . . , and of

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60 Human Assisted Reproductive Technology Act 2004, § 4(a), (e) (N.Z.) available at http://www.legislation.govt.nz/act/public/2004/0092/latest/whole.html#DLM319248 (stating that, “the health and well-being of children born as a result of the performance of an assisted reproductive procedure . . . should be an important consideration in all decisions about that procedure,” and more specifically, that “donor offspring should be made aware of their genetic origins and be able to access information about those origins”); Ken Daniels & Alison Douglass, Access to Genetic Information by Donor Offspring and Donors: Medicine, Policy and Law In New Zealand, 27 Med. & L. 131, 137 (2008) (noting how the New Zealand law reflects a principle that “knowledge by donor-offspring of their genetic origins is central to the health and well-being of children born as a result of assisted reproductive procedure”); see also Christopher De Jonge & Christopher L. R. Barratt, Gamete Donation: A Question of Anonymity, 85 Fertility & Sterility 500 (2006); Can You Be Anonymous as a Sperm, Egg or Embryo Donor? Hum. Fertilisation & Embryology Authority, (Nov. 10, 2009), http://www.hfea.gov.uk/1973.html.

any other child who may be affected” has been retained.62 When it comes to surrogacy, child welfare concerns are often expressed in deciding whether to enforce such agreements. In the famous U.S. case of Matter of Baby M, the New Jersey Supreme Court famously held unenforceable a traditional surrogacy agreement between William and Elizabeth Stern and Mary-Beth Whitehead, relying on analogies to laws prohibiting babyselling and requiring a best interests of the child judgment before authorizing adoption, decrying that

[w]orst of all, however, is the contract’s total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.

Other major U.S. court decisions on surrogacy arrangements have sounded similar child welfare themes.64 Finally, in justifying prohibitions on sex selection, some have stressed the way in which parental control over traits like sex will lead to bad rearing of children who show gender discordant behavior.65

I have argued elsewhere that, in many cases, justifications for regulating reproduction

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65 E.g., MICHAEL SANDEL, THE CASE AGAINST PERFECTION 49 (2007) (worrying that parents who spend large sums to sex select and control that aspect of their offspring will “overreach”); Ethics Committee of the American Society for Reproductive Medicine, Sex Selection and Preimplantation Genetic Diagnosis, 72 FERTILITY AND STERILITY 595, 596 (1999) (discussing the “risk of psychological harm to sex-selected offspring (i.e., by placing on them too high expectations)”); Daar, supra note 18, at 267 (“If parents elect to rig the gender of their child, they no doubt harbor expectations about the rearing experience a child of the selected sex will provide. A child of the ‘preferred’ sex may suffer psychological harms brought on by heightened and genderized parental expectations. If a child of a chosen gender fails to fulfill the gender stereotyping that propelled the parent to seek out PGD in the first place, the parent/child relationship could falter, and greatly aggrieve the child.”); Inmaculada de Melo-Matin, Sex Selection and the Procreative Liberty Framework, 23 KENNEDY INSTITUTE OF ETHICS J. 1, 11–12 (2013) (it is “plausible to believe that someone who has spent the amount of time, energy, money, and health risks that sex selection requires in order to have a child of a particular sex is not going to be particularly accepting if the child fails to fulfill his or her preconceived gender expectations”).
premised on the “best interests of the resulting child” are problematic, and attempts at reformulating the claim carry with them problematic implications.\textsuperscript{66} As in the last chapter, though, my method is not to judge the underlying justifications offered by home countries for criminalizing an activity domestically, but instead to assume this justification is valid and ask what follows about extraterritorial criminalization.

If child welfare concerns underlie restrictions, the case initially seems to parallel the assisted suicide and abortion cases we saw in the last chapter, as well as the initial starting hypothetical of Murder Island. There, we saw that if the home country’s domestic prohibition on one citizen’s action is premised on preventing serious harm to another citizen, the state has a strong justification for extending that prohibition extraterritorially to instances of circumvention tourism. I also argued, to the contrary of other bioethicists, that notions like “external tolerance” – though laudable – are defeated when serious harm to unconsenting individuals is involved. Here, based on this justification for domestic prohibition, a child’s welfare is endangered by the parental action, and the state has restricted that parental action for that reason. Moreover, to the extent that these reproductive technology usages produce children who impose some costs on the home country’s health-care system later on when the children return home (or other forms of what I have elsewhere called “reproductive externalities”), the home country has a further interest in regulating circumvention tourism.

One might resist the analogy to the prior cases by suggesting that Murder Island and assisted suicide involved harm to a citizen child whereas the instant case involves harm to a child-to-be who is not yet a citizen. Even if we view the child as stateless rather than a citizen, an argument I also entertained as to abortion, there is, just as in the abortion case, a strong argument for extraterritoriality. This case differs from abortion in that, if an abortion succeeds, no child will come into existence who can be a citizen, whereas if this act of reproductive technology use is not prohibited, a child who will be a citizen will come into existence in the future. But, if anything, this distinction cuts in favor of extraterritoriality, since there are future costs to the state based on the health of this child that are not present in the abortion case if the activity goes forward.

The argument for extraterritorial criminalization of reproductive technology use based on child welfare concerns is somewhat weaker than the prior cases in two ways. First, in the prior cases, the purported harm to be prevented to the unconsenting child is a serious physical harm. In many of the reproductive technology cases, as I have noted elsewhere, the harms involved are more speculative and psychological in nature. Whether criminal law (or law in general) is right to privilege physical harm as much as it does is an open question, but, to the extent the home country sees nonphysical harms as less serious, it ought to be more willing to defer to the destination country’s norms, especially regarding the threshold for the retaliation and other exceptions. Still, the fact that the act remains

criminal in the home country when this is the basis of harm should give us pause in thinking that this distinction should weaken the obligation to extraterritorialize. Second, given that reproductive technology is a multibillion-dollar industry, destination countries are likely to derive significant economic gains from this kind of circumvention tourism, and thus the strength of the home country’s economic interest in maintaining access to these tourists is larger than in the other cases I have canvassed. From the point of view of the home country, though, this primarily inflects when the retaliation exception will kick in by amplifying the likelihood and size of the retaliation to be expected and not the actual obligation to criminalize. Further, the case is easier than assisted suicide because there is no possibility of consent playing a role.

Those inflections aside, the home country seems to have strong reasons to criminalize circumvention tourism in the reproductive technology arena when child welfare concerns are accepted as the justification for domestic prohibitions of those same reproductive technology practices. That many home countries have relied on this reasoning to justify prohibitions domestically but have not extended them extraterritorially suggests one of two things: either (1) despite their claims of fealty to this reasoning, it is not what primarily underlies the restriction, or (2) they have been wrong not to extend their laws to practices abroad and should follow the Australian and Turkish examples.

b. Corruption.

As we saw in the last chapter, Corruption arguments claim that allowing a practice to go forward will do violence or denigrate our views of how goods are properly valued. When it comes to reproductive technology domestic prohibitions, this justification has been particularly prominent for laws prohibiting compensation: the sale of sperm or egg or surrogacy services is sometimes said to do violence to the way we think the body, life, sexuality, or women’s reproductive labor is properly valued, and thus instantiates an inappropriate mode of valuation. For example, as Downie and Baylis note, the Canadian legislation barring payment for sperm and egg explicitly states that: “Trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raises health and ethical concerns that justify their prohibition,” a view that has also been endorsed by the Canadian Supreme Court in its case law on the Act. Smerdon worries that, “[c]ommodification extends to the children born of surrogacy as well,” and that “[p]ersonhood is harmed when it is not adequately recognized that the product of a woman's reproductive labor is someone not

something.”69 Some have suggested that sex selection leads to a devaluation of women since they are often selected against.70 More generally, Leon R. Kass has critiqued cloning and new reproductive technologies as ignoring the “[w]isdom of [r]epugnance,” which “may be the only voice left that speaks up to defend the central core of our humanity.”71

My approach to this kind of justification for a domestic prohibition on reproductive technology use echoes my treatment of corruption justifications for prohibiting assisted suicide and abortion discussed in the last chapter. As I suggested there, it is imperative to distinguish consequentialist from intrinsic corruption variants.

