

## Circumvention Tourism

I. Glenn Cohen

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# CIRCUMVENTION TOURISM

I. Glenn Cohen†

*Under what circumstances should a citizen be able to avoid the penalties set by the citizen's home country's criminal law by going abroad to engage in the same activity where it is not criminally prohibited? Should we view the ability to engage in prohibited activities by traveling outside of the nation state as a way of accommodating cultural or political differences within our polity? These are general questions regarding the power and theory of extra-territorial application of domestic criminal law. In this Article, I examine the issues through a close exploration of one setting that urgently presents them: medical tourism.*

*Medical tourism is a term used to describe the travel of patients who are citizens and residents of one country, the "home country," to another country, the "destination country," for medical treatment. This Article is the first to comprehensively examine a subcategory of medical tourism that I call "circumvention tourism," which involves patients who travel abroad for services that are legal in the patient's destination country but illegal in the patient's home country—that is, travel to circumvent domestic prohibitions on accessing certain medical services. The four examples of this phenomenon that I dwell on are circumvention medical tourism for female genital cutting (FGC), abortion, reproductive technology usage, and assisted suicide.*

*I will briefly discuss the "can" question: assuming that a domestic prohibition on access to one of these services is lawful, as a matter of interna-*

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*tional law, is the home country forbidden, permitted, or mandated to extend its existing criminal prohibition extraterritorially to home country citizens who travel abroad to circumvent the home country's prohibition?*

*Most of the Article, though, is devoted to the "ought" question: assuming that the domestic prohibition is viewed as normatively well-grounded, under what circumstances should the home country extend its existing criminal prohibition extraterritorially to its citizens who travel abroad to circumvent the prohibition? I show that, contrary to much of current practice, in most instances, home countries should seek to extend extraterritorially their criminal prohibitions on FGC, abortion, assisted suicide, and, to a lesser extent, reproductive technology use to their citizens who travel abroad to circumvent the prohibition. I also discuss the ways in which my analysis of these prohibitions can serve as scaffolding for a more general theory of circumvention tourism.*

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#### INTRODUCTION

Under what circumstances should a citizen be able to avoid the penalties set by his or her home country by going abroad to engage in a prohibited activity in a place where it is legal? Should we view the ability to engage in prohibited activities by traveling outside of the nation-state as a way of accommodating cultural or political differences within our polity?

These are general questions regarding the power and theory of extraterritorial application of domestic criminal law. In this Article, I examine these issues through a close exploration of one setting that urgently presents them: medical tourism. Medical tourism—the travel of patients from the “home country” to the “destination country” for medical treatment—is a rapidly growing multibillion-dollar industry involving thousands of patients from the United States alone.<sup>1</sup> While the existing literature (my own work included) focuses on patients who travel to “price-shop” for services legal in both the home and destination country either on their own initiative or because their insurer or government induces them to,<sup>2</sup> a different facet of the industry also

<sup>1</sup> See, e.g., I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1471–73 (2010) [hereinafter Cohen, *Protecting Patients*] (describing and defining medical tourism).

<sup>2</sup> See, e.g., *id.* (noting that the “numbers relating to medical tourism from this new century have been steadily growing” and that, “[f]or U.S. patients, medical tourism promises significant cost savings”); I. Glenn Cohen, *Medical Tourism, Access to Health Care, and Global Justice*, 52 VA. J. INT’L L. 1, 2–3 (2011) [hereinafter Cohen, *Access to Health Care*] (describing the medical tourism industry); Nathan Cortez, *Embracing the New Geography of*

exists: medical tourism for services that are legal in the patient's destination country but illegal in the patient's home country. I call this form of medical tourism "circumvention tourism" because the patient has traveled to the destination country to circumvent domestic prohibitions on accessing services, although there are also numerous nonmedical examples.<sup>3</sup> To understand medical circumvention tourism, consider the following examples:

- Nawal is a two-year-old U.S. citizen whose parents, both now U.S. citizens, emigrated from Sudan twenty years earlier and gave up their Sudanese citizenship. The family now lives in a largely Sudanese-American community in Baltimore, Maryland. Nawal's grandparents have pressured her parents to have female FGC performed on Nawal. Performing the procedure is illegal in the United States,<sup>4</sup> so Nawal's parents take her to Sudan, where a local doctor legally performs the surgery. Could the United States close this loophole by applying the criminal prohibition extraterritorially to her parents? Should it do so?
- 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.<sup>5</sup> Can Ireland do so? Should it be able to do so?

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*Health Care: A Novel Way to Cover Those Left Out of Health Reform*, 84 S. CAL. L. REV. 859, 861–63 (2011) (citing examples of patients traveling abroad for medical services because of skyrocketing costs); Arnold Milstein & Mark Smith, *America's New Refugees—Seeking Affordable Surgery Offshore*, 355 NEW ENG. J. MED. 1637, 1638 (2006) (describing the industry).

<sup>3</sup> I exclude from this category the "incidental" medical tourist, such as a traveler who finds she needs an abortion while temporarily living or vacationing abroad. Is this exclusion strictly necessary? I remain somewhat agnostic on this point. On the one hand, the circumvention tourist seems more of a bad actor because the person has thumbed a nose at the home country's criminal law by scheming to avoid the law in a way that the incidental medical tourist has not. On the other hand, at least in the normative analysis, it is not clear that this extra fact about the circumvention tourist is necessary to establish a good reason for the home country to criminalize the extraterritorial act. One benefit about drawing the circle around true circumvention tourists is that they have a clearer nexus to and are more likely to be domiciles of the home country, which may not be true of the expatriate. While "circumvention tourism" is a useful descriptive term, I do not intend it to carry a normative connotation that the patient has done something wrong. I devote most of this Article to the question of whether states are justified in trying to criminalize the activities of these patients.

<sup>4</sup> 18 U.S.C. § 116(a) (2006) (authorizing fines and imprisonment for "whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris" of a minor).

<sup>5</sup> 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: Avoid-*

- Jason and his partner Jonathan are frustrated at the difficulty in securing a surrogate in their home country of Canada, where paid surrogacy is criminalized. They turn to a clinic in the village of Anand, India, where the practice is legal.<sup>6</sup> Can Canada prosecute Jason and Jonathan? Should it be able to do so?
- Susan is a fifty-year-old woman diagnosed with Lou Gehrig's disease and is expected to live for at most fourteen months. Due to the ravages of the disease, Susan faces difficulty with speaking, chewing, and swallowing. Susan is unable to end her own life because assisted suicide is illegal in her home state of Connecticut. Her brother Jon helps her travel to Switzerland, where a clinic assists her in ending her life.<sup>7</sup> Upon his return to Connecticut, can Jon be prosecuted by the state for assisting Susan's suicide? Should the state be able to do so? Does the answer change if the federal government were the one to undertake the prosecution?

In this Article, I examine these and other questions relating to medical circumvention tourism. I zero in on these questions by 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 "relitigating" 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 can and should criminalize 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,<sup>8</sup> but one I purposefully bracket here. For readers with deep investment in these issues, it may require considerable mental effort to determine what they would think about extraterritorial application if they believed that something like the abortion prohibition were normatively valid and lawful in the United States;

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*ing a Collision Between Irish Moral Sovereignty and the European Community*, 14 PAGE INT'L L. REV. 385, 387–89 (2002).

<sup>6</sup> This account is based on a narrative from Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9. See also Reference re Assisted Human Reprod. Act, [2010] 3 S.C.R. 457, 457 (Can.) (upholding Canada's ban on paid surrogacy).

<sup>7</sup> The facts of this hypothetical are based on *Rodriguez v. British Columbia (Att'y Gen.)*, [1993] 3 S.C.R. 519, 531 (Can.), and *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 157, 162–63.

<sup>8</sup> 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 always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.").

nonetheless, I think the payoff is great enough to beg this forbearance.<sup>9</sup>

This Article proceeds as follows. In Part I, I describe four case studies of medical circumvention tourism: female genital cutting, travel to obtain an abortion, certain reproductive technology services, and assisted suicide. In these cases studies, such treatments or services are criminally prohibited in the patient's home country. I also present a framework for thinking more generally about a home country's extraterritorial criminalization of its citizens' conduct.

Part II briefly examines existing doctrine. I show that, in these cases, under customary international law, home countries have discretion but are not mandated to extend their existing criminal prohibitions extraterritorially.

Part III, the heart of the Article, turns to the normative question: given this discretion, should home countries criminalize circumvention medical tourism? Drawing some inspiration from civil conflict-of-laws literature, I derive mid-level principles that tie the question of whether extraterritorial criminalization should be permitted to considerations like the type of justification for the domestic prohibition and the citizenship of the victim. Such principles tell us what home states should do in my four case studies.

I show that, contrary to much of the current practice, in most instances home countries should seek to extend criminal prohibitions on FGC, abortion, the usage of reproductive technology services, and assisted suicide to circumvention tourists.

Part IV indicates the way in which my analysis could be used as scaffolding to build a more general theory of the extraterritorial extension of domestic criminal law to circumventing citizens.

## I

### A FRAMEWORK AND FOUR CASE STUDIES

#### A. An Intellectual Framework

Let me begin by setting out the bounds of this Article. This Article focuses on the extraterritorial application of criminal law and not,

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<sup>9</sup> The small bioethical and legal literature on these types of cases has focused on the defensibility of the domestic prohibition. What little that has been written specifically discussing extraterritorial application has both largely endorsed a strong position of pluralism and attached significant weight to the fact that the prohibited activity takes place abroad, two premises that I will critique. *See infra* Part III.A.

This list of examples is far from exhaustive. Medical tourism for stem cell therapies or FDA-unapproved drugs not available in the United States constitute another interesting category, although many (but not all) of the issues raised by these practices parallel those raised in the assisted suicide case that I discuss in greater depth below. *See infra* Part I.B.4. I give this type of medical tourism sustained attention in a forthcoming book, I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, ETHICS, AND LAW (forthcoming).

for example, tort law, contract law, or even administrative regulatory requirements not encompassed by the criminal justice system.

I take up the application of domestic criminal law only to “perpetrators” who are citizens of the home country. I will call this “extraterritorial application of domestic criminal law” because the activities giving rise to the penalty occur outside the geographical territory of the home country.<sup>10</sup>

While I will speak of “citizens” going forward, I restrict my analysis to cases in which the citizen against whom the home country seeks to apply its criminal law is also its domiciliary rather than a domiciliary of the destination country (or another country), as in the case of an expatriate. This is necessary to keep the already complex analysis manageable and it seems like a permissible simplification because cases of domicile apart from citizenship are likely to appear relatively infrequently in the case studies I discuss.<sup>11</sup>

Moreover, the “core” cases that I consider in this Article involve a home country with significant ties to the citizen, as opposed to, for example, a country that claims an individual who has never lived there as its citizen because of blood relation to a prior “full” citizen.

I am also only interested in cases in which the medical activity is prohibited by criminal law in the citizen’s home country but not in the destination country such that circumvention is possible. Thus, I leave for other work cases of medical tourism for services illegal in both the home and destination country, where the destination country has lax enforcement regimes—most notably organ sale tourism.<sup>12</sup>

The focus of this Article is “jurisdiction to prescribe” or “prescriptive jurisdiction.”<sup>13</sup> Such jurisdiction consists of the power “to prescribe rules”—for example, to make it a crime in Ireland for an Irish

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<sup>10</sup> Some conflict-of-laws scholars might prefer to reserve the term “extraterritorial” for application to those persons who are neither citizens of the home country nor in its territory on the theory that there is a territorial contact with the home country by way of the citizenship relationship. Labeling my cases as “extraterritorial” assumes that the unit of analysis is acts (which occur abroad), not persons (who are tied to the home country). I will nonetheless stick with this term because it seems more natural than “application to extraterritorial acts.”

<sup>11</sup> While I will not delve into how adding a second domicile inflects the normative analysis, my general impression is that the more citizenship-like ties the citizen of a home country has to a destination country, including those underlying domicile, the more difficult the normative argument is for criminalizing circumvention tourism.

<sup>12</sup> I take up the case of organ sale or “transplant tourism” in I. Glenn Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J.L. MED. & ETHICS (forthcoming 2013) and in a chapter in COHEN, *supra* note 9.

<sup>13</sup> 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, *Jurisdiction*, in INTERNATIONAL LAW 335, 337, 340 (Malcolm D. Evans ed., 2d ed. 2006).



citizen to procure an abortion in the Netherlands—where the local territorial law does not make the act illegal.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

My discussion in this Article is limited to 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 not to have jurisdiction to enforce the law by arresting its citizen in the foreign country. Because many patients intend to return to their home countries after engaging in prohibited activities, prescriptive jurisdiction, unaccompanied by enforcement jurisdiction, remains an important tool for deterring and punishing circumvention medical tourism. While detection of and the ability to prove extraterritorial circumvention is imperfect,<sup>18</sup> as the historical cases I discuss in the next section show, many countries have been able to detect, deter, and punish these violations.<sup>19</sup>

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<sup>14</sup> See, e.g., Lowe, *supra* note 13, at 338 (noting that “the United Kingdom may enact a law forbidding, say, murder and make that law applicable to all British citizens wherever in the world they might be”).

<sup>15</sup> See *id.*

<sup>16</sup> *Id.* at 339.

<sup>17</sup> *Id.*

<sup>18</sup> The difficulties are not uniform across all my case studies. Detecting and proving abortion tourism seems the most difficult, whereas it seems easier for the other cases. Family and immigration law involving the return of new children from abroad would likely ferret out reproductive technology circumvention tourism; later visits to home country physicians may reveal that FGC has been performed on a minor, and physician reporting requirements for child abuse can alert authorities that the law has been violated either at home or abroad. Although more speculative, the fact that a frail individual never returns from a trip abroad may alert friends or family to the possibility of assisted suicide, which may in turn lead to involvement of home country authorities.

<sup>19</sup> A side benefit of extraterritorial criminalization that somewhat counteracts the enforcement difficulties is that when a home country decrees that criminal liability attaches for the crime, whether it is perpetrated at home or abroad, that country removes a possible defense for someone who engages in the activity at home but claims it was done in the destination country. Thus, if an act such as purchasing cocaine were illegal in the United States but legal in Mexico, an individual could not escape criminal liability by falsely claiming that purchase was done in Mexico when it was actually done in the United States. I largely ignore this side benefit in the remainder of this Article because I think it is orthogonal to the central question, which is whether the state wants to deter or punish the activity

Within these bounds, I offer an intellectual framework. I begin with a familiar distinction between the doctrinal and the normative. Within the doctrinal realm, we need to further distinguish between international and domestic law. It could be the case that a country, though permitted to impose extraterritorial criminal liability on the conduct of its citizen as a matter of international law, is forbidden from doing so under its own domestic constitution or other laws.

In each sphere, the home country might be forbidden from, required to, or permitted to have discretion to extend its domestic criminal prohibition extraterritorially, and each situation may produce conflicting conclusions. For example, if we determined that a state was prohibited from extending its criminal prohibition extraterritorially as a matter of international law but normatively mandated to do so, we would end up in a true conflict, which might lead us toward a law reform effort.

On the normative side, the term “mandated” might be a little strong. When I say a “home country *should* criminalize X form of circumvention tourism,” I mean that, as a normative matter, the home country has very good reasons to do so. This is a softer sense of “should” than, for example, claiming that if a home country did not criminalize circumvention tourism it would violate some grave and established principle of morality.

While one could approach these problems at a one-size-fits-all or case-by-case level, I will argue for a categorical or rule-based sorting, focusing on the nature of the justification for the domestic prohibition, the citizenship of the victim, and other considerations. In some ways, the categorical-sorting approach mirrors that used in resolving civil conflict-of-laws questions under the interests-balancing approach.<sup>20</sup>

## B. Four Case Studies

The foregoing supplies the theoretical vocabulary for the project. I now show the immediate practical payoff using four pressing examples of medical circumvention tourism in which the home country must decide what to do. These case studies also provide me recurring examples to return to that differ in important and clarifying ways.

### 1. *Female Genital Cutting of Minors*

Female genital cutting, also referred to as “female genital mutilation” and “female circumcision,” is a surgical procedure involving the

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when it takes place abroad. This bracketing makes it harder for my argument to succeed, so if I can defend my claims, the defense is even stronger once this side benefit is considered.

<sup>20</sup> See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 146 (1971).

“partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.”<sup>21</sup> The World Health Organization (WHO) estimates that about 140 million women and girls worldwide have undergone FGC.<sup>22</sup>

The WHO divides FGC into four major types:

1. Clitoridectomy: partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
2. Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora . . . .
3. Infibulation: narrowing of the vaginal opening through the creation of a covering seal . . . formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris.
4. Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.<sup>23</sup>

The WHO notes that FGC “has no health benefits” and its immediate complications include “severe pain, shock, haemorrhage (bleeding), tetanus or sepsis (bacterial infection), urine retention, open sores in the genital region and injury to nearby genital tissue,” with long-term consequences including “recurrent bladder and urinary tract infections; cysts; infertility; . . . increased risk of childbirth complications and newborn deaths; [and] the need for later surgeries.” For example, later surgery may be required because the sealed or narrowed vaginal opening (type 3 above) may “need[ ] to be cut open later to allow for sexual intercourse and childbirth.” Finally, FGC has significant long-term effects on sexual pleasure for women.<sup>24</sup>

Motivations for performing FGC have been described as social pressure to conform to community norms about cleanliness, beauty, femininity, virginity, and constraining premarital female libido, and some practitioners believe it has religious support.<sup>25</sup>

A study by Nawal Nour and her associates at the Brigham and Women’s Hospital in Boston, based on U.S. Census data from 2000,

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<sup>21</sup> *Female Genital Mutilation*, WORLD HEALTH ORG. (Feb. 2012), <http://www.who.int/mediacentre/factsheets/fs241/en> [hereinafter *FGC Fact Sheet*].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* For the purposes of this Article, I will take the facts as stated by the WHO as given, but I note that there are dissenting voices even in the medical community. See, e.g., Linda Morison et al., *The Long-Term Reproductive Health Consequences of Female Genital Cutting in Rural Gambia: A Community-Based Survey*, 6 TROPICAL MED. & INT’L HEALTH 643, 652 (2001) (claiming that the connection between “FGC and long-term reproductive morbidity is still not clear,” especially as to type 2 FGC); Carla Makhoul Obermeyer, *The Consequences of Female Circumcision for Health and Sexuality: An Update on the Evidence*, 7 CULTURE, HEALTH & SEXUALITY 443, 458 (2005) (disputing the claim that FGC interferes with sexual activity or enjoyment).

