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Richard Storrow  
*CUNY School of Law*

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# TRAVEL INTO THE FUTURE OF REPRODUCTIVE TECHNOLOGY

Richard F. Storrow\*

*Today, cross-border assisted reproductive care can in many cases be pursued with impunity, given the policy of free movement of goods and services that serves as a cornerstone of unity in Europe and North America. Travel in the future of reproductive technology, however, will occasion risks that reproductive travelers have not faced since the days when Germany and Ireland engaged in internationally condemned practices aimed at punishing their citizens who crossed into other countries to obtain abortions illegal at home. In countries where pre-implantation genetic diagnosis of embryos is outlawed because it is believed to be dangerously akin to eugenics, travel to evade the law has commenced and will increase as low-cost methods of conducting such diagnoses enter the market. What the future of crossing borders for reproductive technology holds, then, lies in part in the extraterritorial effect that countries will choose to give their laws in a globalizing world.*

## I. INTRODUCTION

Procreation is a powerful human drive that inspires such deep religious, moral, and ethical convictions that, at a fundamental level, we know we need to pay close attention to and thoughtfully examine the implications of innovations in reproductive technology. Andrew Torrance's vivid account of the profound impact inexpensive genetic tests will have on human reproduction raises a host of intriguing questions about the future of reproductive technology.<sup>1</sup> In at least one respect, the future is now: with every innovation that places assisted reproduction within the reach and awareness of millions of individuals around the world come calls for restraint. We fear many things—threats to the health of patients and offspring, the exploitation of third-party participants in the quest to bear children, and taints on the reputations of physicians and governments insufficiently responsive to all that is at stake.

Torrance believes that enhancements in genetic technologies coupled with recent significant changes to patent law may alter the calculus of innovation and access in the realm of reproductive technologies.<sup>2</sup> He foresees a future in which inexpensive genetic tests may greatly expand access by individual patients to very specific knowledge about the reproductive experience they are likely to have, perhaps most significantly the probability of success and the risks that will attend the process for both prospective parents and potential offspring.<sup>3</sup> As with any technology designed to satisfy consumer demand, the increasing efficacy of

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\* Professor of Law, City University of New York. J.D., Columbia, 1993; M.A., Columbia, 1989; B.A., Miami University, 1987.

<sup>1</sup> Andrew Torrance, *Family Law and the Genomic Revolution*, 79 UMKC L. REV. 271 (2011).

<sup>2</sup> *Id.* at 272.

<sup>3</sup> *Id.* at 271-72.

genetic tests and the expected drop in their cost over time will tap new markets for information about the genetic determinants of human traits.

A potential wrinkle in such a future is the very legal regime that makes the development of genetic tests attractive to innovators and entrepreneurs. This interplay between patent and innovation plays out according to a familiar script, the “orthodox view” in Torrance’s parlance.<sup>4</sup> Gene sequences are significant in scientific endeavor because their discovery may lead to the development of important diagnostics and other products. Without the protection of the limited monopoly of patent, we are told, scientific innovators will lack incentives to invest capital in developing new technologies of this sort.<sup>5</sup> Patent protection is necessary, then, to inhibit access to new technologies at precisely the moment they appear poised to be of the most benefit.<sup>6</sup> Requiring people to pay for the technology they want to use creates the proper incentive for scientists and entrepreneurs to develop technology further. Without patents, so the story goes, there might well be no technology to resort to.

The familiar script takes an unfamiliar turn when it comes to mapping the human genome. The development in patent law that concerns Torrance<sup>7</sup> and others is the extension of patent protection (which seems perfectly appropriate for techniques developed to detect the presence of certain gene sequences) to the gene sequences themselves. The immediate question in the battle for ownership of the human genome is whether gene sequences, since they are naturally occurring, are appropriate subject matter for patents at all.<sup>8</sup> Then there is the policy question: might patenting gene sequences actually undermine innovation in this area?<sup>9</sup> Might gene patents have the even more perverse effect of facilitating the exploitation of patients and disenfranchised communities and jeopardizing individual and public health?<sup>10</sup> If so, perhaps human rights principles of equality and dignity should control over more technical arguments about innovation and technological advancement.<sup>11</sup>

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<sup>4</sup> *Id.* at 274.

<sup>5</sup> Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office, 702 F. Supp. 2d 181, 191, 210-11 (S.D.N.Y. 2010) (detailing the argument of the patent holder and the supporting amici).

<sup>6</sup> See, e.g., Greenberg v. Miami Children’s Hosp. Research Inst., 264 F. Supp. 2d 1064, 1067 (S.D. Fla. 2003) (involving patent on gene responsible for Canavan disease).

<sup>7</sup> Torrance, *supra* note 1, at 272.

<sup>8</sup> Aaron S. Kesselheim & Michelle M. Mello, *Gene Patenting—Is the Pendulum Swinging Back?*, 362 NEW ENG. J. MED. 1855, 1855-56, 1857 (2010); Michael Crichton, *Patenting Life*, N.Y. TIMES, Feb. 13, 2007, at A23. According to Kesselheim and Mello, “reportedly, about 20% of human gene DNA sequences are currently patented.” Kesselheim & Mello, *supra*, at 1856.