If consequentialist corruption is the worry, then the home country has a stronger reason to prohibit the activity at home than abroad because there is likely a much stronger attitude-modifying effect. This is partially an empirical question, and may in some instances track the mechanism by which corruption is thought to happen. For example, it may be that the effect of allowing home country citizens to buy the eggs of foreign women is unlikely to cause a devaluation of women’s sexuality in the home country because the activity is “out of sight.” By contrast, if sex selection’s gender devaluing role stems from the production of sex ratios imbalanced towards men, that result seems to obtain whether or not the act of sex selection occurs at home or abroad. However, because of the transaction costs associated with traveling abroad for the service, the amount of sex selection may be much less than if the practice is permitted abroad, in which case the gender devaluation effect may not obtain or may also be lessened.

By contrast, as I put it in the last chapter, the intrinsic corruption concern is more metaphysical and suggests that something wrong has been done through the act of value denigration at the moment the act takes place, irrespective of what follows thereafter. On this justification for criminalization, it seems that the home country has just as much of a reason to extend its criminal law to the actions of its citizen abroad as it does when the citizen acts at home. Wrong has been done at the moment the act is done (whatever its consequence), and the act of criminal condemnation is needed both to deter that act and,

69 Smerdon, supra note 4, at 17.
70 E.g., Daar, supra note 18, at 267; Kristi Lemoine and John Tanagho, Gender Discrimination Fuels Sex Selective Abortion: The Impact of the Indian Supreme Court on the Implementation and Enforcement of the PNDT Act, 15 U. MIAMI INT’L & COMP. L. REV. 203, 224–26 (2007) (discussing the effects of sex selection in India and observing that “[w]hile it might be assumed that a scarcity of women would lead to their increased value in society, as of yet nothing indicates that the worsening sex ratio over the past decades has enhanced the position of women in Indian society. In fact, the converse is likely true, for despite the lowest sex ratio in the past century, the status of women in India has arguably never been lower. . . . Instead of raising the value of women, skewed sex ratios only increase the frequency of rape, prostitution, and violence against women.”).
on retributivist or corrective justice type grounds, to re-right the balance. That does not mean, as I stressed before, that the home country has reason to criminalize the act of reproductive technology use by non-citizens in foreign countries as well, as a kind of universal jurisdiction over the crime. Even if the free-floating wrong is the same in all instances for intrinsic corruption, it is a mistake to think that every sovereign is equally morally obligated to punish every wrong done in the world. Rather, the citizenship tie of the perpetrator to the home country is important in helping to justify the home country’s right to punish. It is the fact that one is a national and a member of the coercive structure of a country that both benefits and burdens a citizen; instead of choosing Exit, that citizen has accepted the sovereign’s authority to punish in a way that the citizen has not accepted of any other sovereign.

Indeed, some have claimed that the circumstances in which surrogacy as part of fertility tourism takes place is actually more corrupting than its domestic equivalent. Laufer-Ukeles, for example, picks out some contextual factors she suggests reflect a “greater dehumanization and medicalization of an intimate relationship that occurs in international surrogacy”: the fact that “under the terms of most surrogacy contracts in India, the surrogate mother and her partner agree that if the childbearing woman is injured or diagnosed with a life-threatening disease during advanced pregnancy, she is to be sustained with life support equipment to protect the fetus viability and insure a healthy birth on the genetic parents’ behalf,” which Laufer-Ukeles claims reflects an understanding that the “fetus’s health explicitly comes before the mother’s”; the fact that Indian surrogates “often live in group homes during their pregnancy” with substantial control exerted over their daily activities, diet, prenatal medical care, and limitations on visitation by the surrogate’s other children and conjugal activity with a spouse, which she claims are conditions imposed to “ensure fetal safety, but also to control the surrogates and ensure their docility and compliance with surrogate contracts”; and the practice of allowing surrogates to see the baby when born but then quickly separating the surrogate from the baby and commissioning couple, which she views as largely benefitting the intended parents couples, “as they do not need to deal with messy emotions and relationships.” Each of these factors, Laufer-Ukeles suggests “reflects a much narrower development of relationships and human attachment than in domestic surrogacy.”

Therefore, if the justification for the domestic prohibition on commercial surrogacy, egg sale, sex selection, etc., is intrinsic corruption, I think the home country has good reason to punish the citizen who engages in the forbidden act abroad just as much as it does when the act takes place at home. By contrast, when the justification is consequentialist corruption, I think the home country may justifiably refuse to extend its prohibition to the extraterritorial conduct of its citizen to the extent it believes that attitude-modification effects will be diminished.

c. Exploitation and Undue Inducement.

An objection often raised to egg sale and commercial surrogacy is that the woman is

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72 Laufer-Ukeles, supra note 39, at 45–47 (internal quotation marks omitted).
being improperly exploited or unduly induced into participation. For example, Anne Donchin decrees that the consent of destination country women in these practices “can’t turn a morally unacceptable offer into a morally fair purchase,” and that such “offers exploit their vulnerabilities, expand the reach of market forces, and subvert efforts by the purchasers’ home countries to reign in unfair reproductive practices.” In a related vein, Casey Humbyrd argues that “the only valid objection to international surrogacy is that surrogate mothers may be exploited by being given too little compensation,” although she ultimately concludes that “[i]nternational surrogacy is ethical provided it is practiced following the principles of Fair Trade,” that is, fair wages and good working conditions.

This justification differs from earlier cases we have considered in at least two ways: First, the “victim” whom the law seeks to protect is a citizen of the destination country (rather than the home country or a stateless person). Second, unlike abortion, assisted suicide, or murder, the harm is not loss of life or physical injury (core Harm Principle cases) but more a violation of relational or distributive justice, especially if the “victim” consents (in a formal sense) and is made better off by the victim’s own current, subjective valuation.

Given what I have said in Chapter Seven regarding the moral force of exploitation arguments as applied to selling organs across borders, for many of the same reasons, I am skeptical that these arguments give a strong justification for criminalizing commercial surrogacy or egg provision. But, once again, for the purposes of the analysis in this chapter I am putting my own views about the moral cogency of a justification for a domestic prohibition to one side. Instead, I am taking the fact that the home country has prohibited the activity for this reason and asking what should follow for extraterritorial criminalization.

Here, I think there are good reasons why a home country that criminalizes commercial surrogacy or egg sale domestically for exploitation reasons may not criminalize the same activity abroad. Put otherwise, it seems much more likely that my belief in the statement “X was paid $20,000 for surrogacy services by a U.S. citizen and has thus been wrongfully exploited” will vary based on the citizenship of X.