<sup>25</sup> *FGC Fact Sheet*, *supra* note 21.

suggested that 228,000 women are “with or at risk for FGC,” with “California, New York and Maryland hav[ing] the most female immigrants and refugees from countries where FGC is prevalent.”<sup>26</sup>

In 1996, the United States enacted the Female Genital Mutilation Act, which made it a crime for anyone to “knowingly circumcise[ ], excise[ ], or infibulate[ ] the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years,” with a punishment of up to five years in prison.<sup>27</sup> The statute exempts cases in which FGC is medically necessary.<sup>28</sup> The statute also makes clear that in applying the health exception, “no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual.”<sup>29</sup> Although this proscription has been in place for more than fifteen years, I have been unable to locate any reported decisions securing convictions under the statute. In what appears to be the first and only criminal case in the United States for FGC, in 2006, the state of Georgia convicted thirty-year-old Ethiopian immigrant Khalid Adem under state law for aggravated battery and cruelty to children for performing genital cutting on his two-year-old daughter.<sup>30</sup>

Because it has not been interpreted to apply extraterritorially, the statute allows citizen parents to take their daughters to other countries for FGC and then return to the United States. I am not aware of any reliable statistics regarding how many U.S. parents use medical tourism to circumvent the FGC prohibition, but those in the field have suggested that the problem is not insignificant among certain communities.<sup>31</sup>

In contrast to U.S. law, the United Kingdom’s Female Genital Mutilation Act of 2003 makes it an offense for U.K. nationals or permanent residents to carry out FGC abroad or to aid, abet, counsel, or procure the carrying out of FGC abroad, even in countries where the

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<sup>26</sup> African Women’s Health Ctr., *Number of Women and Girls with or at Risk for Female Genital Cutting Is on the Rise in the United States*, BRIGHAM & WOMEN’S HOSP. (last modified Oct. 19, 2011), available at [http://www.brighamandwomens.org/Departments\\_and\\_Services/obgyn/services/africanwomenscenter/research.aspx](http://www.brighamandwomens.org/Departments_and_Services/obgyn/services/africanwomenscenter/research.aspx).

<sup>27</sup> 18 U.S.C. § 116(a) (2006).

<sup>28</sup> *Id.* § 116(b)(1).

<sup>29</sup> *Id.* § 116(c).

<sup>30</sup> *See Adem v. State*, 686 S.E.2d 339, 345 (Ga. Ct. App. 2009) (recounting the facts of Adem’s crime and denying ineffective assistance of counsel claims); *Georgia: Man Convicted in Daughter’s Mutilation*, N.Y. TIMES, Nov. 2, 2006, at A19; *see also* Michelle A. McKinley, *Cultural Culprits*, 24 BERKELEY J. GENDER L. & JUST. 91, 91 (2009) (highlighting Adem’s case as a rare instance of prosecution for FGC in the United States).

<sup>31</sup> *See* Arta Lahiji, *Female Circumcision: Ethics and Human Rights* (Mar. 3, 2011) (unpublished manuscript), available at <http://www.law.harvard.edu/programs/petrie-flom/news/articles/fgc.pdf> (noting that Nawal Nour has suggested that parents committed to FGC “may take their young girls outside the country” to have the procedure performed).

practice is legal, with a maximum penalty of fourteen years imprisonment.<sup>32</sup> Sweden also criminalizes the activity extraterritorially, and Canada, New Zealand, and the Australian state of Victoria make it a crime to arrange for a child to be taken out of the home country in order to procure FGC.<sup>33</sup>

In April 2010, Congressman Dennis Crowley and Congresswoman Bono Mack introduced the Girls Protection Act of 2010, which sought to extend the existing U.S. prohibition of FGC extraterritorially by adding the words

(d) Whoever, being a United States citizen or alien admitted for permanent residence in the United States, knowingly transports a person in foreign commerce for the purpose of conduct with regard to that person that would be a violation of subsection (a) if the conduct occurred within the United States, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.<sup>34</sup>

The bill has yet to become law in the United States, and under the status quo, the prohibition does not apply extraterritorially.<sup>35</sup>

## 2. *Abortion*

Medical tourism is currently used to circumvent domestic criminal prohibitions on abortion in countries such as Ireland, Portugal, and Poland.<sup>36</sup>

This practice is not new. Under West German law—codified in 1976 prior to reunification—abortion was 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 and (3) overall poor social conditions which would adversely affect pregnancy."<sup>37</sup> The criminal prohibition extended extraterritorially to citizens' abortions performed abroad, with penalties resulting in up to three years of imprisonment unless the women previously received a "Beratungsschein," a certificate from a

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<sup>32</sup> Female Genital Mutilation Act, 2003, c. 31 (Eng.); see Maleiha Malik, *Feminism and Its "Other": Female Autonomy in an Age of "Difference,"* 30 CARDOZO L. REV. 2613, 2628 n.29 (2009).

<sup>33</sup> *Crimes Act 1958* (Vic) s 33 (Austl.); Criminal Code, R.S.C. 1985, c. C-46, § 273.3 (Can.); *Crimes Act 1961*, § 204B (N.Z.); 3 § LAG MED FÖRBUD MOT KÖNSSTYMPNING AV KVIN-NOR (Svensk författningssamling [SFS] 1982:316) (Swed.).

<sup>34</sup> H.R. 5137, 111th Cong. § 2 (2010).

<sup>35</sup> See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

<sup>36</sup> See Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399, 419 (2011) (noting that women in these countries "have long traveled to neighboring countries . . . to obtain access to abortion").

<sup>37</sup> See Karen Y. Crabbs, Note, *The German Abortion Debate: Stumbling Block to Unity*, 6 FLA. J. INT'L L. 213, 220 (1991) (footnotes omitted).

West German doctor.<sup>38</sup> In order to enforce this provision, German 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.<sup>39</sup> 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 abortion tourism.<sup>40</sup>

Ireland's difficulties with abortion tourism stem from its September 1983 adoption of 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."<sup>41</sup>

In *Attorney General v. X*,<sup>42</sup> 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.<sup>43</sup> 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";<sup>44</sup> however, the High Court found that the prospect of suicide did not qualify as a threat to the mother's life and enjoined the trip.<sup>45</sup> 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.<sup>46</sup>

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<sup>38</sup> *Id.* at 222–23.

<sup>39</sup> *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-abortion](http://articles.latimes.com/1991-10-19/news/mn-515_1_legal-abortion) (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).

<sup>40</sup> *See* Martha F. Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. REV. 1657, 1682–83 (2010).

<sup>41</sup> IR. CONST., 1937, art. 40.3.3; *see* Clifford, *supra* note 5, at 398 (noting that passage of the amendment paved the way for a future "collision between Irish moral sovereignty and the [European Community]" (internal quotation marks omitted)).

<sup>42</sup> [1992] 1 I.R. 1 (H. Ct.) (Ir.).

<sup>43</sup> *Id.* at 6–7.

<sup>44</sup> IR. CONST., 1937, art. 40.3.3.

<sup>45</sup> X, [1992] 1 I.R. at 12.

<sup>46</sup> *Att'y Gen. v. X*, [1992] 1 I.R. 16, 53–54 (S.C.) (Ir.).

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."<sup>47</sup> 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.<sup>48</sup>

In the United States, the 1973 *Roe v. Wade* decision secured a constitutional right for American women to access abortions under certain circumstances.<sup>49</sup> Prior to *Roe*, when abortion remained banned in several states, at least one U.S. case considered the application of domestic criminal prohibitions on abortions performed outside of the United States.<sup>50</sup> *People v. Buffum*<sup>51</sup> involved a California doctor who arranged for an associate to transport pregnant women to Tijuana, Mexico, where another doctor performed abortions.<sup>52</sup> 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.<sup>53</sup>

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<sup>47</sup> IR. CONST., 1937, art. 40.3.3; see Clifford, *supra* note 5, at 412.

<sup>48</sup> Clifford, *supra* note 5, 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 somewhat conflicting cases. See, e.g., Case C-159/90, Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan, 1991 E.C.R. I-4685, I-4741 (holding that it is not "contrary to Community law for a Member State . . . to prohibit students associations from distributing [certain] information" regarding procuring an abortion); Open Door Counselling Ltd. v. Ireland, 246 Eur. Ct. H.R. 1, 32 (1992) (holding that "the restraint imposed on the applicants from receiving or imparting information [regarding abortion] was disproportionate to the aims pursued"); Soc'y for the Prot. of Unborn Children (Ir.) Ltd. v. Grogan, [1989] I.R. 760, 764 (Ir.) (rejecting the notion of a right to "inform the mother of an unborn child of the location, identity and method of communication with abortion clinics in the United Kingdom"); Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Open Door Counselling Ltd., [1988] I.R. 593, 625 (H. Ct., 1986) (Ir.) (stating that "no right could constitutionally arise to obtain information . . . to defeat [the] constitutional right to life of the unborn child"); Clifford, *supra* note 5, at 402–04.

<sup>49</sup> 410 U.S. 113, 166 (1973).

<sup>50</sup> Another case, *Edge v. State*, 99 S.W. 1098, 1098 (Tenn. 1907), involved intranational medical tourism, from Tennessee to North Carolina. See C. Steven Bradford, *What Happens if Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 100 (1993) (discussing the *Edge* decision).

<sup>51</sup> 256 P.2d 317 (Cal. 1953).

<sup>52</sup> *Id.* at 319.

<sup>53</sup> *Id.* at 320–22.

### 3. *Reproductive Technology Use*

Many countries (or their states or provinces) limit or ban certain assisted reproductive technologies (ART). “Italy’s Law 40 confines use of reproductive technologies to infertile women of ‘potentially fertile age’ who are married or part of a ‘stable’ heterosexual couple” and prohibits the use of donated sperm or eggs.<sup>54</sup> “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.”<sup>55</sup> Greece and Japan also restrict access to ART for women aged fifty or younger.<sup>56</sup> Egypt, Iran, Kuwait, Jordan, Lebanon, Morocco, Qatar, Turkey, Indonesia, Malaysia, and Pakistan ban all forms of sperm or egg donation.<sup>57</sup> Austria, Germany, Switzerland, the Australian States of Victoria and Western Australia, the Netherlands, Norway, and, most recently, New Zealand and the United Kingdom prohibit anonymous sperm donation.<sup>58</sup> Britain, Canada, and the Australian states of Victoria and New South Wales have banned or limited compensation for egg and sperm donation beyond expenses incurred.<sup>59</sup> Canada, the Australian states of Victoria, New South Wales, and Western Australia have made commercial surrogacy a crime, as have the U.S. states of New York, Michigan, Washington, and the District of Columbia.<sup>60</sup> Britain effectively prohibits commercial surrogacy by forbidding the transfer of parentage rights without “a showing before the court that the surrogate received no financial or other beneficial consideration in exchange for her services.”<sup>61</sup> In France, “[a]ll types of surrogacy are illegal,” and violations may result in sanctions [of] up to “10 years’ imprisonment and around a €150,000 fine.”<sup>62</sup> This list is far from exhaustive.

These restrictions have prompted significant amounts of medical tourism. Major destinations for these services include Australia, Ca-

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<sup>54</sup> I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 450 (2011) [hereinafter Cohen, *Regulating Reproduction*].

<sup>55</sup> *Id.* at 450–51.

<sup>56</sup> *Id.* at 452.

<sup>57</sup> Marcia C. Inhorn, *Fatwas and ARTs: IVF and Gamete Donation in Sunni v. Shi’a Islam*, 9 J. GENDER RACE & JUST. 291, 303 (2005).

<sup>58</sup> Cohen, *Regulating Reproduction*, *supra* note 54, at 461–62.

<sup>59</sup> *Id.* at 466.

<sup>60</sup> *Id.* Stopping short of criminalization, Louisiana, Maryland, Nebraska, New Mexico, and Oregon have rendered commercial surrogacy contracts unenforceable. *See id.*

<sup>61</sup> *Id.* (quoting Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN’S L.J. 275, 286 (2009)) (internal quotation marks omitted).

<sup>62</sup> Myriam Hunter-Henin, *Surrogacy: Is There Room for a New Liberty Between the French Prohibitive Position and the English Ambivalence?*, in 11 LAW AND BIOETHICS: CURRENT LEGAL ISSUES 2008, at 329, 334 & n.29 (Michael Freeman ed., 2008).



nada, Germany, India, Israel, South Africa, and the United States.<sup>63</sup> There are also niche markets: Romania, Ukraine, and the United States are common destinations for ethnically Caucasian sperm or eggs,<sup>64</sup> while Jewish couples often travel to Israel to gain access to procedures that comply with Jewish law.<sup>65</sup>

Efforts to circumvent domestic prohibitions also influence destination country choice. Denmark, which permits anonymous sperm provision, attracts patients from nearby Sweden, Norway, and the Netherlands, which prohibit the practice.<sup>66</sup> Because they permit payment for sperm and egg donors, Spain and Romania attract patients from many Western European countries where compensation is banned or limited; for the same reason, Taiwan attracts patients from China and Japan.<sup>67</sup> Some patients will go to countries where they are permitted by law to use preimplantation genetic diagnosis (PGD) to select their child's sex.<sup>68</sup> India and California have become popular destinations for surrogacy because they permit commercial surrogacy and enforce surrogacy contracts.<sup>69</sup> Over all of this, price, specialization, and expertise form additional considerations.<sup>70</sup>

The Akanksha Infertility Clinic, centered in the village of Anand, India, run by Doctor Nanya Patel, and featured on *The Oprah Winfrey Show*, gives a good sense of surrogacy tourism today.<sup>71</sup> 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."<sup>72</sup> Surrogates receive \$50 a month, plus \$500 at the end of each trimester, and the balance upon delivery. A 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

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<sup>63</sup> See Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 285 (2009).

<sup>64</sup> *Id.* at 286.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 296.

<sup>67</sup> *Id.* at 296–97.

<sup>68</sup> *Id.* at 286.

<sup>69</sup> *Id.* at 298 (citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)).

<sup>70</sup> *Id.* at 299–300; see also Cohen, *Protecting Patients*, *supra* note 1, at 1471–86 (discussing medical tourism's cost saving and specialization).

<sup>71</sup> See Scott Carney, *Inside India's Rent-A-Womb Business*, MOTHER JONES, Mar.–Apr. 2010, available at <http://motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>; Gentleman, *supra* note 6.

<sup>72</sup> Carney, *supra* note 71.

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.<sup>73</sup>

Despite the rampant circumvention of domestic prohibitions on reproductive technology use through medical tourism, the vast majority of countries have not taken steps to deter it. The exceptions, however, are notable. In March 2010, Turkey extended its domestic criminal prohibition on reproducing with donor sperm or eggs (other than from a spouse) to apply to activities by its citizens abroad, such that a Turkish woman inseminated with donor sperm in the United States could face up to three years in prison.<sup>74</sup> In 2004, Italy announced that it would prosecute doctors who referred patients abroad for prohibited reproductive technology services.<sup>75</sup> Two Australian states have also criminalized commercial surrogacy done by their citizens overseas, with penalties of up to two years of imprisonment and fines of \$275,000.<sup>76</sup>

France has also extended its criminal prohibition to citizens who travel abroad to use surrogacy services and has used its family law on parental status as a further deterrent:<sup>77</sup> French courts have nullified U.S. declarations of parenthood and refused to recognize adoption orders in cases arising out of circumvention tourism for commercial surrogacy in California and Minnesota and, in one case, a French court denied the commissioning parents any possibility of ever adopting the children.<sup>78</sup> Japan and the United Kingdom have also had con-

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<sup>73</sup> *Id.*

<sup>74</sup> *Turks Barred from Receiving Sperm or Egg Donations Abroad*, HURRIYET DAILY NEWS, Mar. 15, 2010, <http://www.hurriyetdailynews.com/n.php?n=turks-are-banned-to-receive-sperm-or-egg-donations-abroad-2010-03-15>.

<sup>75</sup> John A. Robertson, *Protecting Embryos and Burdening Women: Assisted Reproduction in Italy*, 19 HUM. REPROD. 1693, 1695 (2004).

<sup>76</sup> Surrogacy Bill 2010 (NSW) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parlament/NSWBills.nsf/0/71c024816771a264ca2577c100195683?OpenDocument>.

<sup>77</sup> Hunter-Henin, *supra* note 62, at 334 n.29.

<sup>78</sup> *Id.* at 334; see Gilles Cuniberti, *French Court Denies Recognition to American Surrogacy Judgement*, CONFLICT OF LAWS.NET: NEWS & VIEWS IN PRIVATE INT'L L. (June 30, 2009), <http://>

troversial cases in which the country initially denied immigration to children born to surrogates abroad.<sup>79</sup>

#### 4. *Assisted Suicide*

Medical travel for assisted suicide, including physician-assisted suicide, has consisted mainly of travel to Switzerland. While other countries permit assisted suicide, only Switzerland permits it without requiring the patient to be a resident.<sup>80</sup>

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.<sup>81</sup> 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.”<sup>82</sup> 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.<sup>83</sup> Both courts rejected her claim.<sup>84</sup>

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/conflictoflaws.net/2009/french-court-denies-recognition-to-american-surrogacy-judgment/.

<sup>79</sup> See Jennifer A. Parks, *Care Ethics and the Global Practice of Commercial Surrogacy*, 24 *BIOETHICS* 333, 333–35 (2010) (discussing the Baby Manji case, involving an Indian surrogate and a commissioning Japanese mother, in which both people refused to take custody of the baby and the Japanese embassy refused to give a passport to the baby to return to Japan with her grandmother); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 *CUMB. L. REV.* 15, 68–74 (2008) (discussing similar cases and issues with immigration to the United Kingdom).

<sup>80</sup> Alexandra Mullock, *Overlooking the Criminally Compassionate: What Are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?*, 18 *MED. L. REV.* 442, 450 (2010) (“Unlike other jurisdictions where assisted dying is permitted, Switzerland (or at least certain Swiss cantons) allows non-Swiss residents to avail themselves of the services of Swiss assisted suicide organisations such as Dignitas.”). Some of the most well-known legal cases involving assisted suicide in Switzerland emanate from the United Kingdom. Indeed, approximately 107 British citizens have used the services of the Swiss group Dignitas to end their lives. See George P. Smith, II, *Refractory Pain, Existential Suffering, and Palliative Care: Releasing an Unbearable Lightness of Being*, 20 *CORNELL J.L. & PUB. POL’Y* 469, 514 n.332 (2011).

<sup>81</sup> *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 161; see also Mullock, *supra* note 80, at 443–45 (discussing *Pretty* and the resulting guidelines from the DPP).

<sup>82</sup> Suicide Act, 1961, 10 *Eliz.* 2, c. 60, § 2 (Eng.).