<sup>9</sup> Ass’n for Molecular Pathology, 702 F. Supp. 2d at 190, 207-10; *Genes and Patents: More Harm Than Good?*, THE ECONOMIST, Apr. 17, 2010, at 90; Crichton, *supra* note 8.

<sup>10</sup> See Debra L. Greenfield, Greenberg v. Miami Children’s Hospital: *Unjust Enrichment and the Patenting of Human Genetic Material*, 15 ANNALS HEALTH L. 213, 229 (2006).

<sup>11</sup> See generally Jonathan D. Kahn, *What’s the Use? Law and Authority in Patenting Human Genetic Material*, 14 STAN. L. & POL’Y REV. 417, 426-27, 442 (2003) (recognizing how the Patent and Trademark Office frames the debate so as to marginalize dignitary and religious discourses).

A clear line has yet to be drawn between patents on diagnostic techniques and patents on gene sequences.<sup>12</sup> The law in this area is still in flux. Trial court rumblings signal impatience with gene patents,<sup>13</sup> but it will be many years before this question is resolved. In the meantime, given the current state of the patent law landscape, it seems likely that patents on specific gene sequences and patents on the diagnostics themselves will inhibit access to the tests people want for mapping their reproductive lives.

Torrance's prescience is his insight that truly "low-cost" genetic tests will depend to a large extent on the direction of patent law. This response recognizes that some jurisdictions will refuse to permit pre-implantation genetic testing altogether. Given these dynamics, potential consumers of such tests will travel to jurisdictions where they are permitted or are less expensive.<sup>14</sup> Travel in the future of reproductive technology may entail some dangers, however. If current indicators are not mere isolated instances, we may see either extraterritorial prosecution of such travel or other legal responses aimed at making it less likely that consumers of low-cost genetic tests have anything to gain from a cross-border quest to attain their reproductive goals.

## II. CROSS-BORDER REPRODUCTIVE CARE

The existence of patents that would make genetic tests prohibitively expensive for many or would place second opinions out of financial reach, makes it probable that those with the financial means to do so will travel to jurisdictions where these tests and related care remain affordable. In addition, where genetic testing is outlawed, travel to permissive jurisdictions will ensue. Travel for genetic testing, then, will take its place alongside other forms of medical tourism that is pursued in the quest for health care that is either too expensive or prohibited at home. Indeed, the evidence shows that cross-border preimplantation genetic diagnosis ("PGD") is already a going concern.<sup>15</sup>

At its root, travelling abroad to acquire assisted reproduction that is out of reach locally is an exercise of personal autonomy.<sup>16</sup> Nonetheless, unfettered choice in matters of assisted reproduction is not a feature of most developed countries, where the general conviction is that reproductive choice is justifiably

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<sup>12</sup> See Michael Tomasson, *Legal, Ethical, and Conceptual Bottlenecks to the Development of Useful Genomic Tests*, 18 ANNALS HEALTH L. 231, 242 (2009) ("[I]t is not a question of whether to pursue patents for our tests, but rather where in the research process we should consider them.").

<sup>13</sup> See, e.g., *Ass'n for Molecular Pathology*, 702 F. Supp. 2d at 181.

<sup>14</sup> Tanja Krones & Gerd Richter, *Preimplantation Genetic Diagnosis (PGD): European Perspectives and the German Situation*, 29 J. MED. & PHIL. 623, 632 (2004); B.M. Dickens, *Preimplantation Genetic Diagnosis and 'Savior Siblings'*, 88 INT'L J. GYNECOLOGY & OBSTETRICS 91, 93 (2005).

<sup>15</sup> Press Release, ESHRE, Europe struggles to meet the legal, ethical and regulatory challenges posed by more patients travelling abroad for PGD (July 2, 2007).

<sup>16</sup> Eric Blyth & Abigail Farrand, *Reproductive Tourism: A Price Worth Paying for Reproductive Autonomy?*, 25 CRITICAL SOC. POL'Y 91, 102, 107-08 (2005).

constrained by legal regulation.<sup>17</sup> The *laissez-faire* approach of the United States is of course an exception, but most other developed countries have enacted comprehensive legislative schemes that can be categorized in the following manner: (1) permissive; (2) cautious; and (3) prohibitive.<sup>18</sup> Permissive jurisdictions such as the United Kingdom and Spain exhibit tolerance toward most well-known forms of assisted reproduction except commercial surrogacy.<sup>19</sup> These jurisdictions typically allow the use of third-party gametes and embryos and do not limit access to assisted reproductive technology (“ART”) based on marital status or sexual orientation. Research using supernumerary embryos, the cloning of embryos for stem cell research, and the selection of embryos with the aid of pre-implantation diagnosis are also permitted in liberal jurisdictions.<sup>20</sup> Cautious jurisdictions such as France and Denmark do not have widespread restrictions but nonetheless have strict rules requiring anonymity in gamete donation<sup>21</sup> and bans on surrogacy.<sup>22</sup> Cautious jurisdictions may allow pre-implantation genetic diagnosis (“PGD”) only in special cases and may prohibit the creation of embryos through in vitro fertilization (“IVF”) or therapeutic cloning for research purposes.<sup>23</sup> Cautious jurisdictions may, however, permit research on embryos that remain from couples who have completed their infertility treatment.<sup>24</sup> In addition to these restrictions on practice, France permits only stable heterosexual couples to have access to assisted reproduction.<sup>25</sup> The prohibitive approach stands in contrast to the liberal approach by placing limits on embryo and stem cell research and embryo selection following PGD.<sup>26</sup> Prohibitive countries such as Germany, Austria, Switzerland, and Italy, for example, outlaw techniques that are elsewhere embraced as mainstream