Why? It will be helpful to recall the philosophical account of exploitation that we discussed in our earlier chapter. To determine that A has wrongfully exploited B, two criteria must be met: (i) A benefits from the transaction, (ii) the outcome of the transaction is harmful (harmful exploitation) or at least unfair (mutually advantageous

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73 Anne Donchin, Reproductive Tourism and the Quest for Global Gender Justice, 24 BIOETHICS 323, 325 (2010); see also Whittaker, supra note 32, at 111 (“The degree of exploitation involved in such transactions depends upon whether there is undue inducement, given the unequal economic position of women donors/surrogates, the level of control and coercion imposed upon them, their subordination within the arrangement, the degree of protection of their rights throughout the treatment process or pregnancy, and the extent of protection of their physical and mental health.”).

74 Casey Humbyrd, Fair Trade International Surrogacy, 9 DEVELOPING WORLD BIOETHICS 111, 112 (2009).
exploitation) to B, and (iii) A is able to induce B to agree to the transaction by taking advantage of a feature of B or his situation without which B would not ordinarily be willing to agree. Many elements of this definition and our analysis of whether to put in place legal interventions (and, if so, of what kind) will be different as between the domestic and medical tourism forms of these practices.

First, evaluating whether these transactions are harmful exploitation depends on the harm or at least the risk to which egg providers and surrogates subject themselves. That will depend on the prevailing standard of care for the procedures for egg retrieval, surrogacy, and postoperative care, as well as how these risks compare to the other risks of the women’s day-to-day lives. Differences between the home and destination country on these factors might lead the home country to determine that the exchange should be banned at home but not abroad, though, on different country comparisons, the opposite conclusion might also obtain.

On the one hand, there is evidence that the physical and psychological risks of surrogacy in India, for example, are greater than in the U.S. As Donchin notes (albeit without citation to medical or other literatures, for what it is worth):

In more developed countries surrogates would have legal representation and independent counseling to explain the complexities of medical interventions. But in poor countries assistance to protect the decision-making authority of surrogates is seldom available. . . . The quality of medical treatment may be substandard. Infection rates are seldom available. Genetic tests may be unreliable. Donor sperm may not have been screened for viruses such as HIV. Reliable data on complication rates during pregnancy and pregnancy outcomes may not be available. Often more embryos are transferred than the home country would permit, risking higher rates of multiple pregnancy.75

Others have also reported that in Indian surrogacy, at least, “C-sections are performed as a matter of course,” opining that they “may be more risky for the surrogates and their nearly automatic use distinguishes the international system from the domestic system, where there is no evidence that C-Sections are regularly preferred.”76

On the other hand, the kinds of risks faced by these women in everyday life in their home countries are also much worse than those faced by surrogates in developed home countries, such that these risks may actually seem more reasonable in relation to their day-to-day lives.77

75 Donchin, supra note 73, at 326, 328.
76 Laufer-Ukeles, supra note 39, at 46.
77 That argument is not totally satisfying in that one might think the fact that these women face these risks in everyday life already is itself unjust and problematic, but as the hypocrisy argument I discussed in Chapter Seven and apply here reminds us, unless we are prepared to undertake a more full-scale re-ordering of these women’s poverty, blocking this option may make them worse off.
Moreover, whether a surrogate is getting a “raw deal” will depend in part on whether the money involved is worth the risk; that, in turn, depends on how much the money offered is worth to her, which will in turn depend on her holdings, her alternatives, and where she is on the curve of diminishing marginal utility from income. In this regard, as Erin Nelson notes, in India, “women are in general less independent and have fewer opportunities for education or for employment that generates an income comparable to what they can earn as surrogate mothers.” Reporting the results of an unpublished study of forty-two surrogates in Anand in India from 2006–2008, Whittaker reports that “the median family income of the surrogates was US$60 per month, “meaning that 34 of the 42 women were below the poverty line” and that the “amounts of money involved for surrogates were significant in local terms – they were paid approximately 300,000 Rupees (US$7,500) – around one-third of the fees paid by contracting parents.” And as another author observes, “the fee paid for surrogacy in the international arena is quite high compared with other options afforded to women of the lower classes who engage in these contracts,” and “[a]part from other problematic ways of earning money, such as drugs or prostitution, there is no comparable way for uneducated women in India to earn such large fees.”

Moreover, perhaps surprisingly, some work on Indian surrogates suggests that participation can elevate their sense of self-worth, a non-pecuniary form of benefit. One of Amrita Pande’s interview subjects among Indian surrogates, a married, college-educated woman “proudly described her desirability as a surrogate in the eyes of clients, and emphasized that it was she who was doing the work, she who would decide what to do with the money, and she who would decide whether a couple who ‘wanted [her]’ was deserving of her services,” and that “for some surrogates, the narrative of ‘being special’ did more than just counter the stigma of being disposable mothers; it also encouraged them to take care of their health and think of their own needs.” Pande writes that this “‘I am special’ narrative is particularly powerful when invoked by lower-class women in India, a country where sex-selective abortions, skewed sex ratios at birth, and high female infanticide and mortality present compelling evidence of the prevalence of son

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78 Nelson, supra note 5, at 248.
79 Whittaker, supra note 32 at 111–12.
80 Laufer-Ukeles, supra note 39, at 49. Laufer-Ukeles marshals these figures as arguments that surrogacy in India is problematic, that “[i]n this economic climate, these decisions seem much more coercive and pressured than in first world countries where women tend to have other choices to support themselves,” id., but I think the fact that the money is so valued by the surrogates actually improves the practice from a moral point of view.
preference,” and that the narrative then “increases the women’s feelings of self-worth.”

Thus, even if the risks are greater than in domestic surrogacy, the rewards are greater too. If, as I suggested in Chapter Seven all exploitation arguments are such that there exists a price where an unfair exchange would be made fair, it may be that the value to these women of the money involved is at or exceeds that price.

Of course, as we observed in our earlier discussion of exploitation, even non-harmful exploitation can be wrongful; that is, there is a category of wrongful mutually advantageous exploitation. At the same time, as discussed before, the mere fact that a buyer takes advantage of a seller’s unfortunate or unjust background situation is not enough to render the transaction unfair, or else many transactions we think of as perfectly fine and even desirable (previously, I used the example of the patient needing amputation) would be prohibited. What we need instead is a kind of moralized baseline, a sense of how much the person ought to receive, to which we can compare what they actually are promised in the transaction. This is not an easy problem to resolve. We saw earlier that some have proposed using a hypothetical market approach to establish the relevant baseline, wherein we imagine what price would obtain in an unpressurized market. On this approach, there is reason to believe that the price at which it would be unfair in the developing world to pay a surrogate might be different from the price it would be unfair to pay a surrogate in the developed world, in part because the prices that we pay people in the developed world for all goods and services is so much lower.

Third, as we discussed in Chapter Seven, some argue that it is problematically hypocritical to block an exchange by a poor person that would make the individual better off unless one is also committed to a redistributive program that would help that person regain the foregone welfare boost (or perhaps at least reach a certain welfare threshold). Smerdon worries that “[o]ne must question the notion of free choice and self-determination when Indian women are agreeing to surrogacy to earn money to obtain urgent medical care for loved ones, win back lost children, raise children as a single parent or as the sole breadwinner, and pay for their children's dowries, particularly when the amount of money involved is so high in relation to the woman's standard of living.”

Similarly, Laufer-Ukeles powerfully attests to the kind of need faced by these women who choose to be surrogates in India, suggesting that “[f]or many, surrogacy is their last resort for feeding and educating existing children.” But I think these points actually cut the other way, showing us how banning the practice engaged in by these women means leaving their children to starve, a kind of “protection” we ought not to impose on the unwilling unless we are willing and able to be the ones to feed their children. Indeed, by

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82 Pande, supra note 81, at 305. Of course, some will dismiss this feeling as false consciousness and suggest it is a further injury, not a benefit to these women. How to evaluate that concern depends in part on knowing more about the conditions under which this feeling of these women were formed as well as one’s substantive theory of preference-laundering in welfare evaluation.