<sup>83</sup> See *R (Pretty) v. Dir. of Pub. Prosecutions*, [2001] UKHL 61, [2002] 1 A.C. 800 (H.L.) (appeal taken from Eng.); *Pretty*, 2002-III Eur. Ct. H.R. at 174–76.

<sup>84</sup> 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

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 a guidance clarifying that her husband would not face charges under the Suicide Act if he assisted her travel to Switzerland to die.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> They specifically found a failing in the fact that an individual assisting a loved one with suicide could not adequately determine from the Code before acting whether prosecutorial discretion would be exercised in favor or against the individual's prosecution.<sup>88</sup>

In response to the decision, in 2010, the DPP issued final guidelines listing sixteen factors in favor of and six against prosecution.<sup>89</sup> With these four case studies in mind, we are poised to examine the doctrinal and normative issues they raise.<sup>90</sup>

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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. See sources cited *supra* note 83. 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. See *Pretty*, 2002-III Eur. Ct. H.R. at 176.

<sup>85</sup> R (Purdy) v. Dir. of Pub. Prosecutions, [2009] EWCA (Civ) 92, [4]–[6] (Eng.).

<sup>86</sup> See *id.* at [61]; Kate Greasley, R(Purdy) v DPP *and the Case for Wilful Blindness*, 30 OXFORD J. LEGAL STUD. 301, 305 (2010).

<sup>87</sup> See R (Purdy) v. Dir. of Pub. Prosecutions, [2009] UKHL 45, [2010] 1 A.C. 345 (H.L.) [73]–[74] (appeal taken from Eng.); Greasley, *supra* note 86, at 305.

<sup>88</sup> See R (Purdy), [2009] UKHL 45, [2010] 1 A.C. [73]–[74].

<sup>89</sup> Mullock, *supra* note 80, at 444–45.

<sup>90</sup> Other legal systems have responded to different types of circumvention tourism. For example, Germany's criminal code, the Strafgesetzbuch, states that the "German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to" offenses committed abroad including:

abduction of minors in cases under section 235 (2) No 2, if the act is directed against a person who has his domicile or usual residence in Germany; . . . abortion (section 218), if the offender at the time of the offence is German and has his main livelihood in the territory of the Federal Republic of Germany; . . . human trafficking for the purpose of sexual exploitation, for the purpose of work exploitation and assisting human trafficking (sections 232 to 233a); unlawful drug dealing; [and the] distribution of pornography . . .

STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, TEIL I [BGBl. I] 3322, as amended, §§ 5–6, art. 3 (Ger.).

## II

THE DOCTRINAL QUESTION: HOME COUNTRIES' POWER TO  
CRIMINALIZE CIRCUMVENTION MEDICAL TOURISM  
UNDER INTERNATIONAL LAW

This Part briefly examines the doctrinal question of whether, as a matter of international law, home states are forbidden, required, or permitted as a matter of discretion to criminalize the activities of their citizens abroad in the four medical circumvention tourism case studies. I find that, in these case studies, customary international law<sup>91</sup>

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<sup>91</sup> I say "customary" because, for FGC, there is a possible argument for treaty-based obligations: that the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], and/or the Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW], actually require member states to criminalize acts of FGC committed by citizens outside their geographic territory. The Human Rights Committee has said that FGC violates Article 7 of the ICCPR because it constitutes cruel, inhumane, and degrading treatment. *See, e.g.*, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Sudan*, Nov. 19, 1997, ¶ 10, U.N. Doc. CCPR/C.79/Add.85; GAOR, 61st Sess. (1997). The Committee on the Elimination of Discrimination Against Women has found that FGC violates CEDAW's guarantees of health and non-discriminatory treatment. *See* United Nations Committee on the Elimination of Discrimination Against Women, "Female Circumcision," General Recommendation No. 14, 9th Sess., 1990; United Nations Committee on the Elimination of Discrimination Against Women, "Violence Against Women," General Recommendation No. 19, 11th Sess., 1992; *see also* Erika Sussman, Note, *Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996*, 31 CORNELL INT'L L.J. 193, 201-02 (1998) (discussing the Female Genital Mutilation Act, in the context of CEDAW). However, it is far more speculative to claim that these treaties require criminalization of extraterritorial acts of FGC. First, the extent to which these agreements require states to prevent private parties from harming each other, as opposed to simply forbidding state or state-sponsored violations of the rights listed in them, is unclear. *See* Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 67-74 (2005). Second, the question of whether these obligations extend beyond a state's geographic territory is currently the subject of heated debate. *Compare* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 180-81 (July 9) (finding that obligations extend to individuals in the territory or subject to the state's jurisdiction), *and* Human Rights Comm., The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, May 26, 2004, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13; GAOR, 80th Sess., General Comment 31 (2004) (same), *with* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 123-27 (2005) (discussing states' disagreement with the view that obligations extend beyond their borders). As for the United States, this claim would be especially unlikely to succeed because the United States is not a party to the First Optional Protocol to the ICCPR—the agreement that empowers the Human Rights Committee to issue authoritative interpretations of the Covenant—and has yet to ratify CEDAW. *See* Optional Protocol to the ICCPR, Mar. 23, 1976, 999 U.N.T.S. 171, *available at* <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-5.en.pdf>; Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13, *available at* <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-8.en.pdf>.

gives discretion and will permit, but not require, home countries to criminalize the circumvention tourism of their citizens.<sup>92</sup>

### A. Bases for Prescriptive Jurisdiction

Under customary international law, prescriptive jurisdiction may be premised on several different possible bases. Because I limit this Article to cases in which the “perpetrator” is a home country citizen who has engaged in medical tourism to skirt the domestic prohibition, all my case studies fall comfortably within the “Nationality Principle” basis for prescriptive jurisdiction—permitting a state to assert jurisdiction over the acts of its citizens wherever they take place.<sup>93</sup> Citizenship or nationality of a person might be the result of being born in the country, having a parent who is a citizen, or being naturalized.<sup>94</sup> 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.”<sup>95</sup>

While for my cases the Nationality Principle would be enough, other possible bases of jurisdiction might be needed if the country sought to criminalize both the activities of its citizens—the topic of this Article—and the activities of destination country citizen providers.

“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 onto a plane that will explode in Israel.<sup>96</sup> This basis may apply in our cases when referrals to foreign physicians are involved, when much of the planning and arrangements are done on home soil, or when some of the activity be-

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<sup>92</sup> Of course, even if international law forbade this type of criminalization, the United States or other countries could simply violate international law in this respect. See, e.g., John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 351 n.1 (2010).

<sup>93</sup> See *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT]; Knox, *supra* note 92, at 357.

<sup>94</sup> Lowe, *supra* note 13, at 345. For an in-depth discussion of nationality-based criminal jurisdiction, see generally Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT’L L. 41 (1992).

<sup>95</sup> Lowe, *supra* note 13, at 346–47. Lowe also identifies some case law suggesting that assertion of the Nationality Principle depends on a “close [factual] link between the individual and the national State” but argues that this is a misreading of case law because courts were focused on the narrower question of diplomatic protection. *Id.* at 346. In any event, the factual link requirement seems unproblematic in my cases.

<sup>96</sup> *Id.* at 343; see also RESTATEMENT, *supra* note 93, § 402(1)(a) (describing bases for jurisdiction to prescribe).

gins in the home country, such as hormone treatments for in vitro fertilization (IVF) that will ultimately be performed abroad.<sup>97</sup>

“Objective territorial jurisdiction” refers to the opposite case: a crime initiated abroad but completed in one’s home territory.<sup>98</sup> 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.<sup>99</sup> Perhaps prescriptive jurisdiction could be premised on this basis in some of our cases as well—for example, the children born through prohibited reproductive technology usage will return to the home country to be reared, girls on whom FGC is performed may incur medical or psychological expenses in the home country, etc.

A third 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.<sup>100</sup> 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.”<sup>101</sup> Passive personality may be used to justify extending extraterritorially sanctions on assisting suicide or FGC on the theory that it protects the home country citizen whose life is ended or minor whose genitals are cut. 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 in Part III.

Customary international law also recognizes “universal jurisdiction” over crimes “so heinous as to be universally condemned by all

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<sup>97</sup> See, e.g., I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 490–91 (2010).

<sup>98</sup> *Yousef*, 327 F.3d at 91 n.24; RESTATEMENT, *supra* note 93, § 402; Lowe, *supra* note 13, at 343.

<sup>99</sup> *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 All E.R. 434 (H.L.) 437–38 (appeal taken from Eng.) (holding that an extraterritorial United States inquiry regarding alleged antitrust infringements was an abuse of the United Kingdom’s sovereignty).

<sup>100</sup> Lowe, *supra* note 13, at 351.

<sup>101</sup> *Id.* at 352.

civilized nations.”<sup>102</sup> Piracy—of the Captain Jack Sparrow and not the DVD-bootlegging variety—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.<sup>103</sup> In recent years, this category has been extended to cases more along the “heinous” line, including slave trade, war crimes, and genocide.<sup>104</sup> The use of this basis in our cases seems unlikely. 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. Perhaps FGC stands apart to the extent that it is thought of as a form of torture or gender subordination.

Finally, 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.<sup>105</sup> While its exact borders are fuzzy, and the United States has pushed its boundaries,<sup>106</sup> I do not think the principle can plausibly be used for prescriptive jurisdiction in our cases.

#### B. Limitations on Jurisdiction to Prescribe

Notwithstanding the presence of a basis for prescriptive jurisdiction, 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.”<sup>107</sup> 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.<sup>108</sup>

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<sup>102</sup> *Yousef*, 327 F.3d at 91 n.24; see *Lowe*, *supra* note 13, at 348.

<sup>103</sup> See *Lowe*, *supra* note 13, at 348. This is a slight simplification in that there is both a substantive component (i.e., is the offense universally proscribed?) and a jurisdictional one (i.e., are all states empowered to prosecute the offense?). Still, this remains a simplification that is likely sufficient for our purposes.

<sup>104</sup> RESTATEMENT, *supra* note 93, § 404.

<sup>105</sup> *Lowe*, *supra* note 13, at 347; see *Yousef*, 327 F.3d at 91 n.24; RESTATEMENT, *supra* note 93, § 402(3).

<sup>106</sup> See RESTATEMENT, *supra* note 93, § 402 cmt. f (expanding jurisdiction to crimes that merely interfere with “government functions” but not state preservation, including espionage, counterfeiting of the state’s seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate customs or immigration laws); *Lowe*, *supra* note 13, at 347–48 (noting that, despite pressure to expand the use of this principle, most states have not followed the United States’ trend toward expansion and have instead used instruments like treaty agreements to extend jurisdiction).

<sup>107</sup> RESTATEMENT, *supra* note 93, § 403(1).

<sup>108</sup> *Id.* § 403(2).



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.”<sup>109</sup> 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. Reproductive technology access will result in an additional citizen being born and may lead to certain consequences such as multiple gestations (made famous by “Octomom”) or older mothers producing children who are severely premature or suffer from genetic abnormalities that cause externalities in the home country.<sup>110</sup> In a case from Canada, sixty-year-old Canadian Ranjit Hayer traveled to her native India when Canadian doctors refused to provide her access to IVF.<sup>111</sup> Upon her return to Canada, she delivered twins seven weeks premature who required intensive neonatal care, and she had to have her uterus removed, all costs incurred by the provincial health care system.<sup>112</sup> These seem like “substantial, direct, and foreseeable”<sup>113</sup> effects on the home country. The same is true of the medical and psychological needs of girls who have FGC performed on them as minors.

(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.”<sup>114</sup> In all of these cases, the “perpetrator” (engaging in the abortion, assisting the suicide, etc.) is a citizen, and for most, 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 to which the desirability of such regulation is generally accepted.”<sup>115</sup> Creating and ending life are activities that are highly im-

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<sup>109</sup> *Id.* § 403(2)(a).

<sup>110</sup> For discussions of these risks, see, for example, Cohen, *Regulating Reproduction*, *supra* note 54, at 442, 453.

<sup>111</sup> See Matthew Coutts, *Mother's Age Raises Ethical Concerns; 'We Can Do So Much but Should We?'*, NAT'L POST (Feb. 6, 2009), [http://www.nationalpost.com/most\\_popular/story.html?id=1256913](http://www.nationalpost.com/most_popular/story.html?id=1256913).

<sup>112</sup> *See id.*

<sup>113</sup> RESTATEMENT, *supra* note 93, § 403(2)(a).

<sup>114</sup> *Id.* § 403(2)(b).

<sup>115</sup> *Id.* § 403(2)(c).

portant to and heavily regulated by most countries,<sup>116</sup> as suggested by the case studies above. How “desirabl[e]” 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.<sup>117</sup> Similarly, the U.S. approach to FGC invokes the deeply imbued tradition of U.S. family law and child protection law that “[t]he state appropriately steps in, as *parens patriae* protector of the welfare of these nonautonomous persons, to act in their behalf, choosing for them.”<sup>118</sup> Moreover, through the State Children’s Health Insurance Program, Medicaid, or other means, the state may bear some of the future medical costs associated with FGC.<sup>119</sup>

(4) “[T]he existence of justified expectations that might be protected or hurt by the regulation.”<sup>120</sup> Given that the activity is illegal at home, the circumventing patient is unlikely to have justified expectations in accessing the service.<sup>121</sup> Perhaps the destination country’s medical tourism sector might claim its expectations in patient flow from that country are justified, but with the possible exception of the reproductive technology industry in destination countries, it seems unlikely that circumvention medical tourism is a significant share of that sector’s total business. I discuss a related point on the normative side in the next Part.

(5) “[T]he importance of the regulation to the international political, legal, or economic system.”<sup>122</sup> It is unclear what this means in our cases, but, for FGC, the existence of many treaties speaking to it suggest significant importance.<sup>123</sup>

(6) “[T]he extent to which the regulation is consistent with the traditions of the international system.”<sup>124</sup> The application of this factor to our cases

<sup>116</sup> See, e.g., *supra* notes 75–76 and accompanying text (creating life); *supra* note 85 (ending life).

<sup>117</sup> See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844–69 (1992) (plurality opinion) (sustaining similar restrictions against a facial constitutional challenge).

<sup>118</sup> James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 411 (2008).

<sup>119</sup> See Taghreed Adam et al., *Estimating the Obstetric Costs of Female Genital Mutilation in Six African Countries*, 88 BULL. WORLD HEALTH ORG. 281, 281 (2010) (estimating the cost impact to society of treating “FGM [female genital mutilation]-related obstetric complications”).

<sup>120</sup> RESTATEMENT, *supra* note 93, § 403(2)(d).

<sup>121</sup> This analysis is somewhat circular. Until we know whether international travel to circumvent is permitted or prohibited, it is hard to say what patients reasonably expect.

<sup>122</sup> RESTATEMENT, *supra* note 93, § 403(2)(e).

<sup>123</sup> See *supra* note 91 and accompanying text (discussing FGC-related treaties and treaty-based solutions).

<sup>124</sup> RESTATEMENT, *supra* note 93, § 403(2)(f).

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.<sup>125</sup> 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 commerce, and engages in any illicit sexual conduct” including “any commercial sex act . . . with a person under 18 years of age.”<sup>126</sup>

(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.”<sup>127</sup> Of the factors, these two seem to provide the most likely basis for arguing against reasonableness, yet the argument does not seem strong. This Article is only about criminalization of the conduct of the 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.<sup>128</sup> Unlike the extraterritorial extension of a country’s antitrust or fair labor standards, 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.<sup>129</sup> The industry can persist as is; it merely becomes inaccessible to foreigners.

The reproductive technology case seems slightly harder in this regard: the destination country may receive significant economic benefit from circumvention tourism and foreign patients may secure higher wages for doctors in the industry, helping to counteract physician brain drain.<sup>130</sup> Still, given the extent to which the other factors favor reasonableness, this contrary fact seems insufficient even as to reproductive technologies. One useful point of comparison is the PROTECT Act covering child sex tourism, which has been upheld by

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<sup>125</sup> 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.*

<sup>126</sup> 18 U.S.C. § 2423(b), (c), (f) (2) (2006).

<sup>127</sup> RESTATEMENT, *supra* note 93, § 403(2)(g)–(h).

<sup>128</sup> Of course, it is possible that a U.S. citizen could become a resident of the destination country and thus qualify for assisted suicide even in countries with residency requirements. This would involve a case of split domicile, a subject I bracket for the purpose of my discussion.

<sup>129</sup> *See supra* note 99 and accompanying text.

<sup>130</sup> *See Cohen, Access to Health Care, supra* note 2, at 11–12 (discussing this possibility with medical tourism more generally).

several U.S. circuit courts as consonant with both U.S. and international law.<sup>131</sup> Thus, I conclude that criminalizing circumvention tourism will not run afoul of the balancing approach of the Restatement. The same conclusion follows under the U.S. Supreme Court's jurisprudence on the subject.<sup>132</sup>

In sum, this analysis shows that existing customary international law will permit, but not require, home countries to criminalize circumvention tourism for FGC, abortion, reproductive technology use, and assisted suicide.

As I suggested above, 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.<sup>133</sup>

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<sup>131</sup> 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).

<sup>132</sup> At times, that jurisprudence sounded an even more permissive note than 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 93, § 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).

<sup>133</sup> I say "structural" because for some cases—abortion in particular—other U.S. constitutional law doctrines might be relevant but would apply equally to criminalizing the conduct domestically. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (plurality opinion).

## III

THE NORMATIVE QUESTION: WHEN SHOULD HOME  
COUNTRIES CRIMINALIZE CIRCUMVENTION TOURISM  
BY THEIR CITIZENS?

Part II establishes that home countries have discretion to criminalize the activities presented in my four case studies of circumvention tourism. The remainder of this Article addresses when home countries that have domestic prohibitions on FGC, abortion, reproductive technology use, and assisted suicide should use that discretion. For my purposes, I will ask the reader to imagine that the home country (and not one of its individual states or provinces) had the prohibition in question in order to bracket both the doctrinal question averred to above of the power of individual states to extraterritorially criminalize and the normative complications that arise when individual states within a nation take opposite views.

Here, I advocate for a form of the categorical-sorting approach. I will show that a one-size-fits-all approach will fail because at least one case exists where, notwithstanding a valid home country criminal prohibition on the activity, extraterritorial extension to circumvention tourism is unwarranted. I do not, however, think that this relegates us to the world of case-by-case analysis because we can derive some principles for a categorical, rule-like system.

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?