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<sup>17</sup> See HOWARD W. JONES ET AL., FERTILITY AND STERILITY, INTERNATIONAL FEDERATION OF FERTILITY SOCIETIES SURVEILLANCE 2010 13-15 (2010), [http://www.iffs-reproduction.org/documents/IFFS\\_Surveillance\\_2010.pdf](http://www.iffs-reproduction.org/documents/IFFS_Surveillance_2010.pdf) [hereinafter IFFS SURVEILLANCE 2010]. A discussion of the policies underlying these restraints is beyond the scope of this response. It is sufficient to mention here that restrictions on assisted reproduction may arise from fears about harm to future children, harm to third-party gamete donors or surrogates, or harm to human dignity generally.

<sup>18</sup> See Linda Nielsen, *Legal Consensus and Divergence in Europe in the Area of Assisted Conception—Room for Harmonisation?*, in CREATING THE CHILD 305, 306 (Donald Evans ed., 1996).

<sup>19</sup> See generally IFFS SURVEILLANCE 2010, *supra* note 17.

<sup>20</sup> THE POLITICS OF BIOTECHNOLOGY IN NORTH AMERICA AND EUROPE: POLICY NETWORKS, INSTITUTIONS, AND INTERNATIONALIZATION 7, 9 (Eric Monpetit et al. eds., 2007) [hereinafter THE POLITICS OF BIOTECHNOLOGY].

<sup>21</sup> IFFS SURVEILLANCE 2010, *supra* note 17, at 65. Israel is another country of this type. *Id.*

<sup>22</sup> *Id.* 109-10.

<sup>23</sup> THE POLITICS OF BIOTECHNOLOGY, *supra* note 20, at 9.

<sup>24</sup> *Id.*

<sup>25</sup> HOWARD W. JONES ET AL., FERTILITY AND STERILITY, INTERNATIONAL FEDERATION OF FERTILITY SOCIETIES SURVEILLANCE 2007 S18 (2007), [http://www.iffsreproduction.org/documents/Surveillance\\_07.pdf](http://www.iffsreproduction.org/documents/Surveillance_07.pdf) [hereinafter IFFS SURVEILLANCE 2007].

<sup>26</sup> THE POLITICS OF BIOTECHNOLOGY, *supra* note 20, at 9.

procedures. In these jurisdictions, oocyte donation is banned outright.<sup>27</sup> Austria and Italy also prohibit sperm donation in IVF.<sup>28</sup> In addition to banning these forms of third-party gamete donation, Switzerland prohibits PGD.<sup>29</sup> It is joined in this restriction by Chile, China, Ivory Coast, and the Philippines.<sup>30</sup> Although not always requiring PGD, non-medical sex selection is banned in the United Kingdom, India, Canada, and Taiwan.<sup>31</sup>

Cross-border reproductive travel out of cautious and prohibitive jurisdictions to more permissive jurisdictions is well known,<sup>32</sup> and, at least when conducted within Europe, is protected by the principle of free movement of persons enshrined in the Treaty Establishing the European Community.<sup>33</sup> In addition, movement out of permissive and *laissez-faire* jurisdictions occurs with an aim to acquire treatment more quickly, to reduce costs, or to acquire treatment that is simply not offered in the country of origin “because it is not considered sufficiently safe or because it is still under experimental evaluation.”<sup>34</sup>

Markets for cross-border reproductive transactions and for medical tourism generally have developed in a multiplicity of countries in response to international demand.<sup>35</sup> The business is authentically global in scope in that cross-border movements are sometimes facilitated by clinics or brokers at home who have partnerships abroad. For example, an agency in the United States may refer couples needing surrogacy services to clinics in India or Ukraine.<sup>36</sup> Physicians in Italy or Turkey, where artificial insemination is banned, may refer

<sup>27</sup> IFFS SURVEILLANCE 2010, *supra* note 17, at 47-48. The European Court of Human Rights, in *S.H. and Others v. Austria*, disapproved of Austria’s ban on oocyte donation and its ban on sperm donation for IVF. *S.H. and Others v. Austria*, 57813/00 Eur. Ct. H.R. (2010). I have argued that the case establishes proportionality review as the proper standard by which countries will have to justify their restrictions on assisted reproduction in the future. See R.F. Storrow, *The Pluralism Problem in Cross-Border Reproductive Care*, 25 HUM. REPROD. 2939 (2010).

<sup>28</sup> IFFS SURVEILLANCE 2010, *supra* note 17, at 46-48.

<sup>29</sup> *Id.* at 100.

<sup>30</sup> *Id.* at 101.

<sup>31</sup> *Id.* at 95, 96.