83 Smerdon, supra note 4, at 54.

84 Laufer-Ukeles, supra note 39, at 50.
way of the hypocrisy argument, one might conclude it is more justified to block the
domestic exchange because one is committed to such a redistributive program but not the
extraterritorial version because the home country is not inclined (or cannot) effect a
redistribution to the destination country citizen, nor will the surrogate’s country of
citizenship.

There is also a related complication. On some theories of global justice, the individuals
making the offer (the intended parents) owe the surrogate who is their fellow citizen,
something different than what they owe to a surrogate who is a citizen of another
country; co-membership in the same nation state is required to ground duties of
distributive justice. We discussed the range of global justice theories and their views
about when we owe duties to others in Chapter Six. The more exploitation is thought of
as an issue of distributive justice rather than obligations to avoid doing harm, the more
this point seems to have bite in distinguishing wrongful exploitation, justifying legal
intervention in the domestic and fertility tourism cases.

All this may mean that the reasons a home country gives for criminalizing commercial
surrogacy or egg provision at home do not themselves necessarily justify its criminalizing
the same activities as part of fertility tourism. To be fair, because many of these analyses
turn on specific characteristics of the surrogates or egg donors, it may mean that the
question of whether there is wrongful exploitation can only be judged on an individual-
by-individual basis, but a home country might (for administrability or other reasons) take
the country of origin of the individual as a proxy and determine extraterritorial
application accordingly. This suggests that it might be too crude to focus on
extraterritorial application simpliciter as a kind of on-off switch and that we should
instead analyze extraterritorially as to a particular destination country.

It may also be that the prescriptive criminalization should treat all foreign countries the
same but that we should use prosecutorial discretion to sort through these differences —
although doing so would leave some deterrent effect in place due to fear of prosecution.
Another possibility, one that parallels a suggestion I have made as to medical tourism for
services legal in both the home and destination countries in Chapters Two and Three,
would be to adopt a kind of certification regime through which penalties attach only to
going to an unapproved center.

III. Surrogacy and the Citizenship of Children Born Abroad.

As the Baby Manji case discussed and the introduction to this chapter suggested,
countries with prohibitions on commercial and/or non-commercial surrogacy
domestically have faced a persistent and repeated dilemma: What should they do when
citizens travel abroad, use these services, successfully produce a child, and then seek to
bring the child back to the home country. Should they grant the child citizenship or at
least some form of permanent residency?

Before I discuss my own views of what policies home countries should adopt in this
situation, let me briefly describe the landscape of possible approaches by reviewing the
law on this subject that has developed in several home countries.

To start at a somewhat more general level, there are two major principles that jurisdictions follow in determining nationality at birth. Some nations operate under the “jus soli” (“right of the soil”) principle, in which any child born in that country’s territorial space is a national of that territory, while others operate under the “jus sanguinis” (“right of the blood”) principle, in which citizenship will pass based on the nationality of the child’s parents or ancestors, and some countries adopt both principles. When the destination country where the child is born recognizes jus soli nationality, as the U.S. does, for example, the child will be able to take on the citizenship of that country and thus will at least not remain stateless, even if its parents’ home country does not recognize the child as its citizen. By contrast, when the destination country recognizes only the jus sanguinis rule, there is a real possibility that the child will become stateless since no country will recognize the citizenship. This problem arises in particular, as with the case studies discussed above, when the home and destination countries adopt conflicting rules within a jus sanguinis framework as to how they define the parental relationship between gestational versus genetic parentage. To have a better grasp of it, let me explain how some countries have handled citizenship issues relating to surrogacy and egg donation abroad.

a. How Home Countries Have Handled These Cases.

Unfortunately, several cases like Baby Manji’s have arisen in various home countries, such that we now have a broad pattern of case and statutory law on this subject. While I cannot exhaustively review the law in every potential home country, I will review the cases and statutes that have received more attention due to controversies that have been litigated.

Under Canadian law, citizenship can be granted to a child born abroad via surrogacy and is granted automatically if the child is genetically related to at least one of the intended (Canadian parents). As Nelson reports, though, there have been at least two known cases where the “fertility clinic errors meant that the requisite genetic connection did not exist,” and, in one, the “Canadian intended parents returned home without the children they had hoped to raise” while, in the other, the “parents remained in India illegally and at great personal and financial cost until the immigration problems could be resolved.”

France has banned surrogacy since 1991. As Storrow explains, couples that travel abroad to engage a surrogate and return home are considered to have falsified their birth

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85 E.g., Lin, supra note 10, at 556.
87 Nelson, supra note 5, at 246.
certificates and the foreign birth certificate is not recognized by the French government, which will recognize only the “the biological connection between the male partner and the child.”88 In one notable case, French consular officials in Los Angeles, suspicious that a surrogate had been used, refused to provide the French couple – the Mennessons – a passport or a visa for the children that were born. The children travelled on U.S. passports back to France with their parents, at which point French prosecutors attempted to charge the parents with fraud to set aside the parents’ entry in the official register of parentage, which would deprive the children of French citizenship. A French judge determined that the criminal charges could not proceed because France had no extraterritorial jurisdiction in the case. When it came to citizenship and parentage, the court recognized the Mennessons’ parentage, but refused to grant the children the French citizenship that would normally go with that recognition. French law further prohibits those who have resorted to international surrogacy from adopting the children because they have attempted to circumvent legal adoption procedures. After five court decisions in ten years, the Cour de Cassation (the highest court in France) ultimately ruled that the girls were not French citizens, though the couple apparently plans to take their case to the European Court of Human Rights.89

Spain has tussled with a similar case, in this instance involving a gay couple. Spanish officials in Los Angeles refused to recognize the parentage of two male Spanish nationals, married in Spain, who produced a child with the help of a U.S. surrogate mother who produced twins. In keeping with California law, a pre-birth judgment was issued by a California court and the official birth certificate listed the men as parents with no reference to the twins’ genetic or gestational mother. The men went to the consulate to register the twins in the Spanish civil registry, but the consulate refused, citing the Spanish law that prohibits surrogacy in Spain. The family returned to Spain and sought official recognition of the California birth certificate, for which they encountered resistance. The matter made its way to litigation, and the court hearing the matter declared that it was a violation of Spanish law not to include the gestational mother as a parent in the registry. At this point, the Spanish Ministry of Justice intervened to establish guidelines for the entry into the civil registry of children born to surrogate mothers abroad, concluding that the proper balance between the interests of children and the Spanish government’s interest in prohibiting surrogacy was achieved “by obtaining a judgment in a host country court recognizing the legal validity of the birth certificate and making factual findings to the effect that the contract for surrogacy was entered into without fraud, overreaching or exploitation of the surrogate mother.”90 Storrow views this approach with favor and connects it to the legal doctrine of comity under which “[f]inal judgments of courts of foreign nations, which concern the recovery of sums of money,

88 Storrow, supra note 41, at 599.
90 This account is drawn from Storrow, supra note 41, at 600–01.
the status of a person, or determine interests in property, are conclusive and entitled to recognition in the courts of other nations” if the judgment was “rendered under a judicial system providing impartial tribunals and procedures compatible with due process of law,” and if the issuing court had jurisdiction to hear the case. Comity is refused “if the foreign judgment in question was obtained by fraud or if extending comity would undermine a strong public policy.”91 Of course, as my discussion below suggests, one key question will be whether recognizing the children born through circumvention tourism undermines public policy.