Many of these factors echo interest-balancing approaches to conflict of laws. I, however, use this analysis to explore when states should extend their criminal law extraterritorially, which differs from the typical conflict-of-laws analysis in several ways: (1) my analysis is explicitly normative, not doctrinal; (2) it is about criminal, not civil, law; and (3) and in the first instance, it is about what legislatures should do about extending their existing laws rather than what courts should do when faced with conflicting rules. The goal is to produce a rule-based approach capable of generating hypothetical imperatives of the type, "If *X*, *Y*, and *Z* obtain, *then* the home country should extend its criminal prohibition extraterritorially to circumvention tourists." I gener-

ate these rules by moving back and forth between a starting thought experiment and the aforementioned four case studies.<sup>134</sup>

My position is contrary to the small, existing literature on this type of medical tourism<sup>135</sup> in that I argue that, in many cases, the home country should extend its domestic criminal prohibition extraterritorially to circumvention tourists.

Two initial cautions are in order. First, any method that uses thought experiments and intuition pumps risks giving normative weight to what may be mere artifacts of social norms.<sup>136</sup> 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, and by mixing in top-down political theorizing with bottom-up casuistic reasoning. I acknowledge, however, that this method is just one way into the problem, not the only one.

Second, because the ultimate set of rules I adopt depends on the justifications for the home country's own prohibition, one might push back on the question of whether it is possible to ascribe a "justification" for a law. Congress, like every legislature, is a "they," not an "it"; legislation is often the result of logrolls, capture, and compromises; justifications may change over time; and multiple justifications may overdetermine the basis for a law.

Many approaches to law depend on an assumption that laws have at least one purpose or justification,<sup>137</sup> and, while having many "co-offenders" is not exculpatory, their existence does show that the approach is not an outlier. Because I am imagining that the home country legislature will explicitly extend its domestic prohibition extraterritorially by statute (as it did in the PROTECT Act),<sup>138</sup> I think this problem is much more minor than if I were discussing courts try-

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<sup>134</sup> The method is one of reflective equilibrium.

<sup>135</sup> Guido Pennings is the most prominent voice in bioethics in this regard, arguing that "[p]rohibitive laws can only determine which services are available on the territory" and that "[a]llowing people to look abroad demonstrates the absolute minimum of respect for their moral autonomy." Guido Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, 13 REPROD. HEALTH MATTERS 120, 123–24 (2004).

<sup>136</sup> For an excellent discussion of this issue in regards to fairness, see LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 60–81 (2002).

<sup>137</sup> For example, legal process approaches to statutory interpretation, interest-based approaches to choice of law, and much of punishment theory, to name but a few, all share this assumption. Indeed, Lea Brilmayer has struggled with the same problem in her discussion of intrastate regulation of abortion and has suggested possible correctives, such as resorting to legislative history, the identity of the groups lobbying for a statute, and, in the case of judicial opinion, the reasoning of the holding. See Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 898 (1993) [hereinafter Brilmayer, *Interstate*].

<sup>138</sup> See PROTECT Act of 2003, 18 U.S.C. § 2252.

ing to decide whether to construct an ambiguous statute as having extraterritorial scope. The current Supreme Court appears to require “a clear statement of extraterritorial effect” in order to construe a statute as applying extraterritorially.<sup>139</sup>

Nevertheless, for those who remain concerned, one salve is to reformulate the inquiry as advising a particular voter or legislator as to how that person should think about the question of extraterritoriality from a normative perspective: “if that person supported this law for this reason, following this analysis, then under these factors, the person should also support its extraterritorial extension to circumvention tourists.” To the extent one’s support for a domestic prohibition is an amalgam of several justifications, it is possible to examine each strand, use what I say here to determine whether it supports extraterritorial extension, consider its weight in the *gestalt* (including whether the strand is sufficient for criminalization standing alone), and then evaluate the strength of the imperative to criminalize circumvention tourism.

Another way of putting the question is to imagine a hypothetical legislator voting on one of two bills: one has only the domestic prohibition while the other has that prohibition with an extraterritorial prohibition as well. The rest of this Article can be thought of as advising that legislator on which bill to enact. One of the insights provided by my Article is that this question is implicitly presented by every criminal prohibition a country enacts.

With those preliminary caveats, we can begin the normative analysis. Again, I emphasize that the United States has criminalized extraterritorial conduct on the basis of its citizens’ activity in many instances.<sup>140</sup> I begin the normative discussion with a provocative thought experiment I call “Murder Island” and use it as a springboard for analyzing my four case studies. While Murder Island is hypothetical, it has a family resemblance to a real-world case: the United States has made certain activities that are criminal in its territory, such as murder by or against a U.S. citizen, illegal in Antarctica, where the United States has no territorial prescriptive jurisdiction.<sup>141</sup> Antarctica, however, is a place without a particular government or law, not a place

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<sup>139</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

<sup>140</sup> See *supra* note 125; cf. MODEL PENAL CODE § 1.03(1)(f) (1962) (stating that a U.S. state may criminalize an activity by its citizen in another state so long as doing so “bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest”).

<sup>141</sup> See *Lowe*, *supra* note 13, at 348–49. Apparently, however, the United States has not extended its prohibition against murder in the same way in another legal vacuum—outer space itself as opposed to “territorial space” or 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,

where the territorial government has passed a law declaring murder is not a criminal offense.<sup>142</sup> It is to such a hypothetical jurisdiction that I now turn.

I am fully aware that Murder Island is about as easy a case as I could derive for extraterritorial application, and my decision to begin by “stacking the deck” with this case 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.

#### A. Welcome to Murder Island

##### 1. *The Prima Facie Case for Extraterritorial Application*

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.<sup>143</sup> 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

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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).

<sup>142</sup> See Beckman, *supra* note 141, at 258.

<sup>143</sup> I specify that this is the key divergence between the two countries’ laws to focus the example, though it is possible that 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 example 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? Those who are bothered by such practical questions can easily substitute a more elaborate version of Murder Island: Murder is allowed only on December 11 (my birthday), only for children under the age of four, only for persons 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 United States should criminalize extraterritorially a murder committed by one U.S. citizen against another. For this reason, I will stick to the simpler and less elaborate version but invite those more persnickety readers to substitute one of these variants if they prefer.



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.<sup>144</sup>

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 extra-territorially 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.<sup>145</sup> 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.<sup>146</sup> Indeed, it seems that this conclusion persists

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<sup>144</sup> When I discuss FGC and assisted suicide, I will consider the effect of relaxing this condition with potentially more robust forms of voluntariness. By contrast, abortion represents no victim voluntariness at all.

<sup>145</sup> 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 (N.Y. 1972). I prefer to use the term "double coincidence of citizenship" to emphasize that we are talking about criminal law and that I do not intend to import all of the intellectual baggage of this choice-of-law approach. I also wish to connect this notion more deeply to the more theoretical work later in this Article, which explores political theories regarding the power of the state to criminalize conduct in the first place. See *infra* Part III.A.1.a.

<sup>146</sup> Does it matter whether Ben, John, or both subscribe to the Island's cultural tradition? I examine a parallel question in the section on FGC below.

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.

Thus, Murder Island presents a strong *prima facie* case that the home country should criminalize the circumvention tourism, subject to some exceptions discussed below.

## 2. *A Political Theoretical Account*

I now complement the thought experiment with a political theoretical argument for extraterritorial extension.

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.<sup>147</sup> 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.<sup>148</sup> Ben has done something wrong that deserves punishment, and John has wrongfully suffered injuries that we would have wished to prevent.

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<sup>147</sup> See Alejandro Chehtman, *The Extraterritorial Scope of the Right to Punish*, 29 *Law & PHIL.* 127, 133 (2010).

<sup>148</sup> It is a categorical error to respond formalistically that, because Ben did not break the law of Murder Island, there is no reason to deter his act. In deciding whether to make act X criminal, the question is whether the home country wants to criminalize act X in order to deter it, whatever the status of the rule on Murder Island.

In a slightly different context, Alejandro Chehtman has responded that the deterrence argument proves too much in that it ought to give rise to universal jurisdiction—deterrence would be maximized if *every* state were able to punish every individual for every crime. *Id.* at 151. Though a clever point, I think it ultimately misses the mark. The home country wants its rules (e.g., treating X but not Y as murder) and its view of *optimal* deterrence to hold sway, not *maximal* deterrence. Further, even if maximal deterrence were the goal, the home country may feel as though it is only entitled to punish offenders by dint of their particular citizenship relationship.

Cehtman himself also concedes a different reason why universal jurisdiction is different: "Deterrence is only one consideration that must be included in a broader calculation of utility, i.e., we need to balance it against other countervailing considerations, such as for instance the friction that the exercise of universal jurisdiction for domestic offences would create between states." *Id.*

Ben benefits from U.S. diplomatic responsibility and U.S. laws that provide for his protection when abroad.<sup>149</sup> 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.

**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.<sup>150</sup> For this reason, the propriety of 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.”<sup>151</sup>

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<sup>149</sup> Cf. Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 923 (1993) (“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.”).

<sup>150</sup> 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*].

<sup>151</sup> Brilmayer, *Liberalism*, *supra* note 150, 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) (noting that “the religious tribunals claim that Jewish religious law has universal, retroactive, and exclusive application,” including extraterritorial application beyond the

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."<sup>152</sup> 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."<sup>153</sup> On this account, the territorial coverage of domestic criminal law follows from the citizenship relation and not vice versa.<sup>154</sup> 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."<sup>155</sup> Indeed, as Duff's statement suggests, the 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 might be put in a more Harm Principle or social contractalist form, or some combination of the two.

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state of Israel); Benjamin Shmueli, *Corporal Punishment in the Educational System Versus Corporal Punishment by Parents: A Comparative View*, 73 *LAW & CONTEMP. PROBS.* 281, 286 (2010) ("Jewish law, or halakhic law, is a religious extraterritorial system of law." (footnote omitted)).

<sup>152</sup> R.A. Duff, *Criminal Responsibility, Municipal and International* 12 (2006) (unpublished manuscript) (on file with author).

<sup>153</sup> *Id.* at 13. Intriguingly, Duff's use of "within it" might be thought to refer to either territorial presence or presence as a citizen in the society but, in context, as the next quotation makes clear, it is the latter that he means.

<sup>154</sup> *See id.* 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 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").

<sup>155</sup> Duff, *supra* note 152, at 15.

The Harm Principle account is somewhat analogous to the international law doctrinal “effects test” reasoning (as well as its U.S. civil procedural equivalent).<sup>156</sup> 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 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.”<sup>157</sup>

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.<sup>158</sup> 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 seems like a relatively weak one. In Hohfeldian terms, 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.<sup>159</sup> 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

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<sup>156</sup> Cf. Brilmayer, *Liberalism*, *supra* note 150, at 14–16 (discussing this possibility in relation to extraterritorial application of Title VII); *Calder v. Jones*, 465 U.S. 783, 787 (1984) (analyzing the effects test in U.S. personal jurisdiction case).

<sup>157</sup> Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 799 (1983).

<sup>158</sup> As I will discuss in greater depth below, the assisted suicide case in some ways alters this configuration in that the most direct “victim” (the one seeking assistance in dying) does *not* want the benefit of the home country’s prohibition. See *infra* Part III.F.

<sup>159</sup> 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).

prohibiting the proper worship of G-d through murder;<sup>160</sup> 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*.’”<sup>161</sup>

**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 were abolished, neither poor nor rich people would need to go abroad.”<sup>162</sup> As the application to Murder Island shows, this 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.

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<sup>160</sup> Cf. Brilmayer, *Interstate*, *supra* note 137, 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).

<sup>161</sup> Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 MICH. L. REV. 939, 944 (1993).

<sup>162</sup> Pennings, *supra* note 135, at 122.

3. *Some Political Theoretical Objections Considered with Particular Attention to Inter Versus Intranational Contexts*

Against these political theoretical arguments, especially the social contract elements, the voluntariness of the tacit consent underlying the argument may be questionable. As Seth Kreimer puts it in the intranational context, "When 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?"<sup>163</sup> This argument seems to prove too much for present purposes 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."<sup>164</sup> 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."<sup>165</sup> 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?

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

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<sup>163</sup> Kreimer, *supra* note 149, 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").

<sup>164</sup> Kreimer, *supra* note 149, at 929.

<sup>165</sup> Joseph Raz, *Authority and Justification*, in *AUTHORITY* 115, 138 (Joseph Raz ed., 1990).

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.<sup>166</sup>

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 medical tourism cases share this feature with Murder Island: the goal of prohibiting acts by citizens causing serious bodily harm to citizens.

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.”<sup>167</sup> 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:<sup>168</sup> 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.

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 as a citizen of one of a series of coequal states is a much thinner

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<sup>166</sup> Kreimer, *supra* note 149, at 929–30.

<sup>167</sup> *Id.* at 930.

<sup>168</sup> This theme reaches its apotheosis in American law in Justice William Brennan’s opinion in *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).



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.<sup>169</sup> 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.<sup>170</sup>

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 Brandeisian sense unless and until the national government reaches a conclusion as to the "right" answer. This 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.<sup>171</sup> By 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.<sup>172</sup>

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<sup>169</sup> See Kreimer, *supra* note 149, 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. See, e.g., *id.* at 925, 935, 936; Mark D. Rosen, "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.

<sup>170</sup> See Kreimer, *supra* note 149, at 923. In one workshop I did of this Article, a colleague usefully suggested 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.

<sup>171</sup> See Rosen, *supra* note 169, at 749 (listing these "three distinct considerations that have been well rehearsed by federalism scholars"); see also *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 . . .").

<sup>172</sup> 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

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.

B. When Should We Resist Extraterritorial Criminalization Even as to Murder?

Under what circumstances might we, as the home country, nonetheless not want to criminalize Ben's conduct on Murder Island? Let me highlight three situations.

1. *Retaliation*

As I suggested above, Murder Island may find it affirmatively important that U.S. citizens murder one another on its shores, or it may want to be a refuge for those burdened by what it views as our repugnant and restrictive domestic laws. Thus, if an extraterritorial prohibition were in place and enforced, 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. When the interest protected by our criminal law is harm prevention and the harm is a serious one such as murder, it seems unlikely that this would convince the home country not to criminalize Ben's activity.

If the retaliation threat 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 our citizens very much enjoy, the threat that the destination country will apply a reciprocal rule of extraterrito-

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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.

rial criminalization on their citizens' activities in our country, etc.—are presumably also intermediate. The best we can say is that the 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.

Even if there were a credible threat of large retaliation, there may be other ways of coping with it. 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.<sup>173</sup> Still, some might find this use of prosecutorial discretion distasteful or distortive, and the discretion would be hard to implement.<sup>174</sup>

## 2. *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

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<sup>173</sup> For the classic treatment, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984) (describing a model of acoustic separation whereby the law sets “conduct rules” for the general public and “decision rules” for public officials).

<sup>174</sup> One might also worry that extending prescriptive extraterritorial jurisdiction to these crimes but not committing the resources to adequately detect and prosecute them might have an adverse effect on willingness to follow the law. This would be traded off against the so-called “expressive function of law,” which might support criminalization even without adequate enforcement. Cf. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (exploring the “expressive function of law—the function of law in ‘making statements’ as opposed to controlling behavior directly”). I do not think the pull and push of these forces can be resolved in the abstract, yet rigorous empirical examination is almost impossible.

pressure to eliminate the domestic prohibition. It seems somewhat less fanciful as to the case studies I discuss below<sup>175</sup> but, for the sake of exposition, I think it better to discuss it at this juncture.

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. Would that count as a good reason not to criminalize murder extraterritorially? On standard consequentialist views, the numbers matter,<sup>176</sup> and if our goal is to minimize the number of murders, we should oppose criminalizing circumvention tourism.

For more deontological views, things are less clear. Without going *too* deeply into it: A standard example offered by deontologists against consequentialism is the killing of an innocent to prevent the murder of far more innocents.<sup>177</sup> Our case, though, involves failing to punish one murderer in order to prevent more murders. On some deontological views, failing to punish a murderer might be as compa-

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<sup>175</sup> Here is an example where the safety valve concerns seems quite plausible indeed. Prior to the Canadian Supreme Court's decision in *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791, par. 1 (Can.), Quebecois were prohibited from taking out private insurance for services that were available under Quebec's public health plan. Six of Canada's ten provinces had similar provisions. See Colleen M. Flood & Tom Archibald, *The Illegality of Private Health Care in Canada*, 164 CAN. MED. ASS'N J. 825, 825 (2001). This prohibition on private insurance "preclude[d] the vast majority of Canadians (middle-income and low-income earners) from accessing additional care, while permitting it for the wealthy who [could] afford to travel abroad or pay for private care in Canada." *Chaoulli*, [2005] 1 S.C.R. at par. 137. It seems very plausible that the ability of elites to travel, in part permitted the continuation of Canada's prohibition. See also Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L.J. 71, 113 (2008) ("Although medical tourism allows patients to escape our laws and regulations, it also allows patients to exercise their autonomy and vote with their feet. This may lead to some degree of political disengagement, but it may also force us to reconsider restrictive local policies.").

There are also real world analogues in other family law choice-of-law contexts. For example, it seems plausible that New York was slow to modernize its divorce law because people of influence circumvented these rules by traveling to Mexico or elsewhere for divorce decrees that New York recognized under principles of comity. See, e.g., *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709, 713 (N.Y. 1965) ("A balanced public policy now requires that recognition of the bilateral Mexican divorce be given . . . as a matter of comity."). Adultery was the only ground for divorce in New York until 1967. See N.Y. DOM. REL. LAW § 170 (McKinney 2012).

<sup>176</sup> *But cf.* John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293, 293–94 (1977) (analyzing "trade-off situations" and arguing that the relative number of people helped or hurt by a particular course of action should not play a significant role in determining which course of action to pursue).

<sup>177</sup> Bernard Williams's hypothetical regarding Jim and the Indians is one of the most famous versions. See Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM FOR AND AGAINST 77, 98–100 (J.J.C. Smart & Bernard Williams eds., 1973).

rably serious a failing as murdering an innocent.<sup>178</sup> On other views, deterring murders might be thought of as a kind of good, with the question being whether it is unjust to have more of the good rather than less if doing so depends on a certain method of distribution. Imagine that punishing only the murders of white Americans or males had the effect of lowering the total number of murders committed and we pursued the policy for that reason (rather than on the basis of racial or gender animus). Some might view that basis of distinction as itself improper,<sup>179</sup> but it is less clear whether failing to punish based on *where* the murder takes place raises similar issues.<sup>180</sup> 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.<sup>181</sup>

Of course, it is not at all clear the safety valve effect will ever 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 travel to permissive regimes and famil-

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<sup>178</sup> Cf. David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 LAW & PHIL. 507, 510–11 (1997) (noting that deontological retributivists “view both ‘punish the guilty’ and ‘do not punish the innocent’ as agent-relative norms with which each person must comply on every particular occasion”).