<sup>32</sup> F. Shenfield et al., *Cross Border Reproductive Care in Six European Countries*, 25 HUM. REPROD. 1361, 1362 (2010).

<sup>33</sup> Treaty Establishing the European Community art. 18(1), Mar. 25, 1957, 298 U.N.T.S. 11, available at [http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html#C\\_2002325EN.003301\\_6\\_ref](http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html#C_2002325EN.003301_6_ref) (“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.”).

<sup>34</sup> Anna Pia Ferraretti et al., *Cross-border Reproductive Care: A Phenomenon Expressing the Controversial Aspects of Reproductive Technologies*, 20 REPROD. BIOMED. ONLINE 261, 265 (2010).

<sup>35</sup> See generally articles in the *International Medical Travel Journal*, available at <http://www.imtjonline.com/welcome/> and *Medical Tourism Magazine*, available at <http://www.medicaltourismmag.com/>.

<sup>36</sup> *E.g.*, Global Surrogacy Solutions, <http://www.globalsurrogacysolutions.com> (last visited Dec. 26, 2010).

couples to nearby Switzerland, Greece, or Cyprus.<sup>37</sup> Destination countries in the developing world are coming forward to generate foreign demand with language pitched to consumerist sensibilities.<sup>38</sup> Some of these countries may soon enact laws that will make it easier for consumers to obtain the services they desire.<sup>39</sup>

Although cross-border reproductive care exists at the intersection of cross-border medical care and assisted reproduction, and thus raises many of the same concerns arising in those contexts, some concerns are particularly salient when it comes to crossing borders. By crossing borders, patients are seeking a different legal, economic, or service-delivery climate than exists at home. Thus, five primary concerns arise from cross-border reproductive travel: (1) compromised access to necessary health care services at home;<sup>40</sup> (2) the sacrifice of distributive justice when access to necessary procedures depends upon the ability to travel;<sup>41</sup> (3) the quality and safety of services both at home and abroad;<sup>42</sup> (4) whether responsible citizenship is undermined by traveling abroad to evade the law at home;<sup>43</sup> and (5) the exploitation of or harm to individuals and communities that have become the destinations of reproductive travel.<sup>44</sup> Related to this last concern is evidence that where clinics in developing countries step forward to fulfill foreign demand, there is now “an emerging divide between those clinics offering health services to local patients, and those concentrating on the provision of services for foreign clients.”<sup>45</sup> This can lead to fewer resources to attend to the health care of the local population,<sup>46</sup> including the migration of

<sup>37</sup> Zeynep Gürtin-Broadbent, *Problems with Legislating Against ‘Reproductive Tourism,’* BIONEWS, Mar. 22, 2010, [http://www.bionews.org.uk/page\\_56954.asp](http://www.bionews.org.uk/page_56954.asp); *Turkey Bans Trips Abroad for Artificial Insemination*, THE TELEGRAPH, March 15, 2010, <http://www.telegraph.co.uk/news/worldnews/europe/turkey/7450571/Turkey-bans-trips-abroad-for-artificial-insemination.html>; Shenfield et al., *supra* note 32, at 1366.

<sup>38</sup> Elise Smith et al., *Reproductive Tourism in Argentina: Clinic Accreditation and its Implications for Consumers, Health Professionals and Policy Makers*, 10 DEVELOPING WORLD BIOETHICS 59, 60, 65 (2010).

<sup>39</sup> See, e.g., The Assisted Reproductive Technologies (Regulation) Bill, 2010, Ministry of Health & Family Welfare pt. 6 (India), available at <http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> (containing provisions legalizing commercial surrogacy and providing that the commissioning parents’ name shall appear on the birth certificate).

<sup>40</sup> Guido Pennings et al., *ESHRE Task Force on Ethics and Law 15: Cross-border reproductive care*, 23 HUM. REPROD. 2182, 2182 (2008), available at [http://www.eshre.com/binarydata.aspx?type=doc/Task\\_force\\_XV\\_cross\\_border.pdf](http://www.eshre.com/binarydata.aspx?type=doc/Task_force_XV_cross_border.pdf) (describing lack of technology or reimbursement as indicating a “structural deficit”).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; Shenfield et al., *supra* note 32, at 1362; Smith et al., *supra* note 38, at 59, 65.

<sup>43</sup> Pennings et al., *ESHRE*, *supra* note 40; Guido Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, 19 HUM. REPROD. 2689, 2691 (2004).

<sup>44</sup> Pennings et al., *ESHRE*, *supra* note 40, at 2183.

<sup>45</sup> Smith et al., *supra* note 38, at 4.