In Italy, Gruenbaum reports on a 2009 case raising similar issues. An Italian woman and a British man entered into an agreement with an English surrogate. After the children were born, the couple moved to Bari, Italy. The couple later divorced and the woman requested and was granted the recognition of the British parental orders. The Italian court concluded that “the prohibition of surrogacy under Italian law was not per se an indicator that the recognition would be against Italian (international) public policy,” noting that “it was in the best interest of the children to be recognized as related to the couple because the children had lived in Bari with the commissioning parents as a normal family since early childhood, and that they had established a close bond with the commissioning mother and no one else in the past ten years.”92

In the U.K., there have also been several high profile cases with similar facts. Under U.K. law, the intended parents who use a surrogate to produce a child are not given any legal rights or duties until a Parental Order is issued. To qualify for that order, the parents must meet several requirements. As Nelson describes those requirements:

the application must be made at least six weeks but less than six months after the child is born; the birth mother and her spouse or partner must consent to the Order; at least one intended parent must be domiciled in the U.K., the Channel Islands or the Isle of Man; the child must be in the care of and residing with the intended parents; at least one intended parent must be genetically related to the child (meaning that intended parents who are both unable to provide gametes are not candidates for a Parental Order); and the intended parents must be a couple (either married or civil partners) — single parents cannot obtain a Parental Order. Finally, and very significantly in the international surrogacy context, the court must be satisfied that “no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of” the agreement, handing over the child, or the making of the Order or making arrangements with a view to the making of the Order — unless the payment is authorized by the court. The purpose of this last requirement is to discourage intended parents from avoiding the prohibition on commercial

91 Id. at 602 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1), § 481 cmt. f (1987)).
surrogacy by participating in commercial surrogacy outside of the U.K.\textsuperscript{93}

One case decided by the High Court of England and Wales, Re X & Y (Foreign Surrogacy),\textsuperscript{94} involved U.K. nationals who traveled to the Ukraine to produce a child with a surrogate mother who lived there. Under Ukrainian surrogacy law, the surrogate mother and her partner or spouse are not treated as the parents of a child born through a surrogacy agreement and, instead, all duties and rights and the status of parent under the law are granted to the intended parents. By contrast, U.K. law adopts the exact opposite rule, that the birth mother is the legal mother of her child and that the birth mother’s spouse or partner is the legal father, with the intended parents having no parental status until a Parental Order is granted. The interplay of these two conflicting regimes led to a tragic result: the children were left stateless and parentless because the intended parents had no legal right to remain in Ukraine and, under U.K. law, the children were not U.K. citizens. Thus, the parents could not bring them back to England.\textsuperscript{95}

In a second case decided by the same court, Re G (Surrogacy: Foreign Domicile),\textsuperscript{96} the situation was reversed, with a U.K. citizen acting as the surrogate. The intended parents were Turkish nationals, domiciled in Turkey, who arranged for surrogacy services in England, and once the child was born they sought a Parental Order under British law. Because of the provision of that law discussed above, however, the parents had no entitlement to seek a Parental Order because neither was a domiciliary of the U.K., the Channel Islands, or the Isle of Man. The case was ultimately resolved by allowing the intended parents to adopt the child (in Turkey) and granting them an order assigning them parental responsibility to facilitate the eventual adoption. In his opinion, McFarlane J. noted that, given the plain text of the statute, it should have been obvious to these intended parents before they began the surrogacy process that they would not have been able to get a parental order under U.K. law.\textsuperscript{97}

While many individuals come to the U.S. to circumvent home country prohibitions on reproductive technology services, U.S. citizens also travel abroad for surrogacy, often for cost-saving reasons, since surrogacy is considerably cheaper in India, for example, than in the U.S. The immigration rules relating to fertility tourism in the U.S. are complicated by the fact that a child born abroad to U.S. citizens has two separate routes to citizenship under the relevant statute, each of which leads to a different decision maker: they can (1) apply while abroad, in which case the Secretary of State has jurisdiction and the application is governed by the interpretation of the statute in the Foreign Affairs Manual; or, (2) return to the U.S. and raise citizenship as a defense in a removal proceeding, in which case the U.S. federal courts ultimately have jurisdiction over the case (on appeal after decision by an immigration judge and the Board of Immigration Appeals) and will

\textsuperscript{93} Nelson, supra note 5, at 244 (citations omitted) (quoting Human Fertilisation and Embryology Act, 2008, c. 22, § 54(8) (U.K.)).

\textsuperscript{94} Re X & Y (Foreign Surrogacy), [2008] E.W.H.C. 3030 (Fam.).

\textsuperscript{95} This account is drawn from Nelson, supra note 5, at 246.

\textsuperscript{96} Re G (Surrogacy: Foreign Domicile) [2007] E.W.H.C. 2814 (Fam.).

\textsuperscript{97} This account is drawn from Nelson, supra note 5, at 246.
decide based on their case law. The two decisionmakers have, however, adopted conflicting rules when it comes to the cases we are talking about, such that the route which is used (or usable) proves crucial.

The crucial section of the immigration statute these two decision-makers are interpreting provides, in relevant part, that “a child born abroad out of wedlock to a U.S. citizen mother will automatically receive U.S. citizenship,” while “a child born abroad out of wedlock to a U.S. citizen father will receive citizenship only if certain conditions are met, one of which requires that ‘a blood relationship between the person and the father is established by clear and convincing evidence.’” While ideas like blood relationship and wedlock are easy to apply in traditional family formation, they are not self-evident in their meaning in reproductive technology usage. The Secretary of State and the only federal appellate court to have opined on the issue (the Ninth Circuit Court of Appeals) have reached diverging conclusions as to what these terms mean in our context.

The Ninth Circuit held that the immigration statute “does not require a blood relationship between a person born in wedlock and his parent who is a U.S. citizen” on the reasoning that, “had Congress intended to require a blood relationship for children born in wedlock, it would have explicitly included it in the statute as it did in the provision concerning children born out of wedlock,” while the Secretary of State has reached the opposite conclusion and interprets the statute to always require a blood relationship to transmit citizenship by descent, and has concluded that “the presumption that children born in wedlock are the product of that marriage is not determinative in citizenship cases because ‘an actual blood relationship to a U.S. citizen parent is required.’”

When it comes to the meaning of “born in wedlock,” the Foreign Affairs Manual adopts a series of rules regarding surrogacy. Namely:

1. a child born to a foreign surrogate mother who is also the biological mother and to a biological father who is a U.S. citizen is a child born out of wedlock to the U.S. citizen father (the identity of the intended, nonbiological mother is irrelevant); (2) a child born to a foreign surrogate mother who is not the biological mother and whose biological mother is a U.S. citizen and biological father is foreign is a child born out of wedlock to the U.S. citizen mother, even if the biological mother and father are married; and (3) a child born to a foreign surrogate mother who is not the biological mother and whose biological mother and father are both U.S. citizens is the child of two U.S. citizens.

While the Ninth Circuit has not addressed the meaning of “born in wedlock” for children

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99 Id. at 874 (citing and quoting 8 U.S.C. §1409).
100 Id. at 875-876 (quoting and citing Scales v. INS, 232 F.3d 1159, 1166 (9th Cir. 2000) and 7 FOREIGN AFFAIRS MANUAL § 1131.4-1 (1998)).
101 Id. at 878 (citing 7 FOREIGN AFFAIRS MANUAL § 1131.4-2 (1998)).
born through reproductive technology, one commentator suggests that its existing jurisprudence as to naturally produced children suggests that “as long as the child’s intended parents are married, the child will be considered born in wedlock.”