<sup>179</sup> For example, this may be a problematic basis for making a decision because of the bad consequences that might follow for perceptions of race and gender equality, not because of welfare-independent fairness concerns.

<sup>180</sup> Cf. *The Wire: Hamsterdam* (HBO television broadcast Oct. 10, 2004) (depicting a fictional scenario in which the police create “Hamsterdam,” a segment of the city where the police agree not to enforce drug laws to achieve harm reduction). Perhaps the geographical variant differs from the race or gender version on luck-egalitarian ways of thinking: one can avoid ever leaving the territorial protection of the United States in a way one cannot avoid one's race at birth such that the former is a matter of “option luck” while the latter is “brute luck.” This distinction raises questions about the persuasiveness of luck egalitarian theory more generally. See, e.g., Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289 (1999) (discussing critiques of luck egalitarianism); Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271, 272–74 (2008) (similar). In any event, in some of the case studies that follow, especially abortion and FGC, the luck egalitarian claims will not work since the victim has little or no control over the travel.

<sup>181</sup> Ironically, the safety valve effect gives opportunistic incentives for constituencies to push what initially seems like the other side's agenda. Those who truly oppose the domestic prohibition should push for its extension as a “the worse, the better” approach (a phrase sometimes associated with Lenin). Those who want to condemn the practice through criminalization wherever it takes place have an incentive to oppose extraterritorial criminalization for fear that it will ultimately lead to the loss of the domestic prohibition as well.

ilarity with the way they function has the opposite effect of undermining domestic home country support for the prohibition rather than releasing pressure.<sup>182</sup> It is hard enough to figure out the empirics of real nations, let alone counterfactuals. Perhaps the best we could do is to look at the percentage of popular support for reversing the domestic prohibition and, if close enough, we might find safety valve concerns to be more plausible.

These are complicated normative and empirical questions that I will not resolve here. For consequentialists (and some deontologists), the safety valve effect will be a good reason not to criminalize circumvention tourism. Having made this point once, I will not belabor each of the case studies with its own safety valve discussion.

### 3. *Core Versus Peripheral Divergence*

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.<sup>183</sup>

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 princi-

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<sup>182</sup> For an argument along these lines, see 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., forthcoming 2013).

<sup>183</sup> *Cf.* *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) (endorsing the “stand your ground” defense). For explanatory simplicity, I propose the United States has one rule.

ples, 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. When the divergence is at the level of the technocratic method of effectuation of the same goal rather than at the level of whether an act deserves criminal liability, it is peripheral rather than core in my terminology.

Second, extending U.S. law to Ana Lucia’s actions in my hypothetical might not only frustrate one of Murder Island’s interests (perhaps they take more seriously the view that a woman’s home is her castle) but actually put U.S. citizens traveling abroad in a difficult position where they would have to evaluate the citizenship of their assailants and try 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 my case studies) 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 hew 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.

While I think this core and peripheral distinction has some explanatory utility, for reasons familiar from Legal Realism, I do want to acknowledge a seeming denominator problem. The divergence in rules is peripheral when we think of the denominator as “the law of murder”—even more so when we think of it as “criminal law”—but the divergence seems much more core when the denominator is “the law of self-defense”—and even more so if we are discussing “the law of retreat from self-defense.”

The PROTECT Act, criminalizing sex tourism with a minor,<sup>184</sup> offers another example: Suppose the age of consent is eighteen in the United States, but the age of consent of the destination country is sixteen. Is that a core or peripheral divergence? The best we can do is to try and return to the animating interest of the home country’s territorial prohibition. If the interest includes harm prevention to sixteen-year-olds, then the Island’s law seems to impinge on the core of that interest. The divergence is as to whether we think sex with sixteen-year-olds is wrongful or not. This is different from a conflict over how criminal law can best effectuate an attempt to punish or deter adults from having sex with sixteen-year-olds. While far from exact, this kind of analysis enables us to have a rough sense of which disputes are more core than others.<sup>185</sup>

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<sup>184</sup> See 18 U.S.C. § 2423(c) (2006).

<sup>185</sup> Another hypothetical possibility for which an exception might be warranted is the case when there is a conflict between the destination and home country rule such that it is impossible to comply with both. We would have to imagine a version of Murder Island, for example, where individuals not only have a *privilege* to murder on the Island but a *duty* to do so, and those who fail to murder violate the criminal law of Murder Island. Of course, even here, Ben could comply with Murder Island’s law by murdering an Islander rather than John (the U.S. citizen), so to come up with a true conflict, we need a still more contrived rule of the Island. As I discussed above in the international law doctrinal discussion, the Supreme Court noted the possibility of such a case. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (noting that “[n]o conflict exists, for these purposes, ‘where a person subject to regulation by two states can comply with the laws of both,’” but distinguishing the actual case before it because the British companies could still comply with U.S. law without putting themselves in violation of British law (quoting RESTATEMENT, *supra* note 93, § 403 cmt. e)). A hypothetical variant of Murder Island in which such a conflict exists would certainly be a harder case for extraterritorial extension, although, even here, the home country citizen could escape such difficult choices by refraining from traveling to the Island in the first place. The citizen would have to claim that the individual interest in traveling to the Island trumped the interest of the home country in punishing the conduct, which strikes me as a hard claim to defend.

In any event, none of the real world medical tourism cases that I cover in this Article have this damned-if-you-do-damned-if-you-don’t structure, though I could imagine instances in which such conflicts could arise relating to health care: for example, a home country that prohibits the disclosure of confidential information regarding a patient’s HIV status to sexual partners and a destination country that imposes exactly the opposite duty to warn; a home country that prohibits FGC on minors versus one that requires all minors



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. In the remainder of this Article, I build on the analysis of Murder Island to examine real cases of circumvention tourism.

### C. Female Genital Cutting of Minors

While Murder Island is fictional, it has an analogue in FGC of minors. Just as in the version of Murder Island, one U.S. citizen causes a physical injury to another U.S. citizen abroad in a way that is prohibited by U.S. law but permitted by the destination country law. Should the same conclusions from Murder Island follow? To answer "yes," one would need to consider and defeat a few possible grounds of distinction that I now take up: that murder is special; that the cultural context and consent makes a difference; that procuring is different from acting; and that demands for religious accommodation make a difference.

#### 1. *Murder Is Special*

One might object that there is something special about murder given its near-universal abhorrence.<sup>186</sup> My response is that, though murder *is* special in that it involves a serious physical harm, it is not unique—serious bodily injury without murder is sufficient. Because several types of FGC (types 1, 2, and 3)<sup>187</sup> also involve serious bodily injury,<sup>188</sup> this ground of distinction from Murder Island fails.

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in the country to undergo FGC. Again, my tentative view is that, while such cases are harder, the home country should still criminalize the activity extraterritorially unless the citizen can make a very strong showing as to why the citizen's interest is set back if the citizen cannot travel to the destination country and that it is unreasonable for the home country to require the citizen to forgo that option as a condition of citizenship. I think versions of these cases involving dual citizenship or split domicile would be much harder still but, as I discussed above, I am purposefully bracketing those cases off from the (already complex) analysis in this Article.

<sup>186</sup> The universality may depend on linguistic equivocation: if murder means "unjustified killing," then we can talk of universals, but there are large disagreements about the grounds of justification, as my discussion of honor killings below highlights. *See infra* note 202 and accompanying text.

<sup>187</sup> *See supra* notes 22–23 and accompanying text.

<sup>188</sup> Type 4 FGC, involving "pricking, piercing, incising, scraping and cauterizing the genital area," *FGC Fact Sheet, supra* note 21, does not appear to be covered by either the U.S. or U.K. statutes even as to domestic criminalization. *See* 18 U.S.C. § 116(a) (2006); Female Genital Mutilation Act, 2003, c. 31 (Eng.). Imagine, however, that the home country did criminalize it domestically: To anticipate a point I make below, as the physical injury becomes less serious, so too should the obligation of the home country to criminalize extraterritorially weaken. The same would be true regarding a hypothetical criminalization of male circumcision, as practiced in the Jewish religion. But even if these procedures resulted in no physical injury at all, non-harm-based reasons may justify their extraterritorial

One way to see this is to replay the facts of Murder Island with rape rather than murder as the activity lawful under destination country law. Just as with murder, the United States has very strong deterrence and retributivist reasons to punish rape (female or male), reflected in the fact that the crime is heavily punished domestically in every state. Like rape, FGC involves physical invasion of the bodily integrity of a person, here a minor. Also like rape, it involves severe pain and shock and, like at least some rape, may carry with it serious physical health consequences including “haemorrhage (bleeding), tetanus or sepsis (bacterial infection), urine retention, open sores in the genital region and injury to nearby genital tissue” with long term consequences including “recurrent bladder and urinary tract infections; cysts; infertility; . . . increased risk of childbirth complications and newborn deaths; [and] the need for later surgeries.”<sup>189</sup> Further, like the rape of women (and indeed potentially of men as well), many view the act as furthering gender subordination.<sup>190</sup> Another way of viewing the comparison is that both rape and FGC extinguish or do violence to one’s sexuality, much the same way murder extinguishes one’s life.

Another route to this conclusion is through an existing analogue involving the genitals already subject to extraterritorial application: the aforementioned PROTECT Act.<sup>191</sup> While that Act goes further in covering acts against noncitizen victims, it would indisputably prohibit a U.S. citizen from transporting a thirteen-year-old U.S. citizen to a destination country (where the practice was legal) to engage in sexual molestation, irrespective of whether the child consented.<sup>192</sup> It is hard to think that Congress was wrong to enact the PROTECT Act as applied to this situation.

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criminalization. In particular, gender subordination worries of the attitude-modification type I discuss below relating to reproductive technology may also be present with FGC. If so, the same analysis presented there applies.

<sup>189</sup> *FGC Fact Sheet*, *supra* note 21.

<sup>190</sup> See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (noting that various groups have “recognized that female genital mutilation is not simply an isolated act of violence but rather a form of gender persecution”); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices,”* 40 HARV. C.R.-C.L. L. REV. 71, 85–86 (2005) (recounting several arguments and points against FGC as enforcing gender norms and roles); Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 382 (2010) (noting that FGC “manifests” a “pervasive structure of gender subordination”).

<sup>191</sup> See *supra* note 126 and accompanying text.

<sup>192</sup> Indeed, the PROTECT Act has been held to criminalize sex with a destination country child under the age of eighteen even though that child was over the age of consent in the place the action took place. See *United States v. Frank*, 486 F. Supp. 2d 1353, 1360 (S.D. Fla. 2007) (noting that although the age of consent in Cambodia is fifteen, Congress sought to stamp out tourism for commercial sex with minors); see also John A. Hall, *Sex Offenders and Child Sex Tourism: The Case for Passport Revocation*, 18 VA. J. SOC. POL’Y & L. 153, 169 (2011) (discussing the ramifications of the *Frank* decision).

From reflecting on rape and the PROTECT Act, a similar conclusion follows for some forms FGC of a minor. Once again, the question is not whether one thinks FGC should be illegal in the United States. Instead, the question is: if one were to believe that the domestic criminal prohibition was well justified in protecting minors from serious bodily harm, would one have a good reason to extend the criminalization to the same activity involving a citizen perpetrator and citizen victim?

Because FGC involves serious bodily harm, I find the distinction between the harms associated with murder and some forms of FGC standing alone as insufficient to distinguish the normative analysis of the cases. Yet, as the bodily harm becomes less serious, the home country may have less strong reasons to criminalize extraterritorially, especially if there are strong, countervailing destination country interests. The fact that we have a domestic criminal prohibition justified on harm prevention grounds in the first place, though, is some indication that we view the harm as serious. Although some cases will present line-drawing problems, FGC does not seem like one of them.

## 2. *Cultural Context and Consent*

One might object that, unlike murder, whether and to what extent FGC is harmful to the minor will depend, at least in part, on the cultural context in which the minor is raised. Members of a community might understand the FGC performed on them as conferring cleanliness, ensuring virginity, or improving one's likelihood of marriage, such that what seems harmful to us may not be viewed as such by members of the community.<sup>193</sup>

This cultural context argument is not convincing. First, the victims of FGC are young girls (often infants) who have not meaningfully consented and may ultimately want to disassociate with their culture at a later age. They still experience the trauma and stigma as well as the physical ailments associated with FGC. For these reasons, the objection does not work as a descriptive matter. Second, the argument proves too much. The category of "more harm" versus "less harm" in this argument should track the categories of "culturally unaffiliated" versus "culturally affiliated," not the categories of "performance of activity in the home country" and "performance abroad." The existing U.S. domestic prohibition has, in its text, explicitly rejected exempting from the domestic prohibition girls whose families are culturally affiliated with the cultures performing FGC.<sup>194</sup> If the United States is unwilling to bow to cultural affiliation domestically, why should it do

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<sup>193</sup> See Eugenie Anne Gifford, *"The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 341-48 (1994).

<sup>194</sup> See *supra* note 29 and accompanying text.

so when its citizens travel abroad to circumvent the domestic prohibition?

One might respond that requiring travel serves as a kind of preference-eliciting rule by imposing additional transaction costs. However, in the case of minors, the decision to travel and undertake FGC may tell us something about parental preferences but precious little about the child's preference, let alone the way in which the act will be understood as more or less harmful to the child when the child becomes an adult. Moreover, these young children can give no meaningful consent. We do not accept the consent of minors domestically as excusing the criminal act, so why should it become relevant once the same act transpires abroad? Once again, the PROTECT Act is a helpful analogy—its extraterritorial prohibition on illicit sexual conduct with someone under the age of eighteen applies even if that minor consents.<sup>195</sup>

I have not discussed a prohibition on performing FGC on adults where there might be more meaningful consent. To be clear, in the United States and the United Kingdom, FGC on adults is not illegal, but imagine, for the sake of argument, that it was illegal in the United States as the home country. If the home country did not accept that adult consent excuses the act domestically, it is unclear why it should do so when the act is taken abroad. However, I will postpone a fuller discussion of consent for the assisted suicide discussion below, where the issue is more clearly presented.

### 3. *Procuring Versus Performing*

In some instances, it will be a U.S. citizen who actually performs the FGC procedure. In most, though, the U.S. citizen's role will be to procure another individual to do it. Is this a relevant distinction? As long as the domestic and extraterritorial prohibitions match in that they both prohibit procuring—as the U.K. law currently does—then the mere fact that a home country citizen did not “get his hands dirty” is immaterial.<sup>196</sup> If, in the original Murder Island hypothetical, Ben hired a contract killer to do the stabbing, the political theoretical rationales for punishing Ben would persist.

The procuring case *is* different in that there is a third-party citizen of the destination country, a physician or other provider, who wants to sell the FGC service to the circumvention tourist but whose

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<sup>195</sup> 18 U.S.C. § 2423(f) (2006).

<sup>196</sup> See Female Genital Mutilation Act, 2003, c. 31 (Eng.). The existing U.S. domestic prohibition covers only performing the operation, not procuring it, 18 U.S.C. § 116(a) (2006), while the proposed extension extraterritorially covers procuring it as well, H.R. 5137, 111th Cong. (2010); however, it seems as though 18 U.S.C. § 2(b) effectively extends the domestic prohibition to procurement as well.

transaction is deterred by the extraterritorial criminal prohibition on the home country citizen. This might deflect the analysis by increasing the threat of retaliation discussed above and thus the costs of extending the prohibition, although that seems implausible here since foreign citizens who seek FGC on their minors are likely to be a small portion of the destination country market for these services.

Beyond retaliation, though, the procuring-versus-performing distinction should not have much purchase. It seems odd to think that the provider of FGC services can put forth a persuasive claim of entitlement to provide services to a foreigner whose own sovereign government has decided that the service should be illegal. Indeed, this point seems to prove too much in that any time one state makes conduct a crime extraterritorially, it chills a potential market—after all, pimps lose out from the PROTECT Act's prohibition on child sex tourism,<sup>197</sup> but that does not make it objectionable.

#### 4. *Accommodation of Religious and Cultural Beliefs*

FGC, along with a few other canonical examples—honor killings and the capture of young women to force compliance with religious beliefs—lies at the fault line of a debate over how much the liberal state should accommodate religious beliefs in what would otherwise be crimes, especially when the victims are women.<sup>198</sup> As Martha Minow has noted, these debates frequently play out as “a contest over liberal universal rights versus cultural autonomy and accommodation for minority or traditional practices—and the players labeled as the *liberal* and the *cultural defender*.”<sup>199</sup> To put the problem in communitarian terms, the perpetrator citizens in this case could be members of two distinct communities—one national and one religious—and their claim is that the home country, if it abides by a just political principle, should not make them choose between those communities.

Does the citizen seeking to have FGC performed on the citizen's minor daughter have a valid claim to a religious or cultural accommodation? In this context, that is the wrong question. Again, we are starting with a case in which the activity is prohibited domestically and we are assuming that the prohibition is valid and lawful. Therefore, an argument by the individual along the lines “as part of the social contract I did/could not give up my right to engage in this religious practice as a condition of my citizenship” or “my dual community membership renders your demand of me invalid as a political princi-

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<sup>197</sup> See 18 U.S.C. § 2423(f).

<sup>198</sup> See, e.g., Martha Minow, *About Women, About Culture: About Them, About Us*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 252, 252–54 (Richard A. Shweder et al. eds., 2002).

<sup>199</sup> *Id.* at 255–64.

ple”—which would justify permitting the practice territorially as well—is one the home country has already rejected. The correct question is: given that such accommodation demands have not moved us to excuse the act domestically, should it make a difference in the extraterritorial case?

Murder Island actually presented the same question in that I suggested the Islanders’ policy was premised on a benign religious belief, but that did not move us to accommodation. One might worry that the thought experiment was too contrived in this respect. Further, perhaps there was a sense that Ben seemed to be taking advantage of the Islanders’ religious belief whereas, in the case of FGC, the “perpetrator” parent is affiliated with the religious or cultural mores of the destination country. Indeed, for this reason, the destination country’s interest might be stronger in including “its own” in its religiously motivated grant of privilege.

A state that has criminalized the domestic performance of FGC on minors demands that “as a citizen, you are required to conform your behavior to our criminal prohibition by avoiding performance of FGC on your daughter, and, if you are unwilling to do, so you may take up your Exit rights by renouncing your citizenship.” The cultural defender, in turn, counter demands: “honor my cultural or religious duties by providing me an exemption to your otherwise applicable criminal prohibition.” The state refuses.

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. How much of a worry that is may depend on orthogonal views on transparency versus “do it, but don’t tell me.”