<sup>46</sup> F. Merlet & B. Sénémaud, *Prise en charge du don d’ovocytes: réglementation du don, la face cache du tourisme procreative* [Egg donation: Regulation of the donation and the hidden face of the cross-border reproductive care], 38 GYNÉCOLOGIE OBSTÉTRIQUE & FERTILITÉ 36 (2010).

health care personnel into the private sector.<sup>47</sup> Elizabeth Jenner calls this phenomenon the “fragmentation of health care in settings of exploitation.”<sup>48</sup>

Commentators on restrictions on assisted reproduction and reproductive tourism have made valuable contributions to the academic literature. Bioethicist Guido Pennings has published comprehensive analyses of various methods of responding to reproductive tourism and has theorized that reproductive tourism permits moral pluralism to flourish.<sup>49</sup> Legal scholars June Carbone and Paige Gottheim urge the cultivation of public trust through regulatory creativity and flexibility as a way to achieve compliance from the citizens burdened by restrictive laws.<sup>50</sup> Although Carbone and Gottheim urge relaxation of certain restrictions, their proposal has the advantage of avoiding the “race to the bottom” that some associate with calls for international harmonization of laws.<sup>51</sup> The research of anthropologist Marcia Inhorn and physician Pasquale Patrizio reveals that “[l]egal barriers . . . bespeak the politics of exile,”<sup>52</sup> and indeed, in qualitative studies, “exile” turns out to be “a more accurate descriptor of the patient[s’] experience.”<sup>53</sup>

In my own work, I have considered how cross-border reproductive care itself might affect countries where clinics have expressed a particular eagerness to meet rising foreign demand for their services.<sup>54</sup> Some of these effects include a surge in egg donation among young women and the possibility that fertility

<sup>47</sup> Rupa Chinai & Rahul Goswami, *Medical Visas Mark Growth of Indian Medical Tourism*, 85 BULL. OF THE WORLD HEALTH ORG. 161 (2007), available at <http://www.who.int/bulletin/volumes/85/3/07-010307/en/index.html>.

<sup>48</sup> Elizabeth Jenner, Paper delivered at International Conference on Ethical Issues in Medical Tourism at Simon Fraser University (June 25, 2010).

<sup>49</sup> E.g., Guido Pennings, *International Parenthood via Procreative Tourism*, in CONTEMPORARY ETHICAL DILEMMAS IN ASSISTED REPRODUCTION 43 (F. Shenfield & C. Sureau eds., (2006)); Guido Pennings, *Cross-border Reproductive Care in Belgium*, 24 HUM. REPROD. 3108 (2009); Guido Pennings, *The Green Grass on the Other Side: Crossing Borders to Obtain Infertility Treatment*, 1 FACTS, VIEWS & VISION IN OBGYN 1 (2009), available at <http://www.fvvo.be/assets/34/02-Pennings.pdf>; Guido Pennings, *International Evolution of Legislation and Guidelines in Medically Assisted Reproduction*, 18 REPROD. BIOMED. ONLINE 15 (2009); Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, supra note 43; Guido Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337 (2002).

<sup>50</sup> See June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509 (2006).

<sup>51</sup> Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, supra note 49, at 338-39 (citing Linda Nielsen, *Procreative Tourism, Genetic Testing and the Law*, in FAMILIES ACROSS FRONTIERS 831-48 (N. Lowe & G. Douglas eds., 1996)); Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, supra note 43, at 2692 (citing Linda Nielsen, *Legal Consensus and Divergence in Europe in the Area of Assisted Conception—Room for Harmonisation?*, in CREATING THE CHILD: THE ETHICS, LAW AND PRACTICE OF ASSISTED PROCREATION 305-24 (D Evans ed., 1996)).

<sup>52</sup> Marcia C. Inhorn & Pasquale Patrizio, *Rethinking Reproductive “Tourism” as Reproductive “Exile,”* 92 FERTILITY AND STERILITY 904, 905 (2009).

<sup>53</sup> *Id.* at 906.

<sup>54</sup> Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L. J. 295 (2005).

tourists might consume treatments at a rate that could price some citizens of the host country out of the market for infertility care. It is further my belief that the policy of freedom of movement thought essential to European unification allows local laws restricting reproductive options to flourish by facilitating the exportation of objectionable behavior which in turn tempers resistance to these laws at home.<sup>55</sup> I have argued most recently that the laws themselves fail to live up to important standards associated with the judicial protection of fundamental rights in democratic states.<sup>56</sup> The now pressing question is whether states will elect to prosecute citizens who travel abroad for treatment outlawed at home or will raise other legal roadblocks aimed at undermining the quest to grow one's family through cross-border reproductive care.

### III. EXTRATERRITORIALITY

Assuming the will and wherewithal to do so, countries with strict policies against the use of genetic diagnostics in matters concerning human reproduction may take one of two directions in an attempt to force compliance. First, states may decide to extend the reach of their prosecutorial powers to instances in which their citizens procure the prohibited tests overseas. Alternatively, states may attempt to dissuade their citizens from procuring cross-border PGD by withholding legal recognition from the children its citizens have crossed borders to conceive, bear, and rear. Although there is no evidence that states have employed these tactics against those who travel abroad to obtain PGD, Turkey has passed a statute criminalizing women who travel abroad for alternative insemination, and countries around the world have begun to resist recognition of children born to their citizens via cross-border commercial surrogacy.