The result of all this is that whether the children born abroad of families formed through reproductive technology will be granted U.S. citizenship by descent will depend heavily on whether the matter is determined by an application while abroad (where, in many cases, the citizenship will not be granted) versus as a defense to a removal proceeding for a child who has been brought to the U.S. (where the more permissive judge-made rule will apply).

This review of the case and statutory law pertaining to children born through reproductive technology outside the intended parents’ home country suggests that, in many of these cases, intended parents face difficult, and, in some cases, insurmountable hurdles in trying to assert parentage over these children and bring them back to the home country. In the next section, I discuss what should be done.

b. Regulatory Options.

There are a series of options available to regulate this space. It is useful to map these out in terms of the interplay between the extraterritorial criminalization issues discussed in the earlier part of this Chapter and the immigration issues discussed in this part, as well as the possibility of restricting access.

One example of this last possibility comes from India: In 2008, India released the Assisted Reproductive Technologies (“Regulation”) Bill and Rules (“Draft ART Bill”), and subsequently revised it in 2010, although the Act at the moment continues to languish in India’s parliament. It has many provisions, but the one most relevant to us is Paragraph 34(19), providing that:

A foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after the pregnancy as per clause 34.2, till the child / children are delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking the surrogacy must ensure and establish to the assisted reproductive technology clinic through proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple/individual) that the party would be able to take the child / children born through surrogacy, including where the embryo was a consequence of donation of an oocyte or sperm, outside of India to the country of

102 Id.
103 Lin, supra note 10, at 561–62.
the party's origin or residence as the case may be. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother commissioned by the foreign party, the local guardian shall be legally obliged to take delivery of the child and be free to hand the child over to an adoption agency, if the commissioned party or their legal representative fails to claim the child within one months of the birth of the child. During the transition period, the local guardian shall be responsible for the well-being of the child. In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship.104

The draft legislation would essentially prevent clinics in India from providing services to foreigners without written proof that the prospective parents’ home country would be able to take the resulting child back to the home country. It also provides guardianship for the child, and, in the event the intended parents are unwilling or unable to take the child, the guardian may place the child for adoption within one month after the birth, and for Indian citizenship of the child in such cases. On the home country side, the Consul Generals of Belgium, France, Germany, Italy, the Netherlands, Poland, Spain, and the Czech Republic have in the interim sent letters to the reproductive technology clinics in India requesting that they no longer provide services to their citizens, and requiring that the citizens obtain pre-approval from their native government before proceeding with the treatments in India.105

With that background, let me outline a series of regulatory options and provide some analysis of their benefits and drawbacks:

(1) Do Not Criminalize, and Facilitate Immigration for the Child Back to the Home Country:

In this approach, essentially the home country would do nothing to obstruct the practice of fertility tourism, nor would the destination country. This approach would attempt to avoid some of the complicated legal battles involving citizenship discussed above by producing a clear and easy recognition of citizenship program for the home country. It would be enough for the home country to specify that if either genetic parent of the child born to a foreign surrogate is a citizen of the home country, then the child would receive citizenship through a jus sanguinis method. The integrity of the system could be ensured by requiring the filing of a genetic test showing relatedness with the application for citizenship in this instance. The destination country would in turn, to the extent necessary, amend its laws to allow the home country intended parents to remove the child from the

destination country. Thus, intended parents using egg or sperm provided by a third party and gestational or traditional surrogacy would be secured the ability to take their child back to the home country where the child would be given citizenship.

That approach would prevent citizenship in one kind of case I discussed above, where neither intended parent is a genetic parent or a gestational surrogate to the resulting child. In theory, one could expand the rule such that even in this case citizenship was provided to the child, by specifying that as long as one intended (if not genetic) parent is a citizen of the home country then the home country will grant citizenship to the offspring. Some might object that such a case looks more like adoption than it does non-assisted reproduction, and the immigration rules of the home country pertaining to adoption of children abroad are the better way of regulating cases of this type. I will not take a strong position on this kind of case here, which occurs fairly rarely as it is, except to say that one’s attitude to whether to extend citizenship directly to the child in this case will turn on (1) one’s attitude as to the importance of genetic ties in family formation, and (2) in what ways reproductive technology is properly thought to be like adoption versus non-assisted reproduction, both issues which have preoccupied me in other work.

But, let us put the case of genetically unrelated parents to the side once again. Under what circumstances would this policy option not be desirable? The answer comes from the earlier part of this chapter: cases of circumvention tourism. Where the justification for an equivalent domestic criminal prohibition in the home country is one that I have argued justifies extraterritorial prohibition as well – as I have argued that some but not all of the justifications do – then this approach to the problem would fail to effectuate the goal of deterring and punishing home country citizens who do abroad what they cannot do at home.

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106 I will put to one side the question of what to do when a gestational or full surrogate herself tries to assert parentage rights over the child. How to resolve this kind of case, familiar in the domestic version in U.S. courts, would depend on how the destination country itself resolves cases where both genetic and gestational parents assert parentage rights. There is also the opposite configuration, which sadly is also not unknown in U.S. circles, see In Re Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998), of “hot potato,” where no parent wants to assert parentage rights. Again, I suspect the right solution for such a case is to adopt whatever solution the destination country has put in place, to essentially make fertility tourism symmetrical with surrogacy usage within the destination country. A different approach, suggested by the Indian legislation discussed below, would be to enable guardianship and adoption of the child into a destination country family.

Thus, home and destination countries should adopt this permissive and facilitative approach where both countries permit the reproductive technology practice in question or where the home country prohibits the activity but its justification for that prohibition does not also justify extending the prohibition extraterritorially. In cases where neither of those conditions are met, the system designer will have to choose among one of two other possible approaches:

(2) **Criminalize Parental Action but Facilitate Immigration for the Child Back to the Home Country:**

or

(3) **Criminalize Parental Action and Deny Immigration for the Child Back to the Home Country:**

The second approach attempts a kind of Solomonic solution. On the one hand, in cases of circumvention tourism where extraterritorial criminalization is justified, it honors that principle by giving symmetrical treatment of the parents’ activity. If it is illegal to engage in artificial insemination by donor, procure a commercial surrogate,108 purchase sperm or egg, engage in sex selection, etc, in the home country, it should be symmetrically illegal to do it abroad (again assuming the justification is one that extends extraterritorially). However, to use the language of the bible, this approach stops short of punishing the child for the sins of the father (and/or mother).109 Justice Hedley, writing in the *Re X & Y*

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108 There remains a separate question of whether the home country ought to also seek to criminalize extraterritorially the activities of the destination country surrogate. Because it will be difficult to practically prosecute a foreign citizen whose activities take place abroad, as a practical matter this option does not seem all that appealing, although asserting prescriptive jurisdiction would at least give some expressive benefit. Whether that expressive benefit is worth it, I think, will depend again on the underlying justification. When the concern is exploitation of the destination country citizen, criminalizing her activity seems very strong medicine for a law meant ultimately to protect her from an exploitative action. When the concern is corruption of the consequentialist form, the key question seems to me what marginal reduction in corruption of the home country mores is achieved through adding this criminal penalty on to that established for the home country citizens. When the concern is child welfare, I think the case for criminalizing the activities of the destination country surrogate is the strongest, but like the abortion providers discussed in Chapter Eight, I think that the concerns of comity as well as the difficulties of enforcement, coupled with the fact that we worry about the conditions that drove these women to participate in the first place, all mitigate against extending domestic criminal prohibitions to them.