Second, the accommodation privilege seems to be distributed in a morally arbitrary way that tracks whether the individual has the fi-

nancial means to travel to the destination country at the right time.<sup>200</sup> If we were serious about accommodation, we in theory should instead lottery state support to travel abroad for FGC among those who cannot afford, or lottery an equivalent number of permits to do it within our 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.<sup>201</sup>

Finally, when the interest is in preventing harm to a child who has not meaningfully 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 child who suffers the physical, sexual, and social deficits of FGC—deficits that the home country believes are weighty—it seems less relevant that the actual cutting took place in the Sudan rather than the United States. Does she not, as a U.S. citizen, deserve the protection of U.S. law, especially when she is not the one who has decided she will travel to the Sudan? 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: 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.<sup>202</sup> 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

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<sup>200</sup> 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.

<sup>201</sup> The lottery thought experiment is also responsive to a related objection: that the home country has, in the back of its head, an optimal, nonzero level of the conduct in question (FGC) that it wants its citizens to engage in—effectively reachable through permitting circumvention tourism. On its face, this seems implausible as a just-so story, but note that if that were the state's real goal, having a lottery for permits to engage in the conduct on U.S. soil would be in many ways a better way of achieving the goal.

<sup>202</sup> 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).

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. Again, unless one is willing to defend a strong version of the “murder is special”<sup>203</sup> argument, it is unclear why something different should follow for FGC.

While a strong case for criminalizing FGC circumvention tourism can be made, the above-discussed exceptions (retaliation, safety valve, and core-versus-peripheral divergence) continue to apply. It also seems that the less serious the physical harm involved, its consequences for the victim, and its externalized costs upon return to the home country, the more likely it is that the exceptions should apply. If what I have said here is right, the United States should adopt the pending House Bill and follow the United Kingdom and other countries that have applied extraterritorially their domestic prohibition on citizens procuring FGC for minor citizens.

#### D. Abortion

Most liberals will not find what I have said thus far to be terribly troubling, but that may not be true of where these principles take us next. I have suggested a strong *prima facie* case for extraterritorial extension of the prohibition on murder and FGC of minors. In some instances, the case of abortion initially appears to be on all fours with the previous two examples. Imagine that Ireland prohibits abortion because it views fetuses as persons and abortion as akin to murder. Rather than Ben killing John, or a parent performing FGC on a child, here we have a citizen mother committing what Ireland views as murder against the fetus that Ireland views as another citizen person (more on that point in a moment).<sup>204</sup> In abortion tourism, as in FGC and Murder Island, the “victim” has not gone abroad to consent to the activity performed on it; indeed, one might think the fetus’s presence there is, if anything, *less* voluntary than in the prior cases. Just as the murder of or FGC performed on 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.

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<sup>203</sup> See *supra* Part III.C.1.

<sup>204</sup> This assumes that the home country targets the mother for criminal liability such that she is the perpetrator. If it does not, and instead targets only the doctor performing the surgery, then the analysis I provide here holds only if the doctor is also a home country citizen. As a practical matter, most extradition treaties prohibit a country from allowing the extradition of its own citizens, William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT’L L. 839, 879–80 (2012), such that, in cases where the home country criminalizes the actions of the abortion provider, who is a destination country citizen, extradition will not be possible.



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).<sup>205</sup> Once again, however, I ask 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 to FGC and Murder Island holds, then it seems that Ireland *should* extend its prohibition. Indeed, one might think this case is even closer to Murder Island than FGC in that the act involved is termination of the existence of an entity (rather than physical injury to it) and there is no religious claim that requires accommodation. As with FGC, I ask: are there morally relevant distinctions between abortion tourism and the prior cases that distinguish it? 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.

### 1. *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.<sup>206</sup> 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.<sup>207</sup>

One could also potentially justify anti-abortion laws as "woman-protective,"<sup>208</sup> a view that has gained more traction in U.S. jurisprudence after Justice Anthony Kennedy's opinion in *Gonzales v. Carhart*,

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<sup>205</sup> Those are actually two separate questions: one can conclude that fetuses are persons and that abortion should not be prohibited. See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 47-49 (1971).

<sup>206</sup> See, e.g., MICHAEL J. SANDEL, 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.").

<sup>207</sup> Justice Kennedy's majority opinion in *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."). I deal with a similar kind of "corruption" or "attitudemodification" argument below when discussing reproductive technology tourism, where such arguments are more frequently invoked. Solely for ease of exposition, I will postpone my discussion of this kind of reason for outlawing abortion until that section. See *infra* Part III.D.

<sup>208</sup> See, e.g., Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe's End*, 51 ST. LOUIS U. L.J. 655, 664, 666 (2007) ("[A] wide array of evidence—scholarly analyses, case

which banned a particular abortion procedure because “[w]omen who have abortions come to regret their choices, and consequently suffer from [s]evere depression and loss of esteem.”<sup>209</sup> This justification has, of course, been subject to significant criticism,<sup>210</sup> but, as with all the justifications, for the purposes of this Article, we assume 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, which tracks my discussion of surrogacy below, or as protecting women notwithstanding their consent to the procedure, which tracks my discussion of the assisted suicide case later on in this Article. 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.

## 2. *Victim Citizenship*

Another possible distinction from FGC and Murder Island, again echoing conflict-of-laws principles, pertains to victim citizenship. 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.<sup>211</sup> The same could be argued as a normative matter.

Is the argument right? The answer is not altogether obvious. Much of the abortion jurisprudence has discussed the state’s interest in the preservation of fetal life, and, in the United States, we have significant existing regulations on how abortion may be carried out (such as the ban on so-called partial birth abortion), the benefits of which presumably inure to the fetus.<sup>212</sup> While the state appears to be protecting the interests of its unborn citizens, these prohibitions might be overdetermined because they could also be justified in terms

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law, statutes, and empirical data—supports the thesis that abortion bans embody policies and purposes directed at the behavior and roles of women.”).

<sup>209</sup> *Gonzales*, 550 U.S. at 183 (Ginsburg, J., dissenting) (internal quotation marks omitted) (alteration in original); *see also id.* at 147 (sustaining a ban on a particular abortion procedure).

<sup>210</sup> *See, e.g.*, Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1767–95 (2008) (critiquing the *Gonzales* decision).

<sup>211</sup> *See supra* notes 100–01 and accompanying text. 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).

<sup>212</sup> *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 163–64 (1973) (discussing state regulations that are “protective of fetal life”); *supra* notes 205–10 and accompanying text.

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.<sup>213</sup>

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, a home country’s citizenship-type interest could precede, rather than follow, legal or moral personhood, even if that initially seems a little awkward. But how? Suppose that, in addition to assault and attempted murder laws that apply to assaulting adults, the home country has a prohibition on feticide *but not abortion* that would apply, for example, if a citizen third-party assailant stabbed the stomach of a gestational mother with the intention of inducing the termination of the fetus.<sup>214</sup> If the assault took place in the home country, the home country would prosecute the assailant for feticide in addition to assault or attempted murder. If the assault took place abroad but still involved a citizen assailant and citizen mother, most of us would think it appropriate to extend the home country’s feticide law

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<sup>213</sup> 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 the destination country, that baby would have had destination country citizenship as well. *Cf.* U.S. CONST. amend. XIV, § 1 (“All persons born in the United States . . . are citizens of the United States . . .”). 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.

<sup>214</sup> In the United States, a number of courts have upheld these kinds of statutes as applied to previability fetuses. *See, e.g.,* Commonwealth v. Bullock, 913 A.2d 207, 211–16 (Pa. 2006). Others have specifically interpreted the statutes to apply only when the fetus is viable. *See, e.g.,* Wynn v. Scott, 449 F. Supp. 1302, 1330–31 (N.D. Ill. 1978), *aff’d sub nom* 599 F.2d 193 (7th Cir. 1979).

to the case, not just its assault and attempted murder laws.<sup>215</sup> This intuition suggests two things: first, it is consistent to think that the state has citizenship-type interests and that the fetus is not yet a person—feticide laws do not depend on accepting fetal personhood. Second, given a conclusion that the fetus should be considered a citizen in establishing the home country's interest in punishing attacks on the fetus by third parties, the same should be true for abortion. It seems strange for the fetus to be a citizen in regard to third-party assailants but not in terms of its mother. If the fetus *is* viewed as a citizen, this ground of distinction from our earlier cases is eliminated and what I have said above applies.

Suppose, however, contrary to my argument, that 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, even though 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 in terms of the home country's interests.<sup>216</sup> 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. Suppose that Ben brings Richard to Murder Island just as he did John in our original hypothetical. 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.

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<sup>215</sup> This last point is important because it is the feticide crime in addition to assault that goes to the interest of the state in the fetus. If this still seems too muddy, we can also imagine a noncitizen gestational surrogate mother carrying the genetic progeny fetus of two U.S. citizens, where the surrogate is the victim of the attack abroad. Or imagine the attacker destroys frozen pre-embryos of two U.S. citizens that are being housed abroad in a way that is a crime in the home but not the destination country. Cf. S.D. CODIFIED LAWS §§ 34-14-16 to -17 (2011) (making it a crime to "conduct nontherapeutic research that subjects a human embryo to substantial risk of injury or death").

<sup>216</sup> Stateless persons are not considered to be citizens of any country; there are an estimated twelve million such people in the world today. *Stateless People: Searching for Citizenship*, UNHCR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c155.html> (last visited July 15, 2012).

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, fifty U.S. citizens are murdered and ten stateless individuals are murdered; if U.S. citizens are prohibited from murdering either group abroad, forty of the same U.S. citizens are murdered while fifty stateless individuals are murdered. If we cared only about deterring the murders of our own citizens, we should prefer the first scenario 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.<sup>217</sup>

Thus, on either retributivist or deterrence grounds, the home country that prohibits murder has a strong interest in punishing its citizen who commits murder against a stateless person on Murder Island. Again, without the double coincidence of citizenship, the interest is weaker.<sup>218</sup> Nevertheless, under either 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, a case I consider below).

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.

### 3. *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.<sup>219</sup> Moreover, even in a home country, the abortion prohibition may be controversial—as with some of the other

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<sup>217</sup> For some, I may need to increase the 50 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.

<sup>218</sup> For this reason, perhaps the above-discussed exceptions would set in sooner.

<sup>219</sup> See Kreimer, *supra* note 149, at 907–13 (discussing some differences among domestic and international abortion regulations).

examples I discuss, the analysis generalizes. 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 with accommodation of cultural defenses for FGC, one can argue that, in the case of contested norms, the state should demand not Exit but only Exit-light in the form of travel. In a short bioethics journal article, Guido Pennings advocates for a similar notion he calls “external tolerance,” 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.”<sup>220</sup> Circumvention tourism thus becomes a kind of *modus vivendi*, which “prevents a frontal clash of opinions which may jeopardise social peace.”<sup>221</sup>

I have several responses similar to those I offered above for FGC. There is something troubling about avoiding confrontation by hiding the act through permitting it to take place abroad. There is something arbitrary about only permitting those able to travel to engage in the procedure. From the perspective of the “victim,” the claim for protection from another home country resident seems to be as strong regardless of the site of the act, especially when the fetus had no say or agency in its presence in the destination country.

One major disagreement between those countries that do and do not criminalize abortion is whether fetuses are persons. 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 extra-territorially.<sup>222</sup> 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 abortions 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

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<sup>220</sup> G. Pennings, *Reproductive Tourism As Moral Pluralism in Motion*, 28 J. MED. ETHICS 337, 340 (2002).

<sup>221</sup> *Id.*

<sup>222</sup> 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.

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. 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).<sup>223</sup>

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.<sup>224</sup> 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 we 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—we need not allow our citizens to travel abroad and circumvent our domestic laws in order to get that kind of learning. We 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 our citizens into their legal culture muddies, rather than clarifies, the issue. If we learn from observing the destination country that they have the abortion issue "right," we should change our law domestically and extraterritorially; if not, we 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

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<sup>223</sup> Cf. SINGER, *supra* note 211, at 17–20 (questioning the personhood of children in vegetative states).

<sup>224</sup> See *supra* note 171 and accompanying text. 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 is free to step in to resolve policy divergences between member states, 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.

their domestic criminal law, for example, by building in some exceptions or defenses or by maintaining a criminal law on the books but investing 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 gravity of harm being done, but instead 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,<sup>225</sup> 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 previability 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.<sup>226</sup>

Would it make a difference for the analysis whether the destination country protects abortion as a constitutional (or otherwise bed-rock) right rather than through ordinary legislation? That the destination country's interest has been more strongly expressed may increase the chance of retaliation, but I do not think it should otherwise alter the analysis. The relevant question is *to whom* the destination country's right extends. From the perspective of the home country, this is still one of its citizens doing serious bodily injury to another citizen, and its reasons for criminalizing seem undiminished by the legal treatment of the abortion right as fundamental in the destination country.

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<sup>225</sup> See Mutcherson, *supra* note 182.

<sup>226</sup> Cf. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (sustaining against a facial challenge a ban on so-called partial-birth abortion).



#### 4. *Timing*

Another argument for the differential treatment of abortion tourism 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—only the latter two of those options are 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 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[ ]”:<sup>227</sup> “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.

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<sup>228</sup> 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

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<sup>227</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 77 & cmt. a (1981).

<sup>228</sup> See I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1185–95 (2008) [hereinafter Cohen, *Rights Not to Procreate*]; I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1179–84 (2008) [hereinafter Cohen, *Genetic Parent*].

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."<sup>229</sup> While theoretically pleasing, I am not sure this would work very well in practice.

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 Part 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.

#### E. Reproductive Technology Use

I focus on two interrelated differences about reproductive technology tourism, again echoing interest-based choice-of-law analysis and the political theory discussion, which distinguish it from the prior cases. First, by criminalizing a particular reproductive technology practice domestically—artificial insemination by donor, IVF, commercial surrogacy (gestational or traditional), noncommercial surrogacy (gestational or traditional), or many others—the home country might have multiple divergent and sometimes overdetermined justifications. Second, we lack the double coincidence of citizenship in that, on some of these justifications, the "victim" is a citizen of the destination country. Together, these differences suggest that for some underlying justifications for the domestic prohibition, the home country does *not* have good reason to extraterritorialize its prohibition to cover circumvention tourism. The remainder of this Part approaches this claim justification by justification.

Although the discussion in this Part of the Article has a more general applicability to reproductive technology prohibitions, I will use gestational surrogacy as my focal example; here, the surrogate does not contribute genetic material but instead is implanted with an already fertilized pre-embryo that she carries to term.<sup>230</sup>

Imagine that a Turkish genetic mother and father and a Turkish gestational surrogate travel to India to undergo surrogacy in order to

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<sup>229</sup> 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.

<sup>230</sup> *E.g.*, Smerdon, *supra* note 79, at 17.

circumvent the Turkish prohibition on gestational surrogacy discussed in Part I. This case is more similar to the prior ones in that it involves an activity done by the “perpetrator” citizen of a home country that makes the act illegal and the “victim” is also a citizen of the same country; in doctrinal parlance, there are both National and Passive Personality bases for jurisdiction.<sup>231</sup>

A more common case, though, would involve a Turkish couple and a gestational surrogate who is an Indian citizen with the activity taking place in India. In this configuration, we have a home country citizen couple violating their home country law by engaging in an activity whose “victim” (or at least one of whose “victims,” a distinction I will return to momentarily) is a citizen of the destination country that does *not* render the activity unlawful. To the extent the Turkish law ostensibly is meant to protect the gestational surrogate, India has shunned that protection for its own citizen, perhaps deciding that the “victim” surrogate is not harmed or wronged through participation in commercial surrogacy. Should that make a difference?

### 1. *Child Welfare Concerns*

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.<sup>232</sup> I have argued elsewhere that, in many cases, justifications for regulating reproduction premised on the “best interests of the resulting child” are problematic and attempts at reformulating the claim carry with them problematic implications.<sup>233</sup> Again, in this Article, my method is 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 an FGC case: a child’s welfare is endangered by the parental action, and the state has restricted that parental action for that reason. Also, as with FGC, to the extent 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 exter-

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<sup>231</sup> See *supra* notes 93–101 and accompanying text.

<sup>232</sup> I have previously cataloged this tendency in great detail. See Cohen, *Regulating Reproduction*, *supra* note 54, at 445–71.

<sup>233</sup> See, e.g., *id.* at 437–42, 471–517; I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 435–36 (2012) [hereinafter Cohen, *Rethinking*]; I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1217–34 (2012) [hereinafter Cohen, *Beyond Best Interests*] (exploring difficulties with reliance on best interests of the resulting child standard).

nalities”), the home country has a further interest in regulating circumvention tourism.<sup>234</sup>

One might resist the analogy to FGC by suggesting that FGC 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, there is 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 is weaker than for FGC in two ways. First, in FGC, 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.<sup>235</sup> 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 too much.

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,<sup>236</sup> 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, this primarily inflects when the retaliation exception will kick in by amplifying the likelihood and size of the retaliation to be expected.<sup>237</sup>

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<sup>234</sup> For concerns regarding the “reproductive externalities” approach, see Cohen, *Beyond Best Interests*, *supra* note 233, at 1220–24.

<sup>235</sup> See Cohen, *Regulating Reproduction*, *supra* note 54, at 450–57.

<sup>236</sup> See Ikemoto, *supra* note 63, at 291 n.108.

<sup>237</sup> As I discuss below, if the home country adopted a truly cosmopolitan viewpoint on this, things might be different in that it would then trade off the harm to the people in the destination country by losing this business against the harm to the home country’s children, without any favoritism for home country citizens. In theory, the harm to the destination country in losing this business might be greater than the harm to the home country in losing business from the equivalent domestic prohibition, such that the calculus would come out differently.

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.

## 2. *Anticommodificationist Corruption and Other Attitude-Modification Concerns*

What I have elsewhere called “corruption”—the idea that allowing the practice to go forward will do violence or denigrate our views of how goods are properly valued<sup>238</sup>—is quite a different justification that has been offered for domestic reproductive technology prohibitions, especially 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.<sup>239</sup> 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.”<sup>240</sup>

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

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Here is a different objection: unlike abortion or FGC, the surrogate does not only want (indeed, in altruistic surrogacy, does not want at all) to make an economic profit, but also has interests in personal reproductive behavior that is stymied by the home country’s extraterritorial criminalization. As to surrogacy, such a claim would inure in a right to be a gestational parent that is uncoupled from a right to be a legal parent and (in the case of gestational surrogacy) a right to be a genetic parent. *See* Cohen, *Rights Not to Procreate*, *supra* note 228, at 1139–46. For present purposes, we need not decide whether such a right should exist as a normative matter. It is enough to say that, if the home country has rejected such a right by criminalizing surrogacy at home, it is unclear why it ought to find such a right to be trumping if the foreign country recognizes it. Indeed, the surrogate is not claiming a right to become a gestational parent—the foreign surrogate can become a gestational parent to genetic parents who are not from the home country prohibiting it—but, rather, a right to become a gestational parent to the fetus of particular genetic parents who are citizens of a sovereign who prohibits it. Conceptualized as such, the rights claim seems weaker still.