#### A. Prosecution of Reproductive Tourism

Although prosecuting cross-border assisted reproductive care has previously been unknown, Turkey, seeking to uphold its statute criminalizing the concealment of a child's paternity, recently announced that it would imprison women for up to three years should they seek to become pregnant via artificial insemination abroad.<sup>57</sup> New regulations also prohibit Turkish clinics from serving as agents for foreign infertility clinics.<sup>58</sup> Prior to the issuance of the new regulations, "inter-clinic collaborations facilitated covert and seamless treatments" linking Turkish patients with clinics in Cyprus.<sup>59</sup> The Turkish regulations criminalizing patients are reminiscent of Germany's former attempts, by means of forced gynecological examinations, to enforce its anti-abortion law

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<sup>55</sup> *Id.*

<sup>56</sup> Storrow, *The Pluralism Problem in Cross-border Reproductive Care*, *supra* note 27, at 2941.

<sup>57</sup> Gozde Zorlu, *Overseas Artificial Insemination Outlawed in Turkey*, BIONEWS, Mar. 22, 2010.

<sup>58</sup> *Turkey Bans Trips Abroad for Artificial Insemination*, *supra* note 37.

<sup>59</sup> Gürtin-Broadbent, *supra* note 37.

at its border with Holland.<sup>60</sup> The regulations criminalizing physicians are reminiscent of Italy's determination to prosecute doctors who referred patients abroad after Italy's enactment of restrictions on assisted reproduction in 2004.<sup>61</sup>

The legal doctrine of extraterritoriality plays a respected role in international law, allowing a state not only to express the importance of its legislation but to give it instrumental force as well, within limits. Although extraterritorial prosecution would be "the most coercive and repressive manner" of preventing cross-border reproductive care, and would dangerously "increase feelings of frustration, suppression, and indignation,"<sup>62</sup> giving the law extraterritorial effect is not unknown in related contexts such as medical tourism<sup>63</sup> and abortion.<sup>64</sup> Nonetheless, laws are not automatically extraterritorially applicable: there is a presumption against a law's having extraterritorial effect. In the absence of clear statutory language exhibiting an intent that a statute operate extraterritorially, a state is permitted to express its interest in controlling the conduct of its citizens even when they are outside of the country.<sup>65</sup> This is known as the *nationality principle*. An example of the nationality principle is Canada's determination to prosecute Canadians who engage in the sexual exploitation of children while abroad,<sup>66</sup> even though other governments exhibit indifference toward this behavior.<sup>67</sup> The United Kingdom

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<sup>60</sup> See Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, *supra* note 43, at 339.

<sup>61</sup> See Ferraretti et al., *supra* note 34, at 265; John E. Robertson, *Protecting Embryos and Burdening Women: Assisted Reproduction in Italy*, 19 HUM. REPROD. 1693, 1695 (2004).

<sup>62</sup> Pennings, *International Parenthood via Procreative Tourism*, *supra* note 49, at 43, 48, 52.

<sup>63</sup> E.g., Xavier Bosch, *European Parliament Approves Organ Trade Ban*, 362 LANCET 1556 (2003); David Kilgour, *Organ Pillaging, Ongoing Crime Against Humanity by Chinese Party-State*, THE EPOCH TIMES, Oct. 1, 2010, <http://www.theepochtimes.com/n2/content/view/43535/> (reporting on extraterritorial legislation banning transplant tourism proposed in Belgian and Canadian parliaments); *Prosecuting Transplant Tourism* (WORLDNEWS NETWORK July 13, 2009), available at [http://wn.com/prosecuting\\_transplant\\_tourism](http://wn.com/prosecuting_transplant_tourism) (reporting on Chinese prosecution of transplant tourism).

<sup>64</sup> 5 ANN. REV. POPULATION L. 23-24 (1979) (French incitement to abortion statute); 11 ANN. REV. POPULATION L. 44 (1984) (prosecution and imposition of a prison term on a couple for abortion that took place in Britain).

<sup>65</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 402(2), cmt. e (1987).

<sup>66</sup> See, e.g., *R. v. Klassen*, [2008] B.C.J. No. 2485; 2008 BCSC 1762 (Can.).

<sup>67</sup> The Canadian legislation makes clear that the offense is deemed to have taken place in Canada; the classification of the act as an offense does not turn on whether the act is prohibited in the host country. See Canada: Legislation Against Child Sex Tourism, [http://www.world-tourism.org/protect\\_children/legislation\\_country/canada.htm](http://www.world-tourism.org/protect_children/legislation_country/canada.htm) (last visited Dec. 26, 2010). This approach is similar to the U.S., Germany, Australia, and Belgium, but "the laws of Sweden, The Netherlands and Switzerland will not prosecute a citizen for the crime of sex tourism committed in another country, unless his action constitutes an offence that violates the law in both countries, the country of origin and the country of destination where the crime has been committed." MOHAMED Y. MATTAR, A REGIONAL COMPARATIVE LEGAL ANALYSIS OF SEX TRAFFICKING AND SEX TOURISM (2005), <http://www.protectionproject.org/wp-content/uploads/2010/09/Regional-Comparative-Legal-Analysis.pdf>. This approach to extraterritoriality is known as double criminality. *Id.* Under a double criminality approach, the country may be barred from prosecuting if the offender was

will also prosecute such behavior, but only if it is illegal in the country where committed.<sup>68</sup> Another limited exception to the general presumption against extraterritoriality is embodied in the *objective territorial principle*. This principle holds that a state may legislate against conduct abroad that has harmful effects within the state even if the conduct was committed by a foreigner.<sup>69</sup>