109 *Compare* Ezekiel 18:20 (“The person who sins will die. The son will not bear the punishment for the father’s iniquity, nor will the father bear the punishment for the son’s iniquity; the righteousness of the righteous will be upon himself, and the wickedness of the wicked will be upon himself.”), *with* Exodus 20:5 (“You shall not worship them or
(foreign surrogacy) case, put his finger on the discomfort of using citizenship of the resulting child as a deterrent, writing:

> What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child’s welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.110

An editorial in the French newspaper *Le Monde* about the Mennesson case described above makes a similar claim: “How do you justify depriving these children, now strangers in their parents’ country, of all the rights connected with citizenship, based solely on the way they were conceived and when there is no dispute over their parentage? What are they guilty of, besides their birth, to merit such sanctions?”111 Justice Hedley’s view in *Re X & Y* accords with those of most commentators, who have argued it is wrong to deny home country citizenship to these children.112

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110 Re X & Y (Foreign Surrogacy) [2008] E.W.H.C. 3030 (Fam.) ¶ 24.
112 E.g., Laufer-Ukeles, *supra* note 39, at 54 (“[I]t is very problematic not to allow those children to be raised by their intended parents. Refusal to let the child into the country seems particularly harsh when they were created at the behest of local citizens. The burden on the foreign country also seems unfair to that jurisdiction and overly punitive to the baby who may be a genetic relation to the intended parents. While this can be said of international adoption as well, children who are orphaned in foreign countries are still citizens of that country and clearly the responsibility of that country.”); Lin, *supra* note 10, at 587 (“[B]y denying citizenship to the surrogate child, the ‘sins’ of the parents are visited upon the undeserving child. Therefore, domestic courts addressing this matter ought to look to the standard that has been adapted by the U.K. courts in resolving the dispute in the best interests of the child. Under this framework, the court must be mindful of the public policy considerations behind the prohibition of surrogacy, but maintain the child’s welfare as its paramount consideration. This approach is in line with international norms on children’s rights, which have recognized the child’s right to a nationality and...”)
These authors, though, subtly mix in ex ante and ex post perspectives in a way that may make their claims appear stronger than they are. More specifically, it seems reasonable to assume that a well-publicized rule applied non-retroactively denying immigration status to children born through circumvention tourism will alter how many parents seek to use circumvention tourism for reproductive technology. In the extreme case, imagine that a well-publicized rule along the lines of the second proposal I delineated reduced the incidence of circumvention tourism for reproductive technology to zero. In that case, there would be no child welfare argument available against the policy, for no children would be born who suffered that penalty. By contrast, at the other extreme, if the rule had no deterrent force, then every child born through circumvention tourism would be harmed by the rule. The key question is where on the spectrum between these two poles will the deterrent effect of preventing immigration status lie. To be more precise, if somewhat mathematical, we should actually ask for the “delta,” the marginal deterrent effect of the rule beyond the other option of only criminalizing the behavior of the intended parents.

To use some fictitious numbers to illustrate how the analysis would go: in a regime where the home country does not criminalize parental behavior and facilitates immigration for the child (Option 1), 400 pairs of home country parents each year employ a foreign surrogate through circumvention tourism, producing 300 children. In a regime where the home country does criminalize the parental behavior and facilitates immigration for the child (Option 2), 200 pairs of home country parents each year employ a foreign surrogate through circumvention tourism, producing 150 children. In a regime where the home country does criminalize parental behavior and denies immigration for the child (Option 3), twenty pairs of home country parents each year employ a foreign surrogate through circumvention tourism, producing fifteen children. The analysis I have suggested would ask, “Is the reduction of 180 acts of circumvention tourism for surrogacy (200–20) worth leaving fifteen children of intended parents without home country citizenship?”

That is an explicitly consequentialist approach to the problem, where the conceded welfare detriment to these children is weighed against the moral harm identified with surrogacy that we wish to deter. The alternative would be a more deontological approach, hinted at by some authors who have written against Option 2. For example, Laufer-Ukeles writes that “[c]riminalization or refusing citizenship is extremely punitive and affects the children as much as the parents” and should be rejected because “[s]uch prohibitions or criminalization can serve to stigmatize children and punish innocent children in a manner that fails to protect children’s civil rights.”Richard Storrow writes passionately that “[i]t is critical that any law reform efforts that lawyers choose to undertake forcefully articulate that rendering surrogate children ‘illegitimate’ harms them the right to stay with one’s family where possible. The receiving country should make every effort to ensure that the child’s rights are not violated, which may include issuing an emergency travel certificate where appropriate so that the child is not forcibly separated from his or her parents.”

Laufer-Ukeles, supra note 39, at 54.
and furthers no proper public purpose” and “[b]estowing a subordinate status on any child born of surrogacy is every bit as invidious as was the stigma of ‘illegitimacy’ that historically attached to children born to families that did not fit the mold of one biological mother married to one biological father.”

My disagreement with these authors is twofold. First, as I suggested above, there is a potential “proper public purpose” in achieving deterrence and punishing wrongdoing by home country citizens, at least as understood through the lens of the home country’s domestic prohibition.

Second, and more to the point, I think a rights-based conception of the need to avoid harm to the child’s own welfare collapses under the weight of the principle. In home countries where the act of intended parents procuring a commercial surrogate is already criminalized, the only countries we are talking about in this section (since these are the only countries where circumvention tourism happens) with the potential to send parents to jail already set back the welfare of the children who are born through this process. These countries have thus, to some extent, decided to trade-off child welfare against the desire to deter and punish these practices that they find odious for some of the reasons discussed above. Indeed, every time the state criminalizes any behavior by any parent, unrelated to reproduction, it also sets back the interests of that parent’s children, and yet there is no “I have children” excuse for criminal behavior. This point, I think, readily answers objections to Option 2, which criminalizes parental behavior in circumvention tourism as it does in the patient’s home country. Criminal liability against parents usually sets back the interest of their children and yet we routinely permit it elsewhere in criminal law because we seek to vindicate deterrent and retributive aims.

Whether these objections provide a strong argument against Option 3, the use of immigration rules for children to deter bad parental conduct, strikes me as a closer question. One might be tempted to analogize to the way the law frequently provides tools to deprive those who commit crimes of their ill-gotten gains in financial and other kinds of crimes, that depriving these parents of children achieved through illicit means is just another kind of “disgorgement,” but that might be thought of as inappropriately treating these children as mere means to deterring parental behavior.

I think the better argument for Option 3 as against Option 2 is to put pressure on its opponents’ underlying assumptions by asking the question why the injury to the child of not being given his or her intended parents citizenship and filiation is morally different from the harms to the child of the criminal incarceration of his or her intended parents? One could imagine that, in some instances, from a child welfare perspective, the flip of Option 2 – no criminal liability for parents but also no immigration to the home country for the child outside of adoption proceedings – might be better for the child. And that last point is worth emphasizing: the question is not whether the child will forever be

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114 Storrow, supra note 41, at 608.
115 E.g., 2012 U.S. SENTENCING GUIDELINES MANUAL §§ 5E1.1, 5E1.4 (orders of restitution and forfeiture for individuals, respectively).
prohibited from becoming a home country citizen, but whether the child should be potentially available for adoption and thus on the same footing as other destination country children as opposed to enjoying the usual benefits of near automatic *jus sanguinis* citizenship.