<sup>238</sup> I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 691–92 (2003) [hereinafter Cohen, *The Price of Everything*].

<sup>239</sup> *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 144, 172 (1993) (describing ways in which contract pregnancy devalues children as “use-objects”); Margaret Jane Radin, What, If Anything, Is Wrong with Baby Selling?, Address at the McGeorge School of Law (Mar. 4, 1994), in 26 PAC. L.J. 135, 143–45 (1995) (discussing commodification of women’s capacity to reproduce).

<sup>240</sup> Leon R. Kass, *The Wisdom of Repugnance*, in THE ETHICS OF HUMAN CLONING 3, 19 (Leon R. Kass & James Q. Wilson eds., 1998).

on the fetus itself.<sup>241</sup> What I say here is also responsive to a case where *that* justification underlies the domestic prohibition on abortion.

Does corruption give good reasons to criminalize circumvention tourism? It is important to distinguish what I have called “consequentialist” and “intrinsic” corruption. Consequentialist corruption justifies intervention to prevent changes to our attitudes or sensibilities that *will* occur if the practice is allowed,<sup>242</sup> for example, that we will “regard each other as objects with prices rather than as persons.”<sup>243</sup> 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.<sup>244</sup>

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.<sup>245</sup>

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” in the sense that, “Well, in India, they allow their women to be sold, but of course we would not do that here.”<sup>246</sup> Herodotus captured this tendency well

<sup>241</sup> See *supra* note 207 and accompanying text.

<sup>242</sup> Cohen, *The Price of Everything*, *supra* note 238, at 692 n.13.

<sup>243</sup> Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 294–97 (1991) (calling these “modified-experience arguments”).

<sup>244</sup> Radin, *supra* note 239, at 144–45.

<sup>245</sup> Cohen, *The Price of Everything*, *supra* note 238, at 692 n.13.

<sup>246</sup> 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

in a story from *The Histories* regarding King Darius's request that the Greeks who burned their dead eat their fathers while the Callatae who ate their parents burn them instead; each "cried out in horror and told him not to say such appalling things," leading Herodotus to wittily note that "custom is king of all."<sup>247</sup>

A more contemporary example is offered by the Netherlands, which permits a regulated form of prostitution.<sup>248</sup> 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 surrogacy,<sup>249</sup> but the comparison is meant simply to show 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.

I say "may" because 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, 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 justifi-

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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.

<sup>247</sup> HERODOTUS, *THE HISTORIES* 185–86 (Robin Waterfield trans., Oxford Univ. Press 1998) (440 B.C.).

<sup>248</sup> See Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *FORDHAM INT'L L.J.* 1178, 1208 (2010).

<sup>249</sup> Among many other things, it is much easier to "catch" violations of an extraterritorial criminalization with surrogacy that lasts nine months and frequently results in a child being born.

Of course, permitting one practice sometimes has collateral side effects—for example, some think the legalization of prostitution in Amsterdam has increased its prominence as a site for human trafficking, which remains illegal. See Victoria Hayes, Note, *Human Trafficking for Sexual Exploitation at World Sporting Events*, 85 *CHI.-KENT L. REV.* 1105, 1119 (2010) ("Instead of creating a safe industry for prostitutes, legalization creates a safe haven for traffickers."). These kinds of externalities seem less likely in the surrogacy case but could also be understood within the rubric of consequentialist corruption.

cation 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.

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 sperm, eggs, or surrogacy services are sold 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’ 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, 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.<sup>250</sup>

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<sup>250</sup> See *supra* notes 104–06 and accompanying text.



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. 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.<sup>251</sup> 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 the authority 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).<sup>252</sup>

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 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 abor-

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<sup>251</sup> See *supra* notes 150–51 and accompanying text.

<sup>252</sup> 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, see *supra* notes 152–55 and accompanying text, 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.

tions, and, as I will suggest below, some reasons for outlawing assisted suicide. Outside of medical tourism, this conclusion may have important implications for other “morals” crimes like prostitution.

### 3. *Exploitation*

An objection often raised to egg sale and commercial surrogacy is that the woman is being improperly exploited (or, as sometimes put, coerced) into participation.<sup>253</sup> 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 FGC, abortion, 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. 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?

First, evaluating whether these transactions are exploitive depends on the risks to which these women 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.

Second, whether paying a particular person \$20,000 for surrogacy services exploits the individual may vary based on important facts about the individual. If the individual is Liliane Bettencourt, one of the richest women in the world,<sup>254</sup> it is hard to believe the transaction is exploitative; if the woman is a college-educated mother of two living in the Midwest, perhaps the claim is more plausible; and if the woman is a surrogate living in Anand, India, for whom this money represents what she would earn over five years for work in the job market ordinarily available to her, the claim is more plausible still.<sup>255</sup> Since the plausibility of a claim of exploitation varies with an individual’s pre-offer

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<sup>253</sup> See, e.g., Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 147 n.114; Cohen, *Regulating Reproduction*, *supra* note 54, at 466–67.

<sup>254</sup> See *The World’s Billionaires: Liliane Bettencourt*, FORBES, <http://www.forbes.com/profile/liliane-bettencourt/> (last updated Mar. 2012) (listing Bettencourt as one of the richest women in the world as of March 2012).

<sup>255</sup> See *supra* note 6 and accompanying text.

holdings, we may have more of a reason to police surrogacy or egg donation in developing countries than we do at home.

On the other side, 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.

To be fair, this characteristic of surrogacy might actually mean that 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, would be to adopt a kind of certification regime through which penalties attach only to going to an unapproved center.<sup>256</sup>

Third, on some views, whether the individual is wrongfully coerced might depend on how well that individual's life would have gone but for the offer. This is sometimes referred to as a statistical baseline, which compares the individual's state after receiving the potentially coercive offer with the individual's welfare as it would have been in the ordinary course of things had the offer not been made.<sup>257</sup> Because the ordinary course of things is quite different for a Midwestern college-educated mother versus a poor Indian woman, the analysis would be different, although this time the difference probably cuts in favor of *not* blocking the Indian surrogate's exchange.

Fourth, and relatedly, 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).<sup>258</sup> On this ground, one might block the domestic exchange because one *is*

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<sup>256</sup> See Cohen, *Protecting Patients*, *supra* note 1, at 1515–23.

<sup>257</sup> ALAN WERTHEIMER, *COERCION* 204–11 (1987).

<sup>258</sup> See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1911 (1987).

committed to such a redistributive program but not the extraterritorial version because the home country is not inclined to (or cannot) effect a redistribution to the destination country citizen nor will her country of citizenship.

Fifth, on other views, what matters is a comparison of what the individual got as against a moralized baseline of what the individual was entitled to as a matter of justice.<sup>259</sup> Perhaps the most famous illustration is Robert Nozick's example of the person who makes an offer to his slave to not beat the slave on one particular day rather than beat him as usual.<sup>260</sup> As against the statistical baseline, the slave is made better off—in the ordinary course of events, the slave would be beaten, and one missed beating is better than no missed beating. Under the moralized baseline, the individual is entitled not to be beaten ever, such that the offer makes the slave worse off as against that baseline and is thus wrongful.<sup>261</sup>

It seems possible that the moralized baseline will differ based on the surrogate's home country because, on some theories of global justice, the individuals making the offer (the intending 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.

On a cosmopolitan view of global justice, the interests of individuals count equally whether they are members of the nation-state or are outside of its borders,<sup>262</sup> and there would be no difference in the analysis between the fellow-citizen surrogate versus the foreign one. Such approaches are grounded in a desire to avoid moral arbitrariness in the distribution of the things we value by not treating "national boundaries as having fundamental moral significance" and a recognition that the increasing interdependence of today's world erodes the case for limiting redistributive duties to within nation-states.<sup>263</sup>

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<sup>259</sup> See WERTHEIMER, *supra* note 257, at 204–11.

<sup>260</sup> See Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 450 (Sidney Morgenbesser et al. eds., 1969) ("Suppose that usually a slave owner beats his slave each morning, for no reason connected with the slave's behavior. Today he says to his slave, 'Tomorrow I will not beat you if and only if you now do A.'"); see also Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 327–28 (2008) (discussing ways to distinguish threats and offers).

<sup>261</sup> WERTHEIMER, *supra* note 257, at 208–09; Lifshitz, *supra* note 260, at 327–28.

<sup>262</sup> See, e.g., CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 143–53 (1979); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 291, 313–20 (2006) (offering a cosmopolitan view based on the Capabilities/Functioning approach); Charles R. Beitz, *Justice and International Relations*, 4 PHIL. & PUB. AFF. 360, 373–83 (1975) (offering a cosmopolitan Rawlsian view).

<sup>263</sup> BEITZ, *supra* note 262, at 151; see also THOMAS W. POGGE, *REALIZING RAWLS* 247 (1989) (equating nationality with genes, gender, and race to support interstate redistribution); Beitz, *supra* note 262, at 367, 373–76 (discussing the influence of economic interde-

On the other extreme, on Statist views, concerns for the interest of those living abroad do not count for distributive justice purposes.<sup>264</sup> Statists claim that distributive justice depends on the existence of a scheme of social cooperation that involves reciprocal benefits and burdens and mutual coercion, and, while that structure is present within nation-states, it is absent in the international order.<sup>265</sup> Intermediate views claim that those outside of the coercive structure of the nation-state count for something in distributive justice terms under certain circumstances but do not count the same as the interests of those within it.<sup>266</sup> This view might make some surrogacy agreements wrongfully exploitative while others not so.

Thus, on at least two of these sets of theories (the Statist and Intermediate), what we owe the foreign surrogate may differ from what we owe the citizen surrogate, and the home country, at least potentially, receives a justification for criminalizing the allegedly exploitative transaction at home but not abroad.

Separately, there is also a stronger argument for deferring to the destination country's judgments about what victimizes its own citizens, especially when this is not a matter of physical harm. Not only is the double coincidence of citizenship missing, but the "victim" is tied directly to the destination country in political theoretical terms in the same way that the "perpetrator" is tied to the home country.

To these principles we need to add additional constraint—that the exploited party is adequately represented in the governance of the destination country or at least as to the determination of whether the practice should be criminalized. The fear here is that a powerful majority has chosen to ignore the claims of victimization of a disenfranchised minority that will bear the brunt of the exploitative transaction. One could imagine various ways to operationalize that constraint from a very strong version (are members of the minority represented in important government positions with decision-making authority?) to a considerably weaker one (are members of the minority, as a formal matter, entitled to vote?), with many possibilities in between. This constraint avoids the conclusion that we ought to defer to the destination country's criminal law in determining what our citi-

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pendence). From a process point of view, a commitment to the Cosmopolitan viewpoint might be desirable in order to correct a tendency of our legislators, responding to the incentives of domestic reelection, to undervalue the interests of those abroad, and thus there may be a reason to overvalue (compared to our "true" valuation) the interests of those abroad as a salve for this myopia of the political process.

<sup>264</sup> See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* 30–64, 93 n.6, 107–20 (1999); Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 118, 127–30 (2005).

<sup>265</sup> See RAWLS, *supra* note 264, at 34–35; Nagel, *supra* note 264, at 128–30.

<sup>266</sup> NORMAN DANIELS, *JUST HEALTH: MEETING HEALTH NEEDS FAIRLY* 346 (2008); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 *PHIL. & PUB. AFF.* 147, 154–70 (2006). The authors call these duties of "inclusion." *Id.*

zens are permitted to do to the destination country's women even in heavily gender-subordinative societies. Again, this constraint would seem to require a country-by-country analysis rather than the on-off approach to extraterritorial application, though, perhaps some of that could be accomplished through prosecutorial discretion. To be sure, there may be administrative and political difficulties for the executive or legislature to make these kinds of assessments, which may favor versions that are easier to administer—for example, looking at whether women are formally allowed to vote in the destination country.

For all these reasons, it seems to me that, if wrongful exploitation is the basis for the domestic prohibition on these practices, the home country could justifiably not extend its criminal prohibition to the extraterritorial activities of its citizens, at least in some instances.<sup>267</sup> To state the principle more formally: *if* the justification for the domestic prohibition relates to matters of distributive justice and not physical harm, *and* the exploited party's country of citizenship (the destination country) has determined that it is not exploitation, *and* the exploited party's participation is voluntary (in the sense of lacking immediate coercion, though perhaps not in a deeper sense of freedom), *and* the exploited party is adequately represented in the governance of the country, *and* the activity takes place in the destination country's territorial sovereignty, *then* the home country does not have good reason to criminalize extraterritorially. That is, of course, a lot of "ands," which is meant to suggest that there is a presumption in this context against extraterritorial application.

While some argue that countries that ban commercial surrogacy or egg sale at home have "outsourced" their ethical dilemmas and created the market in foreign providers who now suffer for it,<sup>268</sup> the causal claim, even if true, does not seem to add much to the exploitation analysis. If we have concluded, on the basis of what I have said above, that this exploitation is not a reason to extend our domestic prohibition extraterritorially, it is not clear what difference an emphasis on the causal history should make.

The justifications for the domestic prohibition on reproductive technology use are key in determining whether we should criminalize circumvention tourism. If the basis is child welfare concerns or intrinsic corruption concerns, the normative requirement to achieve extraterritorial application follows fairly easily. By contrast, if the basis is

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<sup>267</sup> What about the unusual case in which a home country citizen travels to the destination country to be exploited by a party who is also a home country citizen? Here, it seems to me that few of these distinctions apply (the exception would be if the procedure is much safer abroad), and thus the home state should treat the case symmetrically with cases in which the same activity occurs within the home country's territorial boundaries.

<sup>268</sup> See, e.g., Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 325–27 (2005).

consequentialist corruption or exploitation, the home country can justifiably refuse to extend its criminal prohibition abroad, at least under some circumstances, though I would not go the further step of declaring it wrong if it did extend its criminal prohibition in this way.

#### F. 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? Recall 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.<sup>269</sup>

Once again, my approach considers how this case differs from the prior ones. As with the prior cases, it is helpful to unpack the possible justifications for the domestic prohibition and to examine whether they justify extraterritorial extension to circumvention tourists.

##### 1. *Corruption of the Profession, Slippery Slopes, and the Devaluation of Life*

A series of frequently made arguments for criminalizing assisted suicide—which were nicely catalogued by the U.S. Supreme Court in its decision in *Washington v. Glucksberg*<sup>270</sup>—focus on “victims” other than the patient who will receive the assistance. 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.”<sup>271</sup> 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.”<sup>272</sup> 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-

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<sup>269</sup> See *supra* notes 81–89 and accompanying text.

<sup>270</sup> 521 U.S. 702 (1997).

<sup>271</sup> *Id.* at 731.

<sup>272</sup> *Id.* at 732 (citation omitted).

assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain."<sup>273</sup>

Each of these is a type of corruption or attitude-modification argument susceptible to the same analysis offered above. If the justification is 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. This is not true of intrinsic corruption, although if we think of the Swiss medical profession as distinct from the British one, perhaps only the latter is corrupted in an intrinsic sense when a state permits circumvention tourism.

Something similar might be said of the slippery-slope variant with some additional complexities. One might wonder whether, in attitude-modification terms, beginning down the slope in Switzerland will cause us to 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 perhaps less plausible than the typical slippery-slope argument. The approach the British have ultimately taken of having the DPP spell out the factors favoring prosecution might be thought to be some evidence against this kind of concern.<sup>274</sup> Indeed, here the safety valve dynamic may

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<sup>273</sup> *Id.* at 732–33.

<sup>274</sup> *See supra* notes 87–88 and accompanying text. While “assisted suicide” typically conjures up the notion of physician-assisted suicide, the actual practice of the Swiss organization Dignitas that caters to foreigners has only minimal physician involvement. Specifically:

- (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.
- (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.

Suzanne Ost, *The De-Medicalisation of Assisted Dying: Is a Less Medicalised Model the Way Forward?*, 18 *MED. L. REV.* 497, 521–22 (2010) (footnotes omitted). If the home country were to seek to extraterritorially criminalize the activities of the doctor or volunteer, a destina-



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.

## 2. *Patient Protection, Paternalism, and Consent*

If the justification for assisted suicide is protecting the patient whose life would be terminated, the consent of an adult citizen patient might distinguish assisted-suicide circumvention tourism from abortion, FGC, and Murder Island.

However, some argue, in the domestic context, that consent is irrelevant to negating the wrongfulness of the act of terminating the patient's life.<sup>275</sup> Others argue that consent is meaningless because the patient is being manipulated or coerced into choosing death, subtly or grossly, benignly or maliciously.<sup>276</sup> 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.<sup>277</sup>

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tion country perpetrator would be involved, a case I have explicitly put to one side in this Article. My focus here is on cases like *Purdy* and *Pretty*, both depicting scenarios in which a home country family member fears that her assistance will lead to violation of home country law—that is, where there is both a home country perpetrator and victim. On some fact patterns, as a doctrinal matter, it may also be possible to premise extraterritorial prescriptive jurisdiction on subjective territorial or passive personality jurisdiction based on the citizenship of the victim or initiation of acts within the territory, *see supra* text accompanying notes 96–97, 100–01; but, whatever the doctrinal basis, the normative question is the same: should home countries seek to criminalize the activities of their citizens in assisting other citizens to commit suicide in Switzerland, where such assistance is lawful? This is the issue I focus on in this section.

<sup>275</sup> This is the Vatican's position. *See Declaration on Euthanasia*, SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH (May 5, 1980), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19800505\\_euthanasia\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html) ("Furthermore, 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.").

<sup>276</sup> *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.").

<sup>277</sup> *See, e.g.*, Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 MICH. L. REV. 1501, 1510 (2008) ("There is a danger that people will use assisted death out of temporary depression.").

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 assisted suicide as a "default rule," and the relevant question is what the "altering rule" should be to make that conduct no longer criminal.<sup>278</sup>

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 that. In the tourism case, both the

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<sup>278</sup> Cf. Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 6 (2006) (exploring the altering rule idea); Cohen, *Protecting Patients*, *supra* note 1, at 1532–33 (suggesting travel as a kind of altering rule for de facto waivers of medical malpractice liability).