In its debates over whether in some way to penalize the decision of British infertility patients to evade the law by travelling overseas, the British House of Commons heard the testimony of Professor Margaret Brazier to the effect that, “No system of regulation can eliminate or effectively control procreative tourism.”<sup>70</sup> The House of Commons agreed with Brazier, stating, “We believe that any attempts to curtail reproductive tourism would not be justified by the seriousness of the offence. Moreover, it would be impossible to enforce if the treatment was legal in the country concerned.”<sup>71</sup> Brazier was careful to limit her remarks to democratic systems committed to the free movement of persons. In this connection, she commented:

Extra-territoriality is a very difficult area of criminal jurisdiction. For a very long time we have limited our extra-territorial jurisdiction to offences such as homicides and offences against the Crown: sedition and treason. I do not believe that such extensive invasions of personal freedom would be compatible with either the European Union treaties in relation to freedom of movement and freedom of services or the human rights provision.<sup>72</sup>

The Turkish assertion of extraterritoriality over cross-border reproductive care does not carry with it quite the same number of problematic ramifications as would attend a member state of the European Union’s determination to do likewise. Extraterritorial prosecution of a European citizen seeking assisted reproduction banned at home in another European country would not be permitted under the freedom of movement guaranteed by the

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prosecuted in the host country or may be barred from imposing a sentence higher than could have been imposed in the host country. *Id.*

<sup>68</sup> British Foreign & Commonwealth Office, Child sex tourism, <http://www.fco.gov.uk/en/travel-and-living-abroad/be-a-responsible-tourist/child-sex-tourism> (last visited Dec. 26, 2010).

<sup>69</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1990). Extraterritoriality based on the objective territorial principle has received a great deal of attention primarily due to its role in redressing environmental and economic harms. See articles collected in volume 50 of *Law and Contemporary Problems*; see also *AVC Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 149 (2d Cir. 1984); *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984); *Imperial Chem. Indus. v. Comm’n des Communautés Européenes*, 1972 C.J. Comm. E. Rec. 619, 11 Comm. Mkt. L.R. 557; Auten L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009).

<sup>70</sup> HOUSE OF COMMONS SCIENCE AND TECHNOLOGY COMMITTEE, HUMAN REPRODUCTIVE TECHNOLOGIES AND THE LAW 164, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/71.pdf>.

<sup>71</sup> *Id.* at 166.

<sup>72</sup> *Id.* at 165.

European Charter.<sup>73</sup> Moreover, the Turkish law is explicitly extraterritorial such that the presumption against the extraterritorial application of the law is overcome. Since it is outside of the scope of these brief remarks to explore the evidentiary hurdles that would attend any attempted enforcement of this law<sup>74</sup> or to discuss what effect this law will have on Turkey's bid to become a member of the European Union,<sup>75</sup> it is sufficient to conclude that the law places Turkish women at risk of imprisonment should they seek reproductive assistance abroad. It is this aspect of the law that sounds a note of caution to those who are determined to evade the law of their own country by obtaining low-cost PGD abroad.

### B. Legal Interference with Reproductive Tourism

Instead of criminalizing cross-border reproductive travel, many countries use their laws to interfere with reproductive tourism in other ways. They may refuse to issue a visa for the new child to return home with her parents after the birth or, after a successful return to the home country, may refuse legal recognition of the parent-child relationships that have resulted from a transaction abroad that would have been illegal at home. Even if the country is willing to recognize a parent-child relationship, it may refuse to bestow citizenship upon the child. This is especially likely in cases of surrogacy, which is heavily restricted or outlawed by many countries around the world and is much easier for officials to detect<sup>76</sup> than are cases of alternative insemination, egg, or embryo donation that result in the pregnancy of the intending mother abroad but the birth of the child in the home country.

Unlike the kind of law enacted by Turkey, interference of this sort is quite common. Citizens of several European and Asian countries, including the United Kingdom, France, Germany, Spain, Belgium, and Japan have been refused travel documents for their children by consular officials upon suspicion that they had engaged in international commercial surrogacy in the United States,

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<sup>73</sup> Tamara Hervey, *Buy Baby: The European Union and Regulation of Human Reproduction*, 18 OXFORD J. LEG. STUD. 207 (1998).

<sup>74</sup> In this connection, physician and ethicist Françoise Shenfield has remarked, "If a woman goes on holiday and comes back pregnant, who is to tell exactly how or when she got pregnant?" Kate Kelland et al., *Unequal access drives fertility tourism, experts say*, REUTERS, Sept. 14, 2010, <http://www.reuters.com/article/idUSTRE68C57P20100914>. "The authorities," Guido Pennings notes, "generally do not know who is going where for what." Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, *supra* note 49, at 339.

<sup>75</sup> See Gateway to the European Union, Enlargement, [http://europa.eu/pol/enlarg/index\\_en.htm](http://europa.eu/pol/enlarg/index_en.htm) (last visited Dec. 26, 2010).

<sup>76</sup> In one French case, consular officials in Los Angeles refused to issue a visa "en raison de l'impossibilité de produire un certificat d'accouchement de l'épouse et d'une suspicion de gestation pour autrui." Cour de Cassation, Case No. 07-20468, [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/arret\\_no\\_12031.htm](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_12031.htm) 1 (last visited Dec. 26, 2010).

India, or the Ukraine.<sup>77</sup> Upon arriving home (the children using passports issued by the countries in which they were born), parents have met with official refusal to recognize the parent-child relationship or to bestow citizenship upon the children.<sup>78</sup> The French press reports that this happens to about 400 French couples each year,<sup>79</sup> leading lawyer Valérie Depadt-Sebag to designate the children “a new category of pariahs”<sup>80</sup> that reintroduces a distinction between legitimate and illegitimate long ago expunged from the law.<sup>81</sup>

The danger individuals who flout local laws by traveling abroad to procure genetic testing in connection with their quest to have children is not quite the same as is the danger attending law evasion through international surrogacy. Pre-implantation genetic testing is more akin to artificial insemination or egg donation in that the procedure occurs prior to the pregnancy of the intending mother, whereas surrogacy is by definition a pregnancy that the intending mother does not carry. This renders the problems of international surrogacy much more salient and returning home much riskier. Still, as the Turkish law indicates, countries may decide to devote resources to enacting laws that have important symbolic if not practical ramifications. And even merely symbolic laws can cause significant emotional and dignitary harm that may not be worth the risk of their violation.<sup>82</sup> In this way, those who would contravene the law of their country by seeking PGD in permissive jurisdictions will have additional

<sup>77</sup> *In re X & Y*, [2008] EWHC 3030 (Fam.) (U.K.), available at <http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html> (United Kingdom); Patrick Wautelet, *Belgian Judgment on Surrogate Motherhood*, CONFLICT OF LAWS .NET, Apr. 27, 2010, <http://conflictflaws.net/2010/belgian-judgment-on-surrogate-motherhood/> (Belgium); Cour de Cassation, *supra* note 76 (France); Esther Farnós Amorós, *Inscripción en España de la filiación derivada del acceso a la maternidad subrogada en California*, INDRET, 2010, [http://www.indret.com/pdf/711\\_es.pdf](http://www.indret.com/pdf/711_es.pdf) (Spain); *Michigan couple lose their child to surrogate mother*, <http://blog.indiansurrogacylaw.com/page/3/> (Feb. 4, 2010) and *Born in India, Nowhere to Belong*, TIMES OF INDIA, Dec. 18, 2009, <http://www.timesnow.tv/Born-in-India-no-where-to-belong/articleshow/4334611.cms> (Germany); KARI POINTS, THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI (2009), <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf> (Japan).

<sup>78</sup> See generally Charlotte Rotman, *Gestation pour autrui: les enfants fantômes de la République* [*Surrogacy: The Children Ghosts of the Republic*], LA LIBÉRATION, May 20, 2009, <http://www.liberation.fr/societe/0101568271-gestation-pour-autrui-les-enfants-fantomes-de-la-republique>.

<sup>79</sup> *Id.*

<sup>80</sup> Charlotte Rotman, “*Filles fantôme*” en mal de noms [*Girl Ghost in Need of Name*], LA LIBÉRATION, Feb. 18, 2010, <http://www.liberation.fr/societe/0101620002-filles-fantomes-en-mal-de-nom>.

<sup>81</sup> Charlotte Rotman, *Gestation pour autrui: les enfants fantômes de la République* [*Surrogacy: The Children Ghosts of the Republic*], LA LIBÉRATION, May 20, 2009, <http://www.liberation.fr/societe/0101568271-gestation-pour-autrui-les-enfants-fantomes-de-la-republique> (quoting lawyer Nathalie Boudjerada).

<sup>82</sup> Elisabeth Boetzkes, *Symbolic Harm and Reproductive Practices*, in LAW AND MEDICINE 327 (Michael D. A. Freeman & Andrew D. E. Lewis eds., 2000).

informational and psychological hurdles to overcome before they will feel secure in moving ahead with their reproductive goals.

#### **IV. CONCLUSION**

The invention of a readily affordable genetic test that could be used in connection with assisted reproduction raises the distinct possibility that citizens of countries that already choose or will choose to outlaw such tests will cross borders in their quest to procure the technology. Some will see this cross-border movement as an exercise of autonomy that should be respected. Others will see different interests at stake—future children who have a right not to be treated as commodities, physicians who should not risk reputational integrity in furtherance of a eugenic project, and a society with important dignitary interests to protect. Lawmakers will have a crucial choice to make: permit citizens to exercise their autonomy by seeking a friendly forum in which to pursue their reproductive goals or extend the reach of the law to capture instances of extraterritorial law evasion. The choice will not be simple, as each alternative carries weighty ramifications for how a society chooses to define responsible parenthood, medical practice, and citizenship.

Those who carry the dream of becoming parents will also have a crucial choice. In a world where barriers to international travel have fallen away and regulation of reproductive technology is far from uniform, the range of decisions individuals can make about how, when, and where to procreate is wider than it has ever been. But within this world of choice exist legal forces that would interfere with if not prevent full and unfettered reproductive decision-making. These forces will not affect the powerful human drive to procreate, but they will of necessity play into the choices individuals make as they travel into the future of reproductive technology.