The strongest argument for suggesting that the denial of immigration status is different in kind from the criminal sanction to parents is that it is a legal response applied directly to the resulting child and not one that sets back his or her welfare indirectly through a sanction to parents. That is a distinction, but is it a morally relevant difference? The response presumes that the child is being *deprived* of something that is its due – citizenship status in the home country – but a deprivation assumes that the child has an entitlement to that status, and the grounds for that entitlement are not clear. As we have seen through the cases reviewed above, there is no firm agreement between nations that genetic parentage rather than gestational parentage rather than either/or should be the basis for *jus sanguinis* citizenship. It seems to fetishize an essential genetic connection over gestational connections to say that the mere fact that one of your genetic parents comes from a particular home country gives you an entitlement to that country as your citizenship as opposed to the country of the gestational or full surrogate.

The importance of gestational versus genetic ties and their relationship to citizenship is deeply wedded into the culture and legality of the home country, and not something that comes out from thin air. As Storrow summarizes the matter in regard to Europe:

> [T]his approach to surrogacy arises from the intractable view of the legal implications of gestational motherhood. “[I]n traditional European-American thinking a mother's identity is understood as [an unwavering] natural fact:” “birth itself is conclusive proof of motherhood.” In both the civil law and the common law, this tradition is embodied in the maxim “mater semper certa est, etiamsi vulgo conceperit, pater est quem nuptiae demonstrant,” or “maternity is always certain even of illegitimate children, paternity follows marriage,” which continues to carry considerable weight, having been enshrined in the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children (1962) and the Convention on the Legal Status of Children Born out of Wedlock (1975). A Belgian newspaper explains: “The principle is simple: a child's legal mother is she who gives birth to it. Belgian law is extremely clear on this subject.” Not only is the law perfectly clear, there simply is no legal way to “break the lines of filiation.” This maxim holds even in the United Kingdom, where altruistic surrogacy is legal, but not in Greece, where the law recognizes the intending mother in surrogacy arrangements as the legal mother. Most countries in Europe reject surrogacy, however, so that in this area of assisted reproduction at least, the medical technologies of vitro fertilization and embryo transfer have not successfully eroded the force of the maxim.\footnote{Storrow, *supra* note 41, at 593–94 (citations omitted).}

For this reason, I think the strong case against Option 3, which relies on a deontological
right of the child to the citizenship of its genetic parent(s), has not been adequately made. Instead, I think the right way to conceive of the problem is the one I set out above (now subject to some additional qualifications), that is, asking: “Is the reduction of X acts of circumvention tourism for surrogacy worth leaving Y children of intended parents without home country citizenship at birth through jus sanguinis routes?”

That analysis is further inflected by (a) the likelihood that citizenship for the resulting child might be achieved through adoption as with other potential destination country children (which should make us more comfortable with this approach) and (b) whether these children (at least in the interim) will be given destination country citizenship as opposed to being rendered stateless (which should make us more comfortable with this approach). That last point is worth amplifying. Recall that the draft Indian legislation discussed above provides guardianship for the child of intended parents, and, in the event the intended parents are unwilling or unable to take the child, allows the guardian to place the child for adoption within one month after the birth, and for Indian citizenship of the child in such cases. Where such measures are in place, such that the child born has a clear path to destination country citizenship and parentage if not home country citizenship or parentage by the intended parents, I think Option 3 becomes more appealing. Indeed, in such a case we only think the child has been “injured” by not having home country citizenship if we think it “deserves” that citizenship much more than destination country citizenship, but as I suggested above it is not clear whether that entitlement can be defended. To be sure, there is still a setback of welfare for the child if we assume that his life would go better with his intended parents and/or that he would fare better if raised in their home rather than the destination country (contestable assumptions to be sure), but it seems to me much more like the setbacks of welfare that resemble the general criminalization of parental behavior that violates the law.

Because the analysis I have offered as to whether facilitation or obstruction of immigration for resulting children trades off the setback of welfare to children as against the home country’s anticipated marginal deterrence and retributive interests in preventing and punishing the acts it has criminalized, the analysis may once again vary based on the justification for the underlying criminal prohibition domestically and its extraterritorial extension. Where the justification for the prohibition is a powerful one, such as the Harm Principle, it seems to me less marginal deterrence may be tolerated in justifying the initial sanction. Where the motivation is something like consequentialist corruption, which I (at least) find less powerful, it might demand significantly more deterrence to justify harm to the same number of children whose interests are set back.

IV. A Summary.

The emotional pull of children born abroad and unable to return home with their intended parents is undeniable, but I have suggested that we should resist giving in to our impulse to adopt rules giving the child automatically home country citizenship in favor of a more

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117 It is no contradiction to think that a justification focused on child welfare could justify the no-citizenship option that itself sets back child welfare.
subtle and nuanced analysis of these cases.

Where the home and destination country both permit the reproductive technology practice in question or where the home country prohibits the activity but its justification for that prohibition does not also justify extending the prohibition extraterritorially, I have argued that the home country should grant *jus sanguinis* citizenship to the children born to foreign surrogates, at least in cases where a genetic parent of the child is also a home country citizen. Moreover, as the analysis in the first part of this chapter suggests, in such instances, the activities of the parents should not be subject to extraterritorial criminalization.

Where the home country prohibits the reproductive technology practice and its justification for that prohibition extends extraterritorially, I have suggested that the home country needs to engage in a complex analysis as to whether to only criminalize the extraterritorial actions of the home country parents or also deny *jus sanguinis* citizenship to the resulting child as a further deterrent of the activity. It must ask, “Is the reduction of *X* acts of circumvention tourism for surrogacy worth leaving *Y* children of intended parents without home country citizenship at birth through *jus sanguinis* routes?” Where the answer is “no,” the home country should only criminalize extraterritorially. Where the answer is “yes,” the home country should also deny citizenship to the children that result.

While that seems like a neat-and-tidy analysis, the ability to clearly articulate a standard should not obscure the number of difficult judgment calls that must be made. First, how to fill in variables *X* and *Y* are never fully knowable in advance, so, like so much in the law, the home country must make decisions in the shadow of uncertainty based on its best information. Second, as I have suggested above, the “worth” evaluative part of the analysis is inflected by considerations such as (a) What is the justification for the home country criminal prohibition and its extraterritorial extension and how powerful are those considerations? (b) Can the child be easily adopted and receive home country citizenship that way or are their great difficulties? (c) Will the child remain stateless or will the child be given destination country citizenship and a good possibility of adoption?

I have focused largely on what *home* countries should adopt as their rule in this section, but I want to recognize, like most authors, that international regulation would be very desirable, but, is also unlikely to occur in the short or medium term. Nelson, I think, has the diagnosis exactly right: “In principle, the idea of international regulation seems to make sense; we are, after all seeking solutions,” ideally through “a human-rights based instrument to regulate international surrogacy,” but that “solution [of international regulations] is not realistically achievable.” That is,

One need only look at the wide variety of regulatory approaches taken to ARTs in general and surrogacy in particular to appreciate that international consensus will be impossible to achieve. In addition, surrogacy is a complex phenomenon that requires regulation through an array of legal and policy approaches. Because

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118 See, e.g., Lin, *supra* note 10, at 586.
regulation of international surrogacy potentially affects so many areas of domestic law (including family law, contract law, health law, and human rights law), international regulation would likely demand significant modifications to domestic law to eliminate conflicts with the international regime.\textsuperscript{119}

Having now discussed four forms of medical tourism for services illegal in the patient’s home country – travel abroad for organs, abortion, assisted suicide, and reproductive technology services – in the next chapter, I discuss a form of medical tourism that is more in the grey zone based on most home country practices: stem cell tourism.