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.<sup>279</sup>

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 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.<sup>280</sup>

#### IV

#### BEYOND MEDICAL TOURISM: SCAFFOLDING FOR A MORE GENERAL THEORY OF CIRCUMVENTION TOURISM

This Article has focused on circumvention tourism and the extra-territorial application of domestic criminal law. Specifically, it examines whether a home country with a valid and lawful domestic criminal prohibition on an activity can (as a matter of international law) and should (as a normative matter) apply its proscription to the conduct of its citizens who have traveled abroad for the purpose of circumventing the domestic prohibition. I have explored this question through a close analysis of four medical-tourism case studies. In

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<sup>279</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

<sup>280</sup> 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.

this Part, I make some tentative suggestions about how the analysis of these cases can be used as scaffolding for a more general theory of circumvention. I do not pretend to have all the answers; instead, my main goal is to help define a research agenda for myself and others in building a more general theory.

As a first step, I want to suggest that we can fairly easily extend the case-based method of analysis of Part III to several nonmedical cases of circumvention tourism by the similarity of the issues presented.

My analysis suggests that, where there is a double coincidence of citizenship and the justification for criminalization is the prevention or punishment of serious bodily harm, there is a strong argument for extraterritorially extending prescriptive jurisdiction to circumventing citizens. This suggests that home countries ought to adopt extraterritorial prohibitions for much broader swaths of their criminal law than they currently do and include cases such as rape and aggravated assault.

For prostitution and other “morals” crimes, where few home countries have extraterritorialized their prohibitions, my discussion of the exploitation and corruption justifications (and of which form) in the reproductive technology case provide a template for analysis.

We might also find cases that parallel the analysis of prohibitions on assisted suicide, or at least cases where assisted suicide is prohibited based purely on paternalistic justifications. For example, a home country prohibition on Russian Roulette, dueling,<sup>281</sup> or the use of experimental drugs that have not yet cleared Phase I clinical testing<sup>282</sup> might be susceptible to similar conclusions on extraterritoriality as the assisted-suicide case, at least where there is a double coincidence of citizenship between victim and perpetrator.

Another way of putting these points is that the lessons of Part III can be represented in a series of rules, exceptions, and modifiers as follows:

**Rule 1 (serious bodily harm):** If the home country criminalizes territorially an act causing serious bodily harm and the reason for the prohibition is victim protection, **and** the perpetrator and victim are both citizens, **and meaningful victim consent is absent, then** the home country should extend its criminal prohibition extraterritorially to cir-

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<sup>281</sup> Although dueling was formally illegal in many U.S. states before 1838, it frequently was tolerated in “semi-secret places with names like Bloody Island (in the Mississippi River near St. Louis) and the Dueling Oaks (outside New Orleans),” Bladensburg, Maryland, and Weehawken, New York. Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501, 519 (2004).

<sup>282</sup> See *Abigail Alliance for Better Access to Dev. Drugs v. Eschenbach*, 495 F.3d 695, 706–07 (D.C. Cir. 2007) (en banc) (finding no right to access these drugs in the United States despite the plaintiffs’ claim under substantive due process).

cumvention tourists **even when** the perpetrator offers a cultural defense and makes a claim to cultural affiliation with the place where the activity occurs **and even when** the underlying domestic prohibition is based on a norm that is contested in the home country.

**Modifier 1 to Rule 1:** If the victim is a **stateless individual**, then the home country's obligation is **weaker** (and thus the exceptions are more likely to obtain).

**Modifier 2 to Rule 1:** If the perpetrator does not have **sufficient time to Exit** citizenship from the point at which the perpetrator realizes the need to commit the crime, **then** the state may offer the perpetrator the possibility of committing to Exit after the fact (call it **Exile**) instead of punishment.<sup>283</sup>

**Modifier 3 to Rule 1:** If the home country victim citizen is a consenting adult such that the home country's justification for criminalization is paternalism, **then** the home country's obligation to extend its criminalization is **weaker to the same extent** that it views paternalism as a weaker justification than the Harm Principle.

**Modifier 4 to Rule 1:** If the home country victim citizen is an adult who has consented to the victimizing activity but the **home** state is concerned that the citizen's consent **has not been informed or has been manipulated or coerced**, the home country's obligation to extend its criminalization to activities abroad is **stronger** to the **same extent that it cannot monitor the consent abroad**.

**Modifier 5 to Rule 1:** If the home country victim citizen is an adult who has consented to the victimizing activity **but** the home state is concerned that the citizen's consent represents a lack of self-reflection, the home country's obligation to extend its criminalization to activities abroad is **weaker** to the **same extent that** the additional burdens of arranging and engaging in travel are accepted as proof of the seriousness of the individual's self-reflection.

**Rule 2 (corruption):** (a) **Consequentialist:** If the home country criminalizes territorially an act because of its attitude-modifying effects on the norms of its citizens (i.e., consequentialist corruption), **then** the home country's obligation to extend criminal prohibition extraterritorially to circumvention tourists **diminishes as the risk or degree of attitude modification diminishes** due to the situs of the activity taking place abroad.

By contrast, (b) **Intrinsic:** If the home country criminalizes territorially an act because it denigrates the way in which a good is thought to be properly valued irrespective of the attitude-modifying effects that may or may not follow, **then** the home country should extend its criminal prohibition extraterritorially to circumvention tourists.

**Modifier to Rule 2:** Where consequentialist corruption focuses on a **slippery-slope rationale**, **then** the propriety of extraterritorial

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<sup>283</sup> I do not support this modifier, but I note it as a possibility.

criminalization depends on a comparison between the slipperiness of the slope in the domestic and extraterritorial case. **Where** the destination country's slope is less slippery or where the possibility of permitted circumvention tourism diminishes the slipperiness of the home country's own slope, then the case for extraterritorial extension is **weaker**.

**Rule 3 (exploitation):** If the home country criminalizes territorially an act because it views it as exploitative, **and** the perpetrator is a home country citizen while the victim is a citizen of the destination country, **and** the exploited party's participation in the activity is voluntary (in the weak sense of not formally coerced, even if not voluntary in a deeper sense of freedom), **and** meaningful victim consent is absent, **and** the transaction takes place in the destination country's territorial sovereignty, **and** the exploited party is adequately represented in the governance of their country, **and** one of the above-described circumstances apply (different risk of activity, different pre-offer holdings, or at least the subject matter of this activity, different statistical baseline, different moralized baseline, or redistribution will not occur thus making it "hypocritical" to block the exchange), **then** the home country is **not obligated** to extend its criminal prohibition on its citizen perpetrator extraterritorially.

**General Exception 1:** If one is a consequentialist about punishment (i.e., not a deontologist or at least not a strict deontologist) **and** extending prescriptive jurisdiction will result in retaliation from the destination country, **then** one's obligation to extend prescriptive jurisdiction diminishes with the severity of the retaliatory sanctions.

**General Exception 2:** If one is a consequentialist about punishment (i.e., not a deontologist or at least not a strict deontologist) **and**, due to safety-valve concerns, extending prescriptive jurisdiction will undermine support for the territorial prohibition on the same activity to the point that it will be reversed, **then** one has no obligation to extend prescriptive jurisdiction and indeed may face an obligation not to do so.

**General Exception 3:** As the divergence between the home country and the destination country's legal rules on the issue becomes **smaller**, the obligation to extend prescriptive jurisdiction **diminishes** and can more easily **be overcome** by the strength of the destination country's interest and the costs to the perpetrator of having to conform behavior to multiple substantive rules, to the extent the home country views those costs as a bad thing.

How far can we take this analysis? Let me emphasize two limits I have noted earlier in this Article. First, what I have constructed is very

explicitly an analysis of prescriptive *criminal* jurisdiction.<sup>284</sup> Because so much of the analysis turns on social contractalist and communitarian rationales related to criminal law theory, the analysis does not necessarily lend itself to conclusions about tort law or general regulation. Before extending it into those areas, one would need to casuistically consider a large number of cases from those areas and also tap into the legal theories underlying those doctrinal structures. It is possible one would reach the same conclusions as I do here, but, until that work is done, I cannot say for sure. Second, even as to criminal law, I have noted that it is important for this framework that a home country citizen not be put at a competitive disadvantage that will perturb the home country, such as in the extraterritorial application of wage and hour laws.<sup>285</sup> This might mean a different analysis is called for in the extraterritorial imposition of more stringent home country criminal fraud or securities criminal law requirements abroad, since they may put the home country company doing business abroad at a disadvantage.<sup>286</sup> That disadvantage may not be dispositive, and at the end of the day extraterritorial application may be all-things-considered justified, but I want to suggest that the analysis would at least be different on this score.

Beyond those two limits, things are less certain. It is clear to me that the obligation to extend one's laws extraterritorially is at its zenith when there is serious bodily harm and double coincidence of citizenship.<sup>287</sup> Could we go further and broaden that principle to all *malum in se* or all domestic criminalizations based on the Harm Principle, or even paternalism? I think this would raise some difficult questions—such as whether the home country itself versus some external perspective must view the crime as *malum in se*—and may depend on one's views on some orthogonal elements of criminal law theory—whether the Harm Principle has collapsed<sup>288</sup> and whether criminalization of conduct premised on the Harm Principle is more permissible than that premised on paternalism. My cases, which involve serious bodily injury, are core, although I do not map the outer reaches of the penumbra of the argument. While the analysis has proceeded categorically, I have also noted in a few spots the possibility of continua:

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284 See *supra* Part I.A.

285 See *supra* Part III.B.3.

286 See *supra* Part III.B.3.

287 See *supra* Part III.A.1.a.

288 See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 192–94 (1999) (arguing that the proliferation of harm arguments has “produced an ideological shift in the harm principle from its progressive origins” and “significantly changed the structure of the debate over the legal enforcement of morality”).

for example, as the bodily injury becomes less serious, the obligation to criminalize extraterritorially may diminish as well.<sup>289</sup>

What about a case where there is serious bodily harm but the victim is a member of the *destination* country, for example, a variant of Murder Island where the victim is a citizen of the Island? Such a case is like the exploitation analysis for surrogacy in the victim's citizenship except that, rather than the more relational or distributive justice concern, there is a Harm Principle concern. This is a hard case, but my tentative view is that the home country ought not to defer to the destination country, in variance with what I have argued as to surrogacy.<sup>290</sup> Given what I have said about contestability of the norm in the abortion case, I do not think one can sufficiently explain this result by saying "there is high international subjective agreement that murder is bad." Instead, the result might be defended by a claim that these different categories of harms and wrongs are real things that are not interchangeable, perhaps calling on something like an objective list theory of welfare.<sup>291</sup> I do not seek to defend such a line here but, instead, use this example to both show the way in which the analysis of medical tourism offered in this Article helps generate new questions and offer some possible approaches towards constructing a more general, normative theory of extraterritorial application of domestic criminal law.

This Article has focused on cases in which the home and destination country differ on questions of criminal liability. What if both countries treat an activity as a crime but diverge as to sentencing? For

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<sup>289</sup> See *supra* Part III.B.

<sup>290</sup> See *supra* notes 258–66 and accompanying text.

<sup>291</sup> See, e.g., L.W. Sumner, *Welfare, Happiness, and Ethics* 45–80 (1996) (discussing objective list theories). Unlike the serious bodily harm cases that are at the core of my analysis, which involve the double coincidence of citizenship and in which I have suggested that Duff's more communitarian approach and Moore's more legal moralist approach both support my approach, see text accompanying notes 150–55, 252, this case *may* present a place where the two approaches diverge and only the Moore approach robustly favors extraterritorial criminalization. I say "may" because it depends on whether one thinks perpetrator citizenship is sufficient on the communitarian theory to ground the state's right to punish or whether victim citizenship is necessary as well. While I will not try to definitively resolve this issue here, I do think there are plausible versions of Duff's theory that would treat perpetrator citizenship as sufficient, in that the home country may have right to demand that one subordinate oneself to the home country's authority to ban actions even where the victims are not fellow home country residents. My analysis in the abortion case of the possibility of murdering the stateless individual, while not definitively resolving the matter since the destination country may have more of a countervailing interest when its citizen is involved and not a stateless person, would seem to press in this direction. I am less sure whether Duff's approach can ground the home country's right to punish in the opposite configuration where the victim is a home country citizen and the perpetrator is a destination country citizen, such as a Swiss physician providing assisted-suicide services in Switzerland to a U.S. patient. Again, though, I raise, without resolving, these issues in the hope that others will find the work I have done here helpful in thinking through these issues.



example, the home country applies a twenty-year sentence while the destination country applies only a two-year sentence to the same offense? My initial thought is that the same rules announced above as to liability ought to apply as to sentencing divergences, especially when the double coincidence of citizenship obtains. The home country's interest (again, on communitarian or social contractualist grounds) is not just that its citizen be subject to criminal liability, but also that he be subject to the "right" amount of liability and punishment for the crime. Still, it seems to me that the general exception discussed above as to peripheral versus core divergence<sup>292</sup> might have some bite here: small differences in sentences might be thought of as more technocratic differences between the home and destination country that the home country has good reason to ignore in the interests of comity. By contrast, large divergences in sentences might be thought as more core disagreements not—as in the liability case—as to whether an act is the kind of thing the state should criminalize but, instead, within the range of criminalized activities, where it falls in terms of punishment and deterrence.

Finally, there is at least one set of cases in which my normative conclusions might be thought not to go far enough. Consider again the FGC case.<sup>293</sup> While I have supported the United States or other home countries criminalizing extraterritorially (as they do within the territory) the activities of those who take their daughters abroad to do that which cannot be done at home, that is a liability rule regime of the penal variety. What of individuals who, facing such a rule, renounce U.S. citizenship for themselves and their daughters and move their families to the Sudan and take on Sudanese citizenship precisely to perform FGC there? Might the home country have an interest in preventing exactly that citizenship renunciation, at least for the daughter, in the name of *parens patriae* protection? Answering that question would depend on development of a conception of when, as a moral and lawful matter, parents can renounce the citizenship of their children to pursue their own ends that may conflict with what is in the children's best interests. There are fine lines here; at least in the case of intact families, the state does not ordinarily prevent parents from moving their children abroad or taking on foreign citizenship, even if that means a move to a less gender-egalitarian society or one with poorer education or health systems that are against the child's best interest. Should this case be different? The answer will depend on developing a robust theory of parent-child-state relationships in the context of citizenship renunciation that I do not purport to develop here.

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<sup>292</sup> See *supra* Part III.B.3.

<sup>293</sup> See *supra* Part I.B.1.

There is a related problem, which I will flag without resolving, that relates to timing. Imagine Ben renounces his U.S. citizenship just before his trip to Murder Island, commits his murder, and then, at a later date, is able to become a U.S. citizen again. Or, suppose Ben, a citizen of Murder Island, murders John, a U.S. citizen, and then later in life becomes a U.S. citizen. If the individual is currently “in” in terms of the double coincidence of citizenship, does the home country have the right to punish the individual’s activities abroad during the period when such an individual was “out”? I do not have a fully worked out answer to this, although I suspect it would be important to establish some protections against gaming the system—that is, circumventing the rules designed to prevent circumvention tourism. In fact, some legal systems, for some substantive areas, have devised rules to this effect—what we might think of as citizenship “relation back” rules in other contexts. For “offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law,” the Strafgesetzbuches suggests that German criminal law shall apply if the offender “was German at the time of the offence or *became German after the commission.*”<sup>294</sup> There are many complications here, and I merely flag the issue as one worthy of further development.

Again, all of this is tentative. While I have developed an in-depth theory of circumvention tourism for medical services in the prior Parts of this Article, my aim in this Part has been to begin a conversation regarding the normative side of circumvention tourism more generally. I use the term “scaffolding” advisedly. While it is my hope that this work is useful in creating greater structures of this kind, I am fully of the view that the plans themselves will require significant development and revision.

#### CONCLUSION

This Article has focused on circumvention tourism and the extra-territorial application of domestic criminal law—specifically, whether a home country with a valid and lawful domestic criminal prohibition on an activity can (as a matter of international law) and should (as a normative matter) apply its prescriptive jurisdiction to the conduct of its citizens who have traveled abroad for the purpose of circumventing

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<sup>294</sup> STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 17, 1998, BUNDESGESETZBLATT, Teil I [BGBL. I] § 7(2), as amended, Oct. 2, 2009 (Ger.), available at [http://www.gesetze-im-internet.de/stgb/\\_7.html](http://www.gesetze-im-internet.de/stgb/_7.html), translated in [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#StGBengl\\_000P7](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P7). Cf. Carr v. United States, 130 S. Ct. 2229, 2232–33 (2010) (addressing whether the Sex Offender Registration and Notification Act’s failure-to-register crime applied to offenders whose interstate travel had occurred before the Act’s passage). These complications make me more suspicious of solutions to the problem that permit Exile.

the domestic prohibition on several medical activities.<sup>295</sup> I have examined this question through a close analysis of four medical tourism case studies.<sup>296</sup>

On the doctrinal level, I have shown that, under international law, the extension of prescriptive jurisdiction to these cases seems largely unproblematic. On the normative level, I have suggested that states with domestic criminal prohibitions on access to these services should in many cases extend these prohibitions to citizen medical tourists, a conclusion at variance with the current practice.<sup>297</sup>

For FGC and abortion (at least based on typical fetal-protection justifications), I have suggested that the imperative to protect a victim citizen (or at least a stateless person) outweighs an obligation to attempt to accommodate discordant religious beliefs or contestable moral premises when those pressures have not won the day at home.<sup>298</sup> In so doing, I have rejected a “split-the-difference” approach of Exit-light.

On reproductive technology access, the same conclusion follows for domestic prohibitions supported by child-protective rationales and intrinsic corruption.<sup>299</sup> By contrast, when consequentialist corruption is the argument form,<sup>300</sup> the obligation to criminalize circumvention tourism does not necessarily follow. When the desire is to protect the destination country “victim,” when the form of the argument centers on relational or distributive justice questions of exploitation, and not physical harm prevention, and the “victim” has consented and is represented in the destination country political process, there is a strong argument for deferring to the destination country’s approach.

For assisted suicide, what I have said about intrinsic and consequentialist corruption carries over.<sup>301</sup> By contrast, if domestic criminalization is premised on slippery-slope concerns, differences in the slipperiness of the foreign and domestic slopes could be relevant. If the justification is patient protection and the consent offered is not meaningful, distinctions between criminalizing at home versus abroad are considerably less plausible.

Finally, I have offered some tentative thoughts about how this analysis might be used to build a more domain-general theory of circumvention tourism, applicable to a much larger set of domestic crimes.

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<sup>295</sup> See *supra* note 13 and accompanying text.

<sup>296</sup> See *supra* Part I.B.

<sup>297</sup> See *supra* Part II.

<sup>298</sup> See *supra* Parts III.C–D.

<sup>299</sup> See *supra* Part III.E.

<sup>300</sup> See *supra* note 243 and accompanying text.

<sup>301</sup> See *supra* Part III.